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I.
SCOPE OF THIS PAPER

The body of case law, constitutions, statutes and rules which comprise "Texas Criminal Law" is vast, complex, sometimes contradictory, and occasionally counter-intuitive. The many nooks and crannies in our law present tremendous opportunities for those with the time and ability to learn and keep up. At best, the unwary will miss these opportunities to excel; at worst, they will embarrass themselves and hurt their clients. There are innumerable ways in which we all can improve the quality of our work as lawyers. This paper contains a few of my suggestions.

II.
LITIGATE AS MUCH AS YOU CAN OUTSIDE THE JURY'S PRESENCE

When the deep-pocketed insurance companies are paying the bills, civil lawyers depose everyone. Our civil colleagues are smart: they know that discovery by cross-examination is a bad idea. It is better that you learn about your opponent's case before your jury does.

Unfortunately, discovery in criminal cases -- where mere life and liberty are at stake -- is much more limited. Deposition practice is not encouraged by our procedural rules. There are certain techniques, however, that industrious criminal lawyers can employ to require that at least part of the trial takes place outside the jury's presence. I recommend litigating as much of your case as possible either before trial, or, at least, outside the presence of the jury. These hearings might be dispositive, thereby eliminating the need to go before the jury at all. Or they might limit the amount of evidence your opponent can put before the jury. And, in any event, even if not dispositive or directly useful, the hearing might provide you with discovery you could not otherwise get. The following are just a few procedural and evidentiary rules which can be used to get your case away from the jury.

A. *Rule 104: When you are entitled to a hearing outside the jury's presence*

Article 28.01 of the Texas Code of Criminal Procedure permits, but does not require, trial courts to schedule pre-trial hearings. Although pre-trial hearings might be preferred in some cases, the court has discretion to determine the issue during the trial itself. *Moore v. State*, 700 S.W. 2d 193, 205 (Tex. Crim. App. 1985), *cert. denied*, 474 U.S. 1113 (1986).

Some judges routinely conduct hearings on motions to suppress outside the jury's presence; others require some reason to do so. Rule 104(c) of the Texas Rules of Evidence enumerates three circumstances in which hearings "shall" be had outside the jury's presence:

(1) "a hearing on the admissibility of a confession;"

(2) a hearing "when an accused is a witness and so requests;" and,

(3) a hearing on a preliminary matter "when the interests of justice so require."

TEX. R. EVID. 104(c).

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

Under Rule 103(a)(1) of the Texas Rules of Evidence, "[w]hen the court hears objections to offered evidence *out of the presence of the jury* and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections." [emphasis supplied] That is, if you can persuade the judge to hear certain objections outside the jury's presence, and she overrules these objections and admits the evidence, you need not re-urge the objections before the jury.

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

C. *Testifying for a limited purpose outside the jury's presence*

The rules of evidence permit the defendant to testify in a pre-trial hearing for a limited purpose, without being cross-examined on other issues in the case.

> *Testimony by Accused Out of the Hearing of the Jury*. The accused in a criminal case does not, by testifying upon a preliminary matter out of the hearing of the jury, become subject to cross-examination as to other issues in the case.

TEX. R. EVID. 104(d).

This rule is useful when you need the defendant's testimony to prove something at a pre-trial hearing -- such as bail, or standing to contest a search or arrest -- but you do not want to expose him to cross-examination on other matters, such as whether he committed the crime. *See also Simmons v. United States*, 390 U.S. 377, 394 (1968)("intolerable" that defendant should have to give up his Fifth Amendment privilege against self-incrimination in order to establish his Fourth Amendment right to be free from unreasonable seizure).

D. *Motions in limine*

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

That does not mean that motions in limine have no value at all. The trial court might

grant your motion in limine thus altogether preventing your opponent from offering objectionable evidence before the jury. At the very least, by granting the motion in limine, the court will force the other side not to mention the questionable evidence until a hearing is had outside the jury's presence. And, a flagrant violation of an order in limine might show prosecutorial bad faith, which will improve the defendant's chances for reversal on appeal. *See Dexter v. State*, 544 S.W. 2d 426, 428 (Tex. Crim. App. 1975).

E. *Voir dire of expert witnesses*

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

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

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

F. *The Daubert hearing*

Parties are entitled to offer expert testimony from qualified witnesses that "will assist the trier of fact to understand the evidence or to determine a fact in issue." TEX. R. EVID. 702. The party offering the evidence bears the burden of demonstrating to the trial court that this testimony is relevant and reliable. If your opponent intends to present expert testimony under Rule 702, force him to carry this burden outside the presence of the jury by requesting a *Daubert* hearing. *See Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Hartman v.* State, 946 S.W. 2d 60 (Tex. Crim. App. 1997);

Kelly v. State, 824 S.W. 2d 568 (Tex. Crim. App. 1992).

G. *The identification hearing*

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

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

H. *The entrapment hearing*

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

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

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

I. *Extraneous offenses*

a. Rule 404(b)

When deciding whether to admit evidence of extraneous misconduct at the guilt innocence phase, "the trial court must, under rule 104(b), make an initial determination at the proffer of the evidence, that a jury could reasonably find beyond a reasonable doubt that the defendant committed the extraneous offense." *Harrell v. State*, 884 S.W.2d 154, 160 (Tex. Crim. App. 1994). Any time the defense thinks the state is going to offer extraneous misconduct, it should argue that *Harrell* requires a hearing outside the jury's presence, to determine the admissibility of this evidence.

b. Article 37.07, § 3(a)

"[T]he trial judge has the responsibility of determining the *threshold* admissibility of extraneous offenses in the punishment phase. . . ." *Mitchell v. State*, 931 S.W.2d 950, 954 (Tex. Crim. App. 1996)(emphasis supplied). Again, a hearing should be requested outside the jury's presence so that the court can make the threshold determination.

J. *Voir dire character witnesses*

"The procedure to be followed when admitting reputation testimony is to permit the opposing party to test the qualification of the witness outside the presence of the jury before he testifies as to the defendant's reputation." *Lopez v. State*, 860 S.W.2d 938, 944 (Tex. App.--San Antonio 1993, no pet.).

K. *The Administrative License Revocation (ALR) hearing*

In 1995, the legislature enacted a series of seemingly draconian laws permitting the Texas Department of Public Safety to suspend the licenses of drivers who refused or failed breath tests. TEX. TRANS. CODE ANN. § 524.001 et seq. Although these laws greatly increased the state's ability to suspend our clients's drivers licenses, they also provide lawyers with a new opportunity for discovery. At the hearing, the department bears the burden of proving by a preponderance of the evidence both that the driver had an alcohol concentration above the specified limit, and that there was reasonable suspicion to stop and probable cause to arrest the driver. TEX. TRANS.

CODE ANN. § 524.035. This, of course, is the same burden the state bears at the motion to suppress hearing of the related driving while intoxicated case. As a result, the ALR hearing provides a valuable opportunity for discovery from the arresting officer. Additionally, the driver has the right to subpoena to the ALR hearing the breath test operator and the breath test supervisor. TEX. TRANS. CODE ANN. § 524.039.

L. *Depositions: article 39.02*

To be sure, it is not easy to get a judge to order a deposition in a criminal case. Nonetheless, article 39.02 of the code of criminal procedure does permit the defense to take depositions upon a showing that "good reason exists for taking the deposition." TEX. CODE CRIM. PROC. ANN. art. 39.02.

III.
GETTING YOUR CLIENT OUT OF JAIL

A. *Misdemeanor motion to revoke*

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

B. *Deferred adjudication*

"We hold that a defendant whose adjudication of guilt has been deferred has not yet been convicted. Such a defendant is entitled to bail pending an adjudication hearing." *Ex parte Laday*, 594 S.W.2d 102, 104 (Tex. Crim. App. 1980).

C. *Following conviction for 3(g) offense*

A defendant convicted of an offense listed under TEX. CODE CRIM. PROC. ANN. art. 42.12 § 3(g)(a)(1) is not eligible for bond pending appeal, regardless of the sentence. What about someone convicted of such an offense, who receives probation from the jury, then seeks to appeal? Must that defendant be incarcerated during the pendency of his appeal, even though he was assessed probation? *See State of Texas v. The Court of Appeals for the Fifth District*, 34 S.W. 3d 924 (Tex. Crim. App. 2001).

D. *Sample "Application For Writ of Habeas Corpus Seeking Bail Reduction"*

Texas law requires judges to set bond in all but the most extraordinary cases, and, when bond is set, it must be "reasonable." If your trial judge refuses to set bond altogether, or sets it at an unreasonably high amount, you have two choices: do nothing, except perhaps complain and promise to support the judge's opponent in the next election; or file an application for writ of

habeas corpus seeking reasonable bail, and force the judge to follow the law or face reversal in the appellate courts. For those who prefer the latter suggestion, a sample application is attached to this paper as Appendix A..

IV.
MONEY TALKS

A. *The holding in Ake v. Oklahoma*

In *Ake v. Oklahoma*, 470 U.S. 68, 74 (1985), the Court held that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one." Mr. Ake's sanity was a "significant factor" both because his sole defense was insanity, and because, under Oklahoma law, future dangerousness was an aggravating factor at punishment. *Id*. at 86.

B. *The implications of Ake*

1. Several things should be emphasized about *Ake*:

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

b. The *Ake* case guarantees access to *competent* assistance. *Id*. at 83. It goes without saying that not every expert you might be appointed will be competent. If not, be prepared to object.

c. *Ake* does not necessarily guarantee the right to choose your own expert, or to receive funds to hire your own expert. *See Griffith v. State*, 983 S.W. 2d 282, 287 (Tex. Crim. App. 1998)(judge not outside the reasonable zone of disagreement in refusing to appoint the expert requested by appellant); Rather, the state must provide *access* to a competent expert. *Ake v. Oklahoma*, 470 U.S. at 83.

d. *Ake* permits the defendant to "make an *ex parte* threshold showing to the trial court" as to his need for an expert. *Id*. at 82. Proceeding *ex parte* may be a very valuable right, necessary to avoid exposing your defensive theories prematurely. In *Williams v. State*, 958 S.W. 2d 186 (Tex. Crim. App. 1997), the trial court denied appellant his right to proceed *ex parte*, and compelled him to provide a copy of his motion requesting appointment of an expert to the state. This was error. Many times a defendant will have to provide affidavits or evidence in support of his *Ake* motion. "The problem with requiring this showing to be shared with the State at the pretrial stage is that it compels a defendant to disclose to the State his defensive theories or 'work product.'" *Id*. at 193.

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

Id. at 193-94. The right to an *ex parte* hearing is waived absent a request to do so at trial. *Busby v. State*, 990 S.W. 2d 263, 270 (Tex. Crim. App. 1999). The trial court does not err in refusing an *ex parte* hearing where the hearing held did "not reveal any material, new information to the State." *Busby v. State*, 990 S.W. 2d 263, 270 (Tex. Crim. App. 1999).

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

f. *Ake* makes it clear that the defendant bears the "threshold" burden of showing his need for assistance. The Texas Court of Criminal Appeals has always placed hyper technical demands on the defendant to prove his entitlement to expert assistance. Expect the court to be just as rigorous post-*Ake*, and make your record carefully. Otherwise, be prepared for the court to tell you later that you did not preserve the issue for appeal. In *Rey v. State*, 897 S.W. 2d 333, 343 (Tex. Crim. App. 1995), appellant explained his defensive theory and how it could effect the outcome of the case, and he supported this explanation with the affidavit of his expert, who seriously questioned the findings of the state's expert. Additionally, appellant's expert set forth his own opinion as to the mechanism of death which was consistent with appellant's defensive theory. This clearly established that the mechanism of death was to be a significant factor at trial, and was therefore sufficient to meet appellant's threshold burden. *Cf. Jackson v.*

State, 992 S.W. 2d 469, 474 (Tex. Crim. App. 1999)(appellant not entitled to appointment of polygraph expert where he made no preliminary showing of a significant issue of fact either on which the State would present expert testimony or on which the knowledge of a lay jury would not be expected to encompass).

C. *The disinterested expert in Texas*

1. Texas law provides that the trial court shall appoint a disinterested mental health expert to examine the defendant who files notice of intention to raise the insanity defense. This expert must file a written report with the court, who then furnishes copies to the defense counsel and prosecution. TEX. CODE CRIM. PROC. ANN. art. 46.03 § 3(a) (Vernon Supp. 2002). *Ake* held that an indigent defendant is entitled to an expert to "assist in evaluation, preparation, and presentation of the defense." 470 U.S. at 83. Does the Texas "disinterested" expert comport with *Ake*?

2. In *DeFreece v. State*, 848 S.W.2d 150 (Tex. Crim. App. 1993), the Texas Court of Criminal Appeals held that, where the indigent defendant shows that insanity will be a significant factor at trial, due process requires more than just examination by a neutral psychiatrist. "It also means the appointment of a psychiatrist to provide technical assistance to the accused, to help evaluate the strength of his defense, to offer his own expert diagnosis at trial if it is favorable to that defense, and to identify the weaknesses in the State's case, if any, by testifying himself and/or preparing counsel to cross-examine opposing experts." *Id.* at 159; *see also McBride v. State*, 838 S.W. 2d 248, 252 (Tex. Crim. App. 1992)(appellant was entitled to appointment of expert chemist to examine alleged cocaine).

3. "[O]nce he established that cause of death was likely to be a significant factor at trial, appellant was entitled to more than an expert to testify on his behalf--he was also entitled to 'technical assistance . . . to help evaluate the strength of [that] defense, . . . and to identify the weaknesses in the State's case, if any, by . . . preparing counsel to cross-examine opposing experts.'" *Rey v. State*, 897 S.W. 2d 333, 343 (Tex. Crim. App. 1995).

4. The court refused to consider appellant's argument that he was entitled to the appointment of a psychiatrist to assist him at voir dire, since appellant presented no authority, argument, or evidence to show his entitlement. *Teague v. State*, 864 S.W. 2d 505, 509 (Tex. Crim. App. 1993); *see Busby v. State*, 990 S.W. 2d 263, 270 (Tex. Crim. App. 1999)(trial court did not err in refusing to appoint a jury consultant because this expert was a luxury, not a necessity; trial court did not err in refusing to appoint a drug abuse expert where the court did appoint a mental health expert who was well qualified in this field); *Matchett v. State*, 941 S.W. 2d 922, 939 (Tex. Crim. App. 1996)(every lawyer able to ask questions has the expertise, without an expert, to determine whether the jury understands the law); *Cantu v. State*, 939 S.W. 2d 627, 639 (Tex. Crim. App. 1997)(trial court did not err in refusing to provide appellant funds to hire a scholar to study whether Texas jurors are capable of understanding the special punishment issues because appellant showed no particularized need for such a study); *Moore v.*

State, 935 S.W. 2d 124, 130 (Tex. Crim. App. 1996)(appellant's request for expert assistance to select a jury was properly denied where he "offered nothing but undeveloped assertions that the requested assistance would be beneficial").

5. *Ake* does not apply to a motion by the defense requesting that appellant be allowed to accompany his attorney to the alleged crime scene to assist in taking measurements, photographs and in otherwise investigating the offense. The defense had access to the state's file regarding the crime scene, and the trial court ordered the state to turn over its work product if counsel was not allowed access to the crime scene itself. The record is silent as to who was living in the apartment at the time the defense wanted access. *Rosales v. State*, 4 S.W. 3d 228, 232 (Tex. Crim. App. 1999).

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

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

8. In *Wright v. State*, 28 S.W. 3d 526, 532-33 (Tex. Crim. App. 2000), appellant complained, not of the failure to appoint an expert, but that the trial court denied him a continuance needed to examine DNA materials provided by the state. Counsel waited until the first day of trial to request appointment of their expert. The court held that the defense failed to show harm, and that counsel would not be permitted to profit from their own failure to act.

D. *Ake error cannot be harmless*

1. The denial of the appointment of an expert under *Ake* "amounts to structural error which cannot be evaluated for harm." *Rey v. State*, 897 S.W. 2d 333, 344-46 (Tex. Crim. App. 1995).

2. In *Williams v. State*, 958 S.W. 2d 186, 194 (Tex. Crim. App. 1997), the court of criminal appeals held that the trial court errs in not permitting appellant to make an *Ake* motion *ex parte*, but it further held that this sort of sub-*Ake* error is subject to a harm analysis under Rule 44.2(a) of the Texas Rules of Appellate Procedure. The court held that appellant was not harmed at the first phase of the trial, but that the state did not prove beyond a reasonable doubt that appellant was not harmed at the punishment phase. Because of the premature disclosure of the

matters about which the expert testified, the state was more prepared to cross-examine than it would have been without the earlier insight. *Id*. at 195. The case was therefore reversed for a new punishment hearing.

3. The United States Court of Appeals for the Fifth Circuit disagrees with the Texas Court of Criminal Appeals, believing that *Ake* error can be harmless. *White v. Johnson*, 153 F. 3d 197, 207 (5th Cir. 1998).

V.
SUPPRESSION, TEXAS-STYLE

A. *Article 38.22: More than Miranda*

Lawyers are conditioned to think about the *Miranda* warnings when considering whether a defendant's confession is admissible. Texas lawyers should also think about article 38.22 §§ 2 & 3 of the code of criminal procedure. Section 2 requires slightly different warnings than *Miranda*. Section 3(a)(1) generally requires that oral confessions be electronically recorded. They rarely are, of course. With a little preparation, more often than not you can suppress at least a little of the state's case, and this is usually a good thing.

B. *Illegally obtained evidence and the jury*

Article 38.23(b) of the code of criminal procedure requires that, when the evidence raises an issue about whether evidence was legally obtained, the jury shall be instructed to disregard it if it has a reasonable doubt. In other words, the defense can litigate the legality of the seizure of evidence before the court, prior to trial. If it loses before the court, it can raise the issue at trial before the jury, and argue that the jury must disregard relevant evidence if it has a reasonable doubt as to whether it was legally obtained. *See Stone v. State*, 703 S.W. 2d 652, 655 (Tex. Crim. App. 1986).

C. *Evidence illegally obtained by private persons*

Illegally obtained evidence is excludable under the Fourth Amendment only if it was obtained by an agent of the government. *E.g., Burdeau v. McDowell*, 256 U.S. 465 (1921). Under Article 38.23(a) of the code of criminal procedure evidence illegally obtained "by an officer *or other* person" is not admissible in a criminal case. "[T]here is nothing logically absurd about art. 38.23. As such, we must take it to mean only what it says: that evidence illegally obtained by an 'officer or other person' ought be suppressed." *Johnson v. State*, 939 S.W. 2d 586, 588 (Tex. Crim. App. 1996).

D. *Warrantless arrests*

Warrantless arrests in public places based on probable cause without exigent

circumstances are permissible under the Fourth Amendment. *See United States v. Watson*, 423 U.S. 411 (1976). This is not true in Texas. Under TEX. CODE CRIM. PROC. ANN. art. 14.04, a warrantless felony arrest is illegal unless based on probable cause, and a satisfactory showing "that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant . . . ."

VI.
SEVERING DEFENDANTS

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

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

VII.
WIN YOUR CASE DURING JURY SELECTION

A. *The scope of voir dire*

1. *The federal constitution*

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

2. *The state constitution*

Article I, § 10 of the Texas Constitution, however, does guarantee, among other things, the effective assistance of counsel. Accordingly, Texas cases have held that counsel is entitled to broad latitude on voir dire so that he or she can intelligently exercise their peremptory challenges, in order to render effective assistance of counsel as guaranteed by Article I, § 10 of the Texas

Constitution. *E.g., Mathis v. State,* 322 S.W. 2d 629, 631 (Tex. Crim. App. 1959); *accord Shipley v. State*, 790 S.W. 2d 604, 607-08 (Tex. Crim. App. 1990); *Robinson v. State*, 720 S.W. 2d 808, 810 (Tex. Crim. App. 1986); *Smith v. State*, 703 S.W. 2d 641, 643 (Tex. Crim. App. 1985). So, if you want authority for more voir dire, look to the state constitution, and state case law.

3. *Standefer v. State*

The general rule granting broad latitude notwithstanding, the court of criminal appeals has long prohibited questioning which seeks to "commit" potential jurors. Recently, the court has attempted to clarify what it means by improper commitment questions. *See Standefer v. State*, 59 S.W. 3d 177 (Tex. Crim. App. 2001). This is *not* an easy case to understand. Anybody serious about selecting jurors must read it for themselves. What follows is a summary of what I see as the important rules established in *Standefer*:

a. "Commitment questions are those that commit a prospective juror to resolve, or to refrain from resolving, an issue a certain way after learning a particular fact." *Id*. at 179.

b. Some commitment questions are proper. "When the law requires a certain type of commitment from jurors, the attorneys may ask the prospective jurors whether they can follow the law in that regard." *Id*. at 181. "[F]or a commitment question to be proper, one of the possible answers to that question must give rise to a valid challenge for cause." *Id*. at 182. Questions which test the venireperson's ability to follow legal requirements are proper:

(1) "Can you consider probation in a murder case" is proper because it simply commits the venireperson to consider the full range of punishment provided for an offense.

(2) Likewise, it is proper to ask a venireperson whether he could follow a law that requires him to disregard illegally obtained evidence.

(3) It is proper to ask the venireperson whether he could follow an instruction requiring corroboration of accomplice witness testimony.

(4) It is proper to ask the venireperson whether he could follow the law that requires him not to hold against the defendant his failure to testify.

(5) It is proper to ask the venireperson if he could be "fair and impartial" if the victim were a nun.

(6) "Do you think there might be circumstances that would mitigate against the death penalty" merely seeks the juror's general views on mitigating factors and does not commit to the consideration of specific kinds of evidence.

(7) A question like "Have you known anyone who has been abused as a child?" and "Are you related to anyone in law enforcement?" are proper as they seek no commitment at all.

(8) A question in a child molestation case which ask whether the venireperson believes that no child could or would lie is legitimate.

(9) It is proper to ask whether a venireperson could not believe that a police officer would ever lie on the stand.

(10) "Would you presume someone guilty if he or she refused to make a statement to the police?" is proper.

c. "However, where the law does not require the commitment, a commitment question is invariably improper."

d. A question which does give rise to a valid challenge for cause will "be improper if it includes facts *in addition* to those necessary to establish a challenge for cause." *Id*. at 182. "To be proper, then, a commitment question must contain *only* those facts necessary to test whether a prospective juror is challengeable for cause." *Id*. at 182.

(1) So, a juror may not be asked whether he considers a particular type of evidence mitigating.

(2) Since victim impact evidence is legitimately considered by a jury in deciding whether to impose a life sentence instead of the death penalty, a venireperson cannot be asked whether such

evidence would affect his decision.

(3) And, the state cannot commit a juror to the proposition that rehabilitation is irrelevant to future dangerousness.

(4) It is not proper to ask, "Could you consider probation in a case where the victim is a nun?"

(5) It is improper to ask whether a venireperson could consider probation where a child had died.

(6) "Could you find someone guilty on the testimony of one witness is not proper.

(7) "Could you find someone guilty on circumstantial evidence alone" is not proper.

(8) "What circumstances in your opinion warrant the imposition of the death penalty?" is not proper.

e. This question was refused by the trial court in *Standefer*: "Would you presume someone guilty if he or she refused a breath test on their refusal alone?" The court of criminal appeals upheld the trial court's decision, finding that this question was an improper commitment question. Jurors may permissibly presume guilt from such refusal. That is, the facts in the question would not lead to a valid challenge for cause. *Id*. at 183.

B. *Time limits*

1. The right to a reasonable time to conduct voir dire is a component of effective assistance of counsel, and is therefore protected by Article I, § 10 of the Texas Constitution. *Ratliff v. State*, 690 S.W. 2d 597, 599 (Tex. Crim. App. 1985).

2. In *Ratliff v. State*, 690 S.W. 2d 597 (Tex. Crim. App. 1985), the court noted that three factors are relevant in determining whether the trial court abused its discretion in imposing a time limit: (a) whether defendant's examination reveals an attempt to prolong the voir dire with irrelevant, immaterial or repetitious questions, unnecessary to assist intelligent jury selection; (b) whether the unasked questions were proper voir dire questions, and (c) whether the defendant was not permitted to individually examine jurors who served on the jury. *Id.* at 599-600; *accord McCarter v. State*, 837 S.W. 2d 117, 120 (Tex. Crim. App. 1992).

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

4. To preserve error, the record must show the proper questions counsel was not permitted to ask. This can be done by a bill of exception. *Ratliff v. State*, 690 S.W. 2d 597, 600 (Tex. Crim. App. 1985); *see Cartmell v. State*, 784 S.W. 2d 138, 139 (Tex. App. – Fort Worth 1990) (questions set out in motion for new trial). In the following cases, the courts have found the time restrictions unreasonable, under all the facts presented:

a. *Tobar v. State*, 850 S.W. 2d 182, 182 (Tex. Crim. App. 1993) (45 minutes).

b. *McCarter v. State*, 837 S.W. 2d 117, 118 (Tex. Crim. App. 1992) (30 minutes).

c. *Ratliff v. State*, 690 S.W. 2d 597, 600 (Tex. Crim. App. 1985) (81 minutes).

d. *Thomas v. State*, 658 S.W. 2d 175, 176 (Tex. Crim. App. 1983) (45 minutes).

e. *Clark v. State*, 608 S.W. 2d 667, 669 (Tex. Crim. App. 1980) (38 minutes).

f. *De La Rosa v. State*, 414 S.W. 2d 668, 670 (Tex. Crim. App. 1967) (30 minutes).

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

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

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

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

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

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

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

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

6. A sample Motion To Extend Time Limitation For Voir Dire is attached to this paper as Appendix B.

C. *When the court wants to confiscate your jury selection notes*

1. The statutes

a. Article 35.26(a)

> When the parties have made or declined to make their peremptory challenges, they shall deliver their lists to the clerk. Except as provided in Subsection (b) of this section, the clerk shall, if the case be in the district court, call off the first twelve names on the lists that have not been stricken. If the case be in the county court, he shall call off the first six names on the lists that have not been stricken. Those whose names are called shall be the jury.
>
> TEX. CODE CRIM. PROC. ANN. art. 35.26(a).

b. Article 35.29

> Information collected by the court or by a prosecuting attorney during the jury selection process about a person who serves as a juror, including the juror's home address, home telephone number, social security number, driver's license number, and other personal information, is confidential and may not be disclosed by the court,

> the prosecuting attorney, the defense counsel, or any court personnel except on application by a party in the trial or on application by a bona fide member of the news media acting in such capacity to the court in which the person is serving or did serve as a juror. On a showing of good cause, the court shall permit disclosure of the information sought.
>
> TEX. CODE CRIM. PROC. ANN. art. 35.29.

2. Saur v. State

In *Saur v. State*, 918 S.W.2d 64 (Tex. App.--San Antonio 1996, no pet.), the defense counsel complained, to no avail, when the trial court ordered him to surrender his juror information sheets at the close of voir dire. On appeal, the San Antonio Court of Appeals held that article 35.26(a) only requires the parties to deliver their jury *lists*, not the information sheets. Article 35.29 prohibits the disclosure of personal information about the jurors, "however, it does not authorize the court to order the delivery of the sheets to the clerk." *Id*. at 67. Although it might be appropriate in some cases for the court to take up the sheets at the conclusion of voir dire, this should not be done without forewarning counsel, so that he or she may make necessary notes elsewhere. The court did not reverse in *Saur*, being uncertain that error was committed under the facts, or that harm was shown.

D. *A checklist of common voir dire objections*

There are a half dozen or so objectionable actions a prosecutor or judge may take during voir dire, and each has its own procedural requirements that must be followed to preserve error. Stephanie Stevens has prepared a very useful checklist of the most commonly occuring objections during voir dire. *See* S. STEVENS, PRESERVATION OF ERROR DURING JURY SELECTION, 28 *Voice For The Defense* 16 (June 1999).

VIII.
WIN YOUR CASE DURING OPENING STATEMENT

Numerous studies show that, in a substantial majority of cases, jury verdicts are consistent with the first impressions formed by jurors immediately after opening statements. True enough, this alone does not prove a causal relationship between the opening statement and the verdict, but it is enough to convince me that a good opening statement improves my chances of victory. In my experience, though, defense lawyers waive openings more than they give them.

Article 36.01(b) of the Texas Code of Criminal Procedure gives the defense the right to make their opening statement immediately after the state does. I believe it is a serious error not to claim this right.

IX.
MAKE EFFECTIVE OBJECTIONS

A. *The general rule*

Everyone is familiar with the rules requiring timely and specific objections in order to preserve error. *See* TEX. R. EVID. 103(a)(1); TEX R. APP. PROC.33(a).

B. *The Texas Constitution*

1. The general rule, and how to invoke it

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

2. When the Texas Constitution is more protective

Following are several cases in which the court of criminal appeals has interpreted our constitution more broadly than the federal constitution.

a. Search and seizure

In *Heitman v. State*, 815 S.W. 2d 681, 685 (Tex. Crim. App. 1991), the court of criminal appeals declared its unwillingness "to march lock-step with federal court interpretations of constitutional rights." The court went on to "expressly conclude" that when interpreting Article I, § 9 of the Texas Constitution, it would "not be bound by Supreme Court decisions addressing the comparable Fourth Amendment issue." *Id*. at 690.

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

In *State v. Ybarra*, 953 S.W. 2d 242, 245 (Tex. Crim. App. 1997), the court of criminal

appeals held that, pursuant to Article I, § 9, "the State must prove the voluntariness of a consent to search by clear and convincing evidence," even though the federal constitution requires only proof by a preponderance of the evidence.

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

b. Double jeopardy

In *Bauder v. State*, 921 S.W. 2d 696 (Tex. Crim. App. 1996), the court held that the Double Jeopardy Clause of the Texas Constitution -- found at Article I, § 14 -- provides broader protection than that of the Fifth Amendment. "We therefore hold that a successive prosecution is jeopardy barred after declaration of a mistrial at the defendant's request, not only when the objectionable conduct of the prosecutor was intended to induce a motion for mistrial, but also when the prosecutor was aware but consciously disregarded the risk that an objectionable event for which he was responsible would require a mistrial at the defendant's request." *Id*. at 699.

c. Scope of voir dire

See § VII, above.

d. Post-arrest silence

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

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

e. Equal rights and due course of law

The Fourteenth Amendment to the United States Constitution has clauses guaranteeing equal protection and due process of law. In the 1970's there was an unsuccessful effort to amend

the federal constitution to add an equal rights amendment. Although the federal effort failed, in 1973 our state enacted TEX. CONST. ART. I, § 3a which provides that "[e]quality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin." In *Esteves v. State*, 849 S.W. 2d 822, 823 (Tex. Crim. App. 1993), the court of criminal appeals acknowledged that this provision prohibits the exercise of peremptory challenges based on race, just as does the federal equal protection clause. On its face, our state constitutional equal rights amendment looks broader than does the federal Equal Protection Clause. *See In Interest of McLean*, 725 S.W. 2d 696 (Tex. 1987). It might be argued, then, that this provision provides even more protection than the *Batson* case. *See Yebra v. State*, 915 S.W. 2d 492, 493 (Tex. Crim. App. 1996)(Judges Overstreet and Baird, dissenting to the refusal of a petition for discretionary review, suggest that "it is time for Texas courts to ensure that Texans are sufficiently protected against the racially discriminatory use of peremptory challenges by interpreting Article I, § 3a of the Texas Constitution as providing greater protection than does the U.S. Constitution").

The Texas Constitution guarantees "due course of law." TEX. CONST. ART. I, §§ 13 and 19. Does this mean something different than "due process of law?"

C. *Constitutionalize your objections*

"Except for certain federal constitutional errors labeled by the United States Supreme Court as 'structural,' no error, whether it relates to jurisdiction, voluntariness of a plea, or any other mandatory requirement, is categorically immune to a harmless error analysis." *Cain v. State*, 947 S.W. 2d 262, 264 (Tex. Crim. App. 1997). Ordinary constitutional error is reversible unless the appellate court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment. TEX. R. APP. PROC. 44.2(a). Non-constitutional error is to be disregarded on appeal unless the court determines that the error affected substantial rights. TEX. R. APP. PROC. 44.2(b). Since it is much easier to show harm for constitutional error than for non-constitutional error, successful lawyers will want to find a constitutional basis for their objections at trial, and will want to reurge these objections on appeal.

San Antonio lawyer Bud Ritenour has prepared a chart entitled "Rights of the Accused," updating an earlier chart by Gerry Goldstein, which correlates federal and state constitutional and state statutory objections. A copy is attached to this paper as Appendix C.

D. *Fundamental error*

1. Rule 103(d)

As previously stated, the general rule is that the failure to make a specific and timely objection waives error on appeal. TEX. R. EVID. 103(d), however, recognizes the possibility of fundamental error. "In a criminal case, nothing in these rules precludes taking notice of fundamental errors affecting substantial rights although they were not brought to the attention of

the court."

2. Blue v. State

In *Blue v. State*, 41 S.W. 3d 129 (Tex. Crim. App. 2000), the trial court made some profoundly prejudicial comments to the venire, which were unobjected to. Nobody questioned that the judge erred, but the state argued that the error was waived, absent an objection. The court of criminal appeals disagreed. "The comments of the trial judge, which tainted appellant's presumption of innocence in front of the venire, were fundamental error of constitutional dimension and required no objection." *Id*. at 132.

E. *Limiting instructions*

1. Rule 105(a)

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

2. Should be given contemporaneously

This limiting instruction should be requested contemporaneously, at the time of the evidence is admitted, pursuant to Rule 105 of the Texas Rules of Evidence. *Rankin v.* State, 974 S.W.2d 707, 713 (Tex. Crim. App. 1996). A request that the instruction be given "at the appropriate time" does not sufficiently request a contemporaneous instruction. Giving the instruction in the jury charge is "appropriate." *Wilson v. State*, 7 S.W. 3d 136, 144 (Tex. Crim. App. 1999).

3. Waiver?

One case suggests that counsel waived his right to a limiting instruction at the end of the case because he did not request a contemporaneous limiting instruction. *Wesbrook v. State*, 29 S.W. 3d 103, 115 n. 8 (Tex. Crim. App. 2000).

X.
EXTRANEOUS MISCONDUCT

Limiting the state's ability to prove extraneous misconduct is crucial. This is a huge topic, but here are three suggestions.

A. *Expand your definition of "extraneous"*

When contemplating excluding extraneous misconduct, think expansively. "[A]n extraneous offense is defined as any act or misconduct, whether resulting in prosecution or not, that is not shown in the charging papers." *Rankin v. State*, 953 S.W. 2d 740, 741 (Tex. Crim. App. 1995). The term "extraneous *offense*" is a misnomer, since the misconduct at issue need not amount to a crime in order to be excluded. "The analysis of the admissibility of extraneous conduct is the same whenever the extraneous conduct reflects adversely on the character of the defendant, regardless of whether that conduct might give rise to criminal liability." *Plante v. State*, 692 S.W. 2d 487, 490 n.3 (Tex. Crim. App. 1985)(unpaid debts).

B. *Request Notice*

Request notice from the state of its intent to: introduce extraneous misconduct in its case in chief, as provided by Rule 404(b) of the Texas Rules of Evidence; introduce misconduct evidence at the punishment phase, as provided by article 37.07 § 3(g) of the Texas Code of Criminal Procedure; introduce extraneous sexual misconduct evidence pursuant to article 38.37 § 3 of the code of criminal procedure; or impeach witnesses, as provided by Rule 609(f) of the rules of evidence. Generally, the most effective way of doing this is by making a written *request* of the prosecutor, rather than by filing a motion which requires some action by the court. *See Espinosa v. State*, 853 S.W. 2d 36, 39-40 (Tex. Crim. App. 1993)(Baird, J., concurring). If the state provides notice of intent to offer misconduct, this evidence can be investigated before trial in an effort to exclude it, or, at least, to minimize its damaging effect. Better still, if the state fails to provide notice, the state should be precluded from introducing this evidence. *See Buchanan v. State*, 911 S.W. 2d 11, 15 (Tex. Crim. App. 1995)(merely opening the state's file does not satisfy the requirement of notice). A sample request is attached to this paper as Appendix D.

C. *Make effective and comprehensive objections*

Objections are required, both to exclude extraneous misconduct at trial, and, if unsuccessful, to complain on appeal. Whether made in the traditional fashion, within the jury's presence, or outside the jury's presence, as provided by Rule 103(a)(1), these objections must be both timely and specific, and counsel must obtain adverse rulings. Particular evidence might be excludable for a number of different and independent reasons. To maximize your chances of success in both the trial and appellate courts, a battery of objections may be called for. *See Montgomery v. State*, 810 S.W. 2d 372, 387-90 (Tex. Crim. App. 1990).

a. Object that the evidence is irrelevant under Rule 401 and therefore inadmissible under Rule 402 of the Texas Rules of Evidence;

b. A relevancy objection does not preserve Rule 404(b) error. Therefore, if your relevancy objection is overruled, next object that

the evidence, if relevant at all, is relevant only to character conformity, and is therefore inadmissible under Rule 404(b);

c. Request that the trial court require the state to articulate into the record the purpose for which the evidence is offered;

d. If the trial court admits the evidence, request that the court articulate into the record its reason for doing so;

e. Request that the trial judge *at that time* "instruct the jury that the evidence is limited to whatever purpose the proponent has persuaded him it serves;"

f. If the trial court rules against you under Rules 401/402 and 404(b), *further* objection under Rule 403, is required, complaining that the probative value of the evidence is substantially outweighed by its potential for "unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence;"

g. Request that the trial court conduct a complete Rule 403 balancing test;

h. If the objections are overruled, request limiting instructions, not only when the evidence is admitted, but also in the final written jury charge.

XI. PRIVILEGES

A. *The attorney-client privilege*

Generally, a client has the right to refuse to disclose and to prevent others from disclosing "confidential *communications* made for the purpose of facilitating the rendition of professional legal services to the client." TEX. R. EVID. 503(b)(1)(emphasis supplied).

There is a "special rule of privilege in criminal cases" that is even broader. "In criminal cases, a client has a privilege to prevent the lawyer or lawyer's representative from disclosing any other fact which came to the knowledge of the lawyer or the lawyer's representative by reason of the attorney-client relationship." TEX. R. EVID. 503(b)(2). *But see Manning v. State*, 766 S.W. 2d 551, 557 (Tex. App.--Dallas 1989), *aff'd,* 773 S.W. 2d 558, 559 (Tex. Crim. App. 1989)(adopting court of appeals opinion)(although if read literally, this "rule would prevent the disclosure of matters that neither involved communications between lawyer and client, nor were

intended to be confidential . . . a close examination of the case law reveals that the courts have not read the rule to shield such matters”).

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

B. *The physician-patient privilege in criminal cases*

1. *The general rule*

“*Limited Privilege in Criminal Proceedings*. There is no physician-patient privilege in criminal proceedings. However, a communication to any person involved in the treatment or examination of alcohol or drug abuse by a person being treated voluntarily or being examined for admission to treatment for alcohol or drug abuse is not admissible in a criminal proceeding.” TEX. R. EVID. 509(b). *See also* TEX. CODE CRIM. PROC. ANN. art. 38.101(concerning substance abusers).

2. *Accomplishing the same thing with the attorney-client rule*

There is, of course, an *attorney-client* privilege. Pursuant to TEX. R. EVID. 503(a)(4)(A), “[a] ‘representative of the lawyer’ is: . . . one employed by the lawyer to assist the lawyer in the rendition of professional legal services.” If you employ a physician, or any other expert, to assist in the rendition of professional legal services, then that person becomes your representative, and confidential communications between the client and the representative are privileged. TEX. R. EVID. 503(b)(1). *See also Skinner v. State*, 956 S.W. 2d 532, 538 (Tex. Crim. App. 1997)(“expert appointed pursuant to *Ake* . . . is an agent of defense counsel for purposes of the work product doctrine”).

C. *Article 39.14(b)*

Article 39.14(b) permits the court to order both the defense and the state to provide their opponents the names and addresses of any expert witnesses who will be called at trial. Instruct any experts who are members of the defense team that confidential communications are privileged under Rule 503(b)(1) and that they must not talk to the prosecution before trial or turn over records unless authorized by you.

D. *Privileged statements during competency examinations*

“No statement made by the defendant during the examination or hearing on his competency to stand trial may be admitted in evidence against the defendant on the issue of guilt in any criminal proceeding.” TEX. CODE CRIM. PROC. ANN. art. 46.02, § 3(g). Article 46.03, §

3(g), which governs examinations with regard to the *insanity* defense, contains no such privilege.

XII.
READ THE COURT'S CHARGE TO THE JURY

A. *A reasonable time to examine the charge*

Counsel is entitled to "a reasonable time to examine" the jury charge before it is read to the jury. TEX. CODE CRIM. PROC. ANN. arts. 36.14 & 36.16.

B. *Three jury instruction issues*

1. *The misleading instruction on good time credit*

a. Article 37.07, § 4

Where a defendant has been found guilty of a 3(g) offense, or where the judgment contains an affirmative finding, the sentencing jury is to be given the following instruction on parole, pursuant to article 37.07, § 4 of the code of criminal procedure:

> "Under the law applicable in this case, the defendant, if sentenced to a term of imprisonment, may earn time off the period of incarceration imposed through the award of good conduct time. Prison authorities may award good conduct time to a prisoner who exhibits good behavior, diligence in carrying out prison work assignments, and attempts at rehabilitation. If a prisoner engages in misconduct, prison authorities may also take away all or part of any good conduct time earned by the prisoner.
>
> "It is also possible that the length of time for which the defendant will be imprisoned might be reduced by the award of parole.
>
> "Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served equals one-half of the sentence imposed or 30 years, whichever is less, without consideration of any good conduct time he may earn. If the defendant is sentenced to a term of less than four years, he must serve at least two years before he is eligible for parole. Eligibility for parole does not guarantee that parole will be granted.
>
> "It cannot accurately be predicted how the parole law and good conduct time might be applied to this defendant if he is sentenced to a term of imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities.

"You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant."

b. The fallacy

In Texas, persons not released on parole must be released on mandatory supervision when their actual calendar time served plus any accrued good conduct time equals the term of the sentence. TEX. GOV'T CODE ANN. § 508.147. A person is not eligible for mandatory supervision, however, if he is serving a sentence for an offense enumerated in § 3(g). TEX. GOV'T CODE ANN. § 508.149(a)(1). At least two things are wrong, then, with this statutorily mandated charge. First, persons convicted of 3(g) offenses, or offenses in which a deadly weapon was used or exhibited, contrary to what the charge suggests, clearly cannot "earn time off the period of incarceration imposed through the award of good conduct time. . . [for] good behavior, diligence in carrying out prison work assignments, and attempts at rehabilitation." Second, it is simply not true that "it cannot accurately be predicted how the parole law and good conduct time might be applied to this defendant if he is sentenced to a term of imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities." In fact, it can be predicted quite precisely how good conduct time will be applied to those so convicted: *it will not be applied at all*, because § 508.149(a)(1) mandates that it will not. Contrary to what the jury was led to believe in the charge, the award of good time credit will be of no benefit whatsoever to a defendant who was convicted of a 3(g) offense.

c. Jimenez v. State

The court of criminal appeals recently had the opportunity to resolve this anomaly. In *Jimenez v. State*, 32 S.W. 3d 233 (Tex. Crim. App. 2000), the court assumed for the sake of argument that the instruction was error, but then found that, if it was, the error was harmless under *Almanza v. State*, 686 S.W. 2d 157 (Tex. Crim. App. 1984). *Id*. at 239.

In light of *Jimenez*, it is still an open question whether the charge required by article 37.07, § 4 is erroneous. Until this issue is resolved, though, the defense should object, in order to preserve error.

2. *When the jury is unable to agree*

Article 36.16 of the code of criminal procedure provides, among other things, that: "After the argument begins no further charge shall be given to the jury unless required by the improper argument of counsel or the request of the jury, or unless the judge shall, in his discretion, permit the introduction of other testimony, and in the event of such further charge, the defendant or his counsel shall have the right to present objections in the same manner as is prescribed in Article 36.15."

In *Jackson v. State*, 753 S.W. 2d 706, 712 (Tex. App.--San Antonio 1988, pet. ref'd), the jury sent this note: " After deliberating for 4 hours we are unable to come to a unanimous verdict." The trial court then gave an *Allen* instruction. The court of appeals found that this note "does not constitute a request by the jury for anything but merely informs the trial court of the jury's status after 4 hours of deliberation." *Id*. Since the *Allen* charge was not "required by the . . . request of the jury . . . " the trial court erred in giving it. The court went on to hold, however, that appellant waived error by not making this objection at trial. *Id*. at 713.

3. *Proof beyond a reasonable doubt and the presumption of innocence, post-Geesa*

Before the *Geesa* decision, Texas courts were not required to define "proof beyond a reasonable doubt." After *Geesa*, for about nine years, a definition mandated by the court of criminal appeals was required, whether requested or not. *See Geesa v. State*, 820 S.W. 2d 154 (Tex. Crim. App. 1991). Then, in 2000, the court reversed itself, and held that no definition is required. *Paulson v. State*, 28 S.W. 3d 570 (Tex. Crim. App. 2000). After *Paulson*, certain courts in Bexar County removed the *Geesa* instruction, but failed to replace it with anything which discusses the presumption of innocence or proof beyond a reasonable doubt. The failure to instruct on these two bedrock principles of law might violate federal due process of law. *Taylor v. Kentucky*, 436 U.S. 478, 490 (1978).

XIII.
PLEADING GUILTY BEFORE THE JURY

A. *Article 26.14*

> Where a defendant in a case of felony persists in pleading guilty or in entering a plea of nolo contendere, if the punishment is not absolutely fixed by law, a jury shall be impaneled to assess the punishment and evidence may be heard to enable them to decide thereupon, unless the defendant in accordance with Articles 1.13 or 37.07 shall have waived his right to trial by jury.

TEX. CODE CRIM. PROC. ANN. art. 26.14.

B. *Proving the defendant's eligibility for probation*

A jury cannot recommend probation in a felony case unless the defendant proves he has never before been convicted of a felony. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 4(d)(3). What if you don't want to put the defendant on to prove this. In *Martinez v. State*, 577 S.W. 2d 242, (Tex. Crim. App. 1979), the defendant's wife testified, "in effect" that she had known him since he was 10, and that he had not been convicted of a felony in that time. "This is sufficient to require the submission of a charge on probation." *Id*. at 243.

NO. 2002-CR-0001

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

APPLICATION FOR WRIT OF HABEAS CORPUS SEEKING BAIL REDUCTION

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Joe Smith, by and through his attorney of record, and makes this Application for Writ of Habeas Corpus Seeking Bail Reduction, and, for good cause shows the following:

I.

Defendant is illegally confined and restrained of his liberty by the Sheriff of Bexar County, Texas in the Bexar County Adult Detention Center in San Antonio, Texas in lieu of a bond in the amount of $1,000,000.00. Defendant is charged with the misdemeanor offense of driving while intoxicated.

II.

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

III.

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

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

Respectfully submitted:

____

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

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of defendant's Application For Writ of Habeas Corpus Seeking Bail Reduction has been delivered to the District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas, on this the 15th day of March, 2002.

MARK STEVENS

THE STATE OF TEXAS)

COUNTY OF BEXAR)

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

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

____

__________________________________MARK STEVENS

______SUBSCRIBED AND SWORN TO before me this _____ day of __________, 2002 A.D. to certify which witness my hand and seal of office.

____
Notary Public, State of Texas

My commission expires:______________

ORDER SETTING HEARING

On this _____ day of ________________, 2002 A.D., came on to be heard the Application of Joe Smith for a Writ of Habeas Corpus, and it appearing to the Court that said defendant is entitled to a hearing on said application, it is therefore ordered that the Clerk of this Court issue a Writ of Habeas Corpus directed to the Sheriff of Bexar County and commanding the said Sheriff to have and produce the person of Joe Smith before me in the courtroom of the __________ Court, on the ______ day of ___________, 2002 A.D. at ________ o'clock ____.M., then and there to show cause why the said Joe Smith should not be released from custody on reasonable bond.

____
JUDGE PRESIDING

Appendix A

__________________________________***ORDER***

______On this the _______ day of ______________________, 2002, came on to be considered defendant's Application for Writ of Habeas Corpus Seeking Bail Reduction, and, said writ is issued and after hearing evidence and argument of counsel, relief on said writ is

(GRANTED) (DENIED).

Bond is set in the amount of ____________________________.

____

__________________________________JUDGE PRESIDING

Appendix A

NO. 2002-CR-0001

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

MOTION TO EXTEND TIME LIMITATION FOR VOIR DIRE

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

I.

Defendant is charged with the offense of driving while intoxicated.

II.

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

III.

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

IV.

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

due course and equal protection of the law, guaranteed by the United States and Texas Constitutions.

V.

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

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

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

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

VI.

Counsel believes he can conduct an adequate voir dire in this case in one hour, and he requests that he be allowed that amount of time.

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

Respectfully submitted:

____

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

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of defendant's Motion To Extend Time Limitation For Voir Dire has been delivered to the District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas, on this the 15th day of March, 2002.

____

MARK STEVENS

ORDER

On this the ___ day of __________, 2002, came to be considered defendant's Motion to Extend Time Limitation For Voir Dire, and said motion is hereby

(GRANTED) (DENIED)

____

JUDGE PRESIDING

RIGHTS OF THE ACCUSED

RIGHT PROTECTED	U.S. CONSTITUTION	TEXAS CONSTITUTION	TEXAS CODE OF CRIMINAL PROCEDURE
Compulsory Process	5th, 6th & 14th	Art. I §10	Art. 1.05
Confrontation & Cross Examination	6th & 14th	Art. I §10	Arts. 1.05, 1.15, 1.25
Cruel & Unusual Punishment	8th & 14th	Art. I §13	Arts. 1.09, 16.21
Discriminatory Use of Peremptory Challenges	14th (Eq. Protection)	Art. I §§3, 3a	Art. 35.261
Double Jeopardy	5th & 14th	Art. I §14	Arts. 1.10, 1.11, 37.14
Due Process/ Due Course of Law (Tx)	5th & 14th	Art. I §§13, 19	Art. 1.04
Effective Counsel	6th & 14th	Art. I §10	Arts. 1.05, 1.051, 15.17, 16.01, 20.17, 26.04, 26.052, 52.04
Excessive Bail	8th & 14th	Art. I §§11, 11a, 13	Arts. 1.07, 1.09, 17.033, 17.09, 17.15, 17.151, 17.26, 23.11, 23.12, 44.04, 44.35, 45.016, 45.0425, 51.05
Excessive Fines	8th & 14th	Art. I §13	Art. 1.09
Grand Jury Indictment	5th	Art. I §10	Art. 1.05
Jury Trial	6th & 14th	Art. I §§10, 15, 15a	Arts. 1.05, 1.12, 1.15
Notice	6th & 14th	Art. I §10	Arts. 1.05, 20.17, 21.02-21.09, 21.11-21.13, 21.15, 21.21, 21.23, 25.01-25.04, 59.04
Presumption of Innocence	14th*	None	Art. 38.03
Public Trial	6th & 14th	Art. I §10	Arts. 1.05, 1.24
Search and Seizure	4th & 14th	Art. I §9	Arts. 1.06, Chap. 14, Chap. 15, 18.01-18.09, 18.16, 18.20-18.21, 38.23, 49.19-49.20, 50.05, 51.03, 52.01, 59.02-59.04
Self Incrimination	5th & 14th	Art. I §10	Arts. 1.05, 15.17, 16.03-16.04, 20.17, 38.08, 38.21-38.23, 52.05
Speedy Trial	6th & 14th	Art. I §10	Arts. 1.03, 1.05, 17.151, 28.061
Suggestive Identification (denied fair trial)	14th	Art. I §§13, 19	Art. 38.23

Appendix C

* Not specifically articulated in the US Constitution, but recognized by the Supreme Court as a “basic component” of the right to a fair trial secured by the 14th Amendment. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 1692, 48 L. Ed. 2d 126, 130 (1976)

Feb 02; John J. “Bud” Ritenour, Jr.

NO. 2002-CR-0001

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

REQUEST FOR NOTICE OF INTENT TO OFFER EXTRANEOUS CONDUCT UNDER RULE 404(b) AND ARTICLE 38.37 AND EVIDENCE OF CONVICTION UNDER RULE 609(f) AND EVIDENCE OF AN EXTRANEOUS CRIME OR BAD ACT UNDER ARTICLE 37.07

TO THE BEXAR COUNTY DISTRICT ATTORNEY'S OFFICE:

I.

Pursuant to Rule 404(b) of the Texas Rules of Evidence and Article 38.37 of the Texas Code of Criminal Procedure, defendant requests the state to give reasonable notice in advance of trial of its intent to introduce in its case-in-chief evidence of crimes, wrongs, or acts other than that arising in the same transaction.

II.

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

JOE SMITH

III.

Pursuant to Article 37.07 § 3(g) of the Texas Code of Criminal Procedure, defendant requests that the state give reasonable notice of intent to introduce against the defendant evidence of an extraneous crime or bad act at the punishment phase of the trial.

Respectfully submitted:

____

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

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of defendant's Application For Writ of Habeas Corpus Seeking Bail Reduction has been delivered to the District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas, on this the 15th day of March, 2002.

____
MARK STEVENS