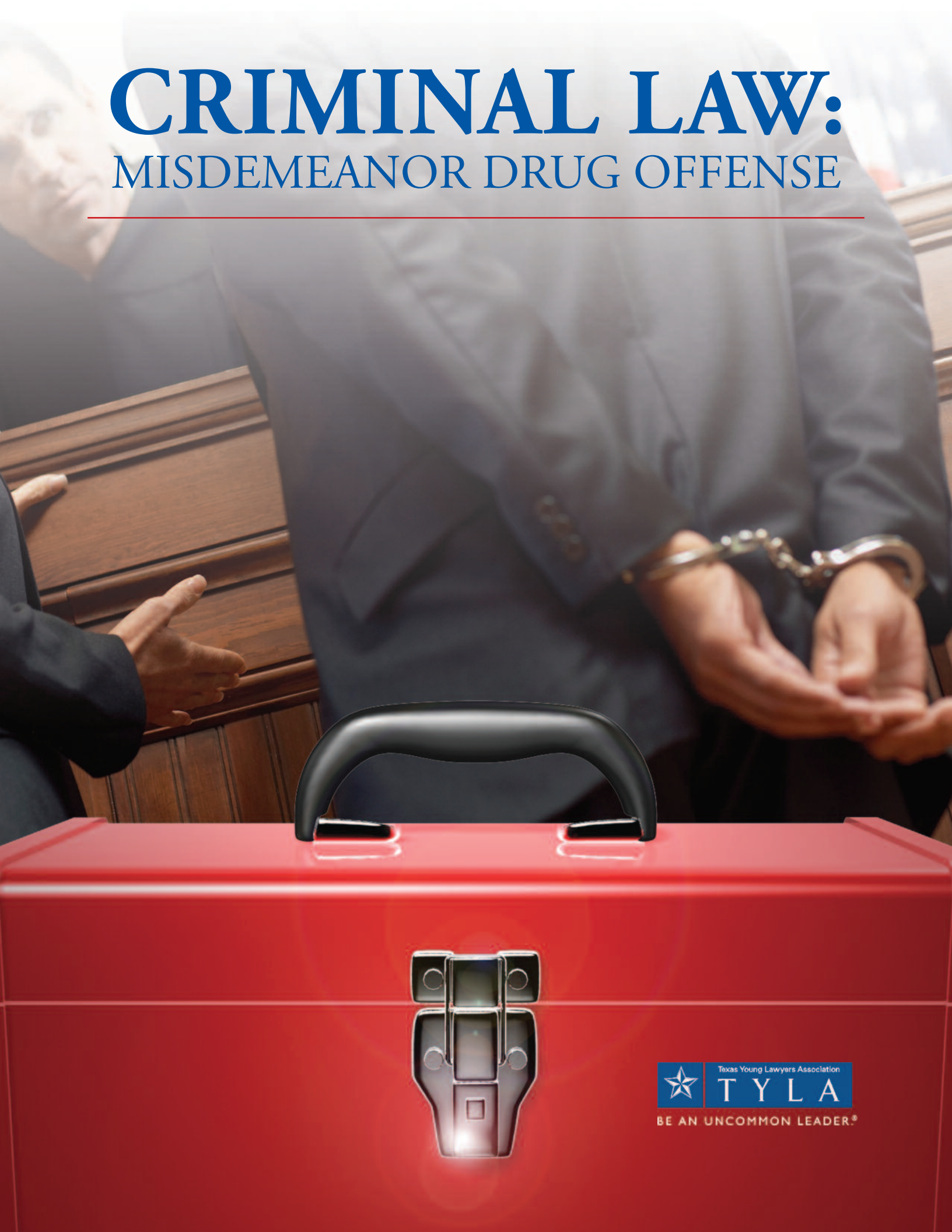


CRIMINAL LAW: MISDEMEANOR DRUG OFFENSE



Texas Drug Crimes Criminal Law Handbook (State)
Texas Young Lawyers Association
2014 Edition

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Texas Drug Crimes Criminal Law Handbook (State)

Drug crimes are covered by both federal and state laws in Texas. Federal offenses are regulated by The Comprehensive Drug Abuse Prevention and Control Act of 1970, known as the Controlled Substances Act. This guide focuses on Texas state practice.

The Controlled Substances Act covers nearly all of the drug offenses in Texas and is codified in the Texas Health and Safety Code, Chapters 481 through 486. Since Texas is an international border state, drug traffic offenses are a major concern and your clients' affiliation with groups known to traffic drugs may have a major impact on sentencing.

Drug offenses are among the most serious charges in criminal law. They carry with them severe penalties and can have other consequences in areas of one's life, such as family life and employment. The legal penalties for drug crimes will depend on the nature of the drug offense.

Drug offenses are considered more severe if they take place in certain areas, such as near a school or daycare center or other places where children would normally frequent. Drug offenses also frequently coincide with other criminal offenses, such as DWI, Assault, or other offenses for which a person is arrested and drugs are subsequently found on their person or in their vehicle.

Introduction

A criminal defense lawyer's involvement is contingent upon a client's request for assistance. In cases where a person asks for help prior to the return of an indictment or the filing of an information, a lawyer could be involved in conversations with the prosecutor before he or she makes the decision to file charges.

Being involved before formal charging carries significant advantages. Defending against a case that has been filed is fairly easy: you already know that the worst that can happen is the client will be found guilty. When a client engages defense counsel early in the criminal investigation, there are opportunities to make strategic decisions which successfully end the investigation or prevent charges from being filed.

Misdemeanor drug cases will be almost exclusively possession of marijuana or possession of certain prescription narcotics without said prescription. Depending on where the client was arrested, a drug-free zone may also come into play. A determination that the drugs were in a drug-free zone will increase the severity of the offense by one degree.

A drug offense conviction will have many collateral consequences. A conviction for possession of marijuana or almost any other illegal drug will result in the loss of driving privileges for one year. Also, a drug conviction will result in not being eligible for various federal loans and grants such as student loans. There are also immigration consequences for non-citizens.

Because of these consequences, it is important for attorneys representing individuals accused of drug offenses to be aware of the most common weaknesses in the typical prosecution's case. These include:

- Unconstitutional stops by authorities
- Improper search warrants
- Illegal searches and seizures

Strategy

Often the best course is to challenge the drug charge by having a motion to suppress evidence hearing. The motion to suppress is a method to challenge various parts of the State's case. Occasionally, even though the motion to suppress was not successful in having the charge dismissed, the prosecutor may realize that the officer was not truthful or that the case has some other weakness, and will therefore reduce or dismiss the charges. If the motion to suppress is successful, the prosecutor will normally dismiss the charges. If the motion to suppress is not successful, you can still go to trial, or you can still negotiate a plea bargain. However, make sure you speak with the prosecutor handling your case about whether any plea bargain offered will still be available after a motion to suppress is litigated.

After you are retained or appointed

If you are appointed to represent a defendant, the local rules for your county should provide time guidelines for visiting your client in jail.

1. At the first meeting, obtain information about their addresses and telephone numbers, as well as additional people to use for contacts. The intake sheet enclosed in this toolkit is an ideal place to start. Allow time for them to give you an overview of their arrest and the circumstances leading up to the arrest.
2. Ask if they are aware of any additional charges that might be filed in either the same or other counties.
3. Review your client's criminal history information (don't just rely on self-reports by the client, use resources such as PublicData.com). The prosecutor's file will also usually have your client's criminal history. Even if you are not allowed to view it, the prosecutor will often be forthcoming with any information concerning your client's criminal history.
4. Determine if there are co-defendants.
5. Provide the client with information about how you want them to contact you. Try to provide more than one method of communication (e.g., telephone AND e-mail).
6. Always return phone calls, preferably within 24 hours.

Criminal Discovery

1. When the file is opened in the prosecution office, there should be someone responsible for review and to request needed reports, statements, recordings, etc.
2. The prosecution has the benefit of using grand jury subpoenas to obtain records such as medical records, school records, therapy or mental health information, and a variety of other helpful information. The defense must rely on the subpoena duces tecum to request documents.
3. Do not forget to request 911 calls, other recorded calls, or any in-car videos that may be available. They are frequently erased or deleted if there has not been a request to preserve them.
4. Visiting the scene of a traffic stop or the residence searched may be useful for a suppression motion, or you can use tools like Google's Streetview to get a better idea of the area.
5. Consider retaining an expert to reanalyze the drug evidence or reweigh it if you believe there may have been an error at the state-run laboratory.

Conducting discovery with the prosecution

1. Article 39.14 of the Code of Criminal Procedure governs discovery in a criminal case. The Michael Morton Act (SB1611) was signed into law on May 16, 2013 and will take effect and apply to all offenses committed on or after January 1, 2014.

2. After receiving a timely request from the Defendant, the State, as soon as is practicable, **shall** produce and permit the inspection and the electronic duplication, copying, and photographing of offense reports, documents, papers, written or recorded statements of the defendant or a witness, including witness statements of law enforcement officers, books, accounts, letters, photographs or objects or other tangible things that constitute or contain evidence material to any matter involved in the action and are in the possession, custody, or control of the State or any person under contract with the State.
3. Discovery items may not be disclosed to third parties unless a court orders the disclosure, the items have already been publicly disclosed, or the attorney for the Defendant allows the Defendant, witness or prospective witness to review but not duplicate items. Certain identifying information must be redacted prior to disclosure.
4. Before accepting a plea of guilty or nolo contendere, or before trial, each party shall acknowledge in writing or on the record in open court the disclosure, receipt and list of all documents, items and information provided to the Defendant.

The prosecution has a duty to turn over exculpatory evidence under a case that should be familiar to you. *Brady v. Maryland*, 373 U.S. 1194 (1963). This United States Supreme Court case requires the prosecution to disclose any evidence which may be exculpatory in nature or which would mitigate or reduce the punishment. However, this should be covered by the new discovery statute, which requires disclosure of all evidence, exculpatory or not.

Experts who will be used at trial are discoverable by both the prosecution and defense. The party desiring discovery must file a motion and the court may order disclosure of experts' names and addresses not later than the 20th day before the trial begins. C.C.P. article 39.14(b)

Document your file. This should include all visits to the prosecutor's office, when and what discovery has been provided, and any plea offers. Frequently issues arise later which may require one or both parties to address how discovery was conducted, particularly in cases where a trial was held.

Interview witnesses provided by your client. Interview family members/coworkers/friends for potential character evidence at punishment. Visit the crime scene, if possible. Consider having another expert review the forensic evidence. Do not be afraid to request that the prosecution look into a specific claim made by your client or a defense witness in advance of trial. However, make sure you get approval of discussion of that claim from your client before taking it to the prosecution. It is one of the trial attorney's duties to make an independent investigation of the client's case. *Ex Parte Ewing*, 570 S.W.2d 941 (Tex. Crim. App. 1978).

You also have a duty to be on the lookout for any mental health issues that may affect your client's case. The Texas Court of Criminal Appeals has held that counsel has a duty to investigate the possibility that the client was insane at the time of the offense given the likelihood of mental illness noted in reports from jail medical personnel. *Ex Parte Imoudu*, 284 S.W.3d 866 (Tex. Crim. App. 2009).

Plea Bargaining in Misdemeanor Cases

Classes of Misdemeanors

Class C Misdemeanors – Fine up to \$500

Class B Misdemeanors – Up to 180 days in jail and a \$1,000 fine

Class A Misdemeanors – Up to one year in jail and a \$2,000 fine

Class C Misdemeanors are usually handled in municipal courts and usually involve only fines.

1. Community supervision (regular probation) county jail sentence that is imposed, but then suspended for a designated period of time as long as the defendant abides by conditions of supervision set out by the Court.
2. The maximum term of community supervision is two years for a misdemeanor.
3. The court can extend the period of supervision in a misdemeanor for a period not to exceed three years.
4. Deferred adjudication is a form of community supervision where the defendant has entered a plea of guilty or nolo contendere and the judge has found sufficient evidence to find the defendant guilty, but the guilty finding is deferred for a period of time. The maximum term of deferred adjudication community supervision is two years for misdemeanors.
5. Deferred adjudication is not available as an alternative for all offenses. C.C.P. 42.12 5(d).
6. You must read and learn Article 42.12 of the Code of Criminal Procedure regarding community supervision.

Alternative dispositions to a misdemeanor case

Lesser included offenses: A plea may be negotiated to a lesser included offense of a charged offense without filing a new charging instrument. Article 37.09 C.C.P.

Pre-trial Diversion or Deferred Prosecution: This usually is offered by the prosecutor's office as an alternative to traditional deferred probation, which is supervised by the probation department. The prosecutor's office will "supervise" the client's progress towards completing classes, therapy, treatment, or other conditions they deem appropriate in return for not pursuing a criminal case. These arrangements vary widely by county and you should ask a local defense attorney or a prosecutor about availability and eligibility for any such program.

Dismissal: The attorney representing the State may, with permission of the court, dismiss a criminal action at any time upon filing a written statement with the district clerk setting out his reasons for such dismissal. No case may be dismissed without the consent of the presiding judge.

Probation

Most first-time drug defendants are eligible for either regular probation or deferred adjudication probation. The Code of Criminal Procedure art. 42.12 governs probation and refers to the program as "community supervision." The terms and conditions are set by the trial court, with recommendations made by the prosecution as to special terms, length of probation, as well as fines. Common conditions include regular reporting, abstaining from the use of drugs or alcohol, drug testing, payment of court costs fines and fees, and community service.

Any county over 200,000 people must have a drug court program. If your client has a drug or substance abuse problem that has led to their current predicament, drug court may be a good option for them. It is more intensive than regular probation, but offers significantly more resources to help the individual overcome their abuse problems. In addition, if the program is completed successfully, the defendant may be eligible for a non-disclosure order preventing all but law enforcement from learning about the commission of the offense. Make sure you inquire with a local defense attorney about the availability of a drug court in your county.

Client Communication

You must communicate any plea offer made to your client. Failure to do so will result in a finding of ineffective assistance to the client. *Randle v. State*, 847 S.W.2d 576 (Tex. Crim. App. 1993). The duty also includes an obligation to inform the State of an acceptance of a plea offer in a timely fashion, *i.e.* before the offer expires. *Id.*

Make sure you advise your client regarding collateral consequences of guilt, especially immigration issues. As far as immigration issues go, if you learn that your client is not a United States citizen, before you do anything that might resolve the case, consult with an immigration attorney and make sure that you have informed the client about ALL the potential consequences to his immigration status that go along with a guilty plea/conviction. Not doing so can be grounds for a finding of ineffective assistance of counsel.

Collateral Consequences

A final misdemeanor conviction has consequences other than just the fine and probationary period.

- A final conviction for possession of marijuana will result in the suspension of your driver's license.
- If you are not a citizen of the United States, a final conviction other than a Class C traffic ticket could affect your immigration status.
- A drug conviction may affect your standing with a licensing or regulatory board as well as your ability to work in that field.
- A final conviction may also adversely affect your employment prospects in the future.

This is not meant to be a complete list of all of the consequences of a conviction but only a small sample of the collateral consequences.

Drug Penalty Groups

The Controlled Substances Act separates drugs into different penalty groups. A full list is attached as a separate document, but you should frequently check to see if it has been updated.

Penalty Group 1 consists of many prescription narcotics like morphine as well as other illicit drugs like heroin, opium, and cocaine.

Penalty Group 1-A consists of lysergic acid diethylamide (LSD), including its salts, isomers, and salts of isomers.

Penalty Group 2 consists of hallucinogenic drugs like ecstasy (MDMA) and mescaline.

Penalty Group 3 consists of barbiturates and other prescription drugs, such as anabolic steroids.

Penalty Group 4 consists of mainly prescription drugs that include smaller quantities of drugs listed in other groups, such as codeine mixed with acetaminophen.

Possession of Marijuana

Marijuana offenses have a separate set of statutes under the Texas Health and Safety Code. One important difference is that there is no such crime as possession of marijuana with the intent to distribute. The only trafficking crime related to marijuana is actual delivery of marijuana.

< 2 oz.

2 oz. to < 4 oz.

Class B Misdemeanor

Class A Misdemeanor

Up to 180 days County Jail
and/or fine of \$2,000

Up to 1 year County Jail and/or
fine of \$4,000

Statute of Limitations for Misdemeanor Offenses

All misdemeanors must be presented or filed within two years. Tex. Code Crim. Proc. art. 12.02

Defendant's Pleadings and Motions

The pleadings and motions in criminal cases are governed by Texas Code of Criminal Procedure. art. 27.02.

Specific motions and pleadings that may be filed:

- (1) A motion to set aside, or an exception to an indictment or information for some matter of form or substance;
- (2) A special plea as provided in article 27.05 of the code;
- (3) A plea of guilty;
- (4) A plea of not guilty;
- (5) A plea of nolo contendere, the legal effect of which shall be the same as that of a plea of guilty, except that such plea may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based;
- (6) An application for probation, if any;
- (7) An election, if any, to have the jury assess the punishment if he is found guilty; and
- (8) Any other motions or pleadings that are by law permitted to be filed.

These pleadings must be filed pre-trial and usually within a certain amount of time before the pre-trial hearing or conference. Some trial courts require suppression motions to be filed and heard before trial begins, but others will carry the motions with the trial. Speak with a local defense attorney about this before you determine the best course of action. If the suppression issue turns on a fact determination, it may be submitted to the jury.

Pretrial Motions

1. Time to File – Article 28.01 states that pretrial pleadings must be filed seven days before the scheduled hearing. Local rules will sometimes expand that time.

7 “Must File” Motions –

Motion to quash, if the indictment or information is defective

Punishment election, if defendant wants the jury to assess punishment

Application for probation, if defendant is eligible

Requests for notice, *e.g.* 404(b), 609(f), and 37.07

Motion to Suppress Evidence/Statements

Notice of insanity defense (only if insanity is an issue)

Brady motions

Trial Considerations

Know what your defense will be at trial:

1. There is nothing to link my client to the narcotics (NO affirmative link to the drugs)
2. The police made a mistake/abused their authority and illegally searched my client.
3. The laboratory that tested the narcotics made a mistake.
4. The narcotics are not illegal (exceedingly rare).

Voir Dire and Challenges for Cause

Make sure you get your client a fair trial. Many people have biases or prejudices against criminal defendants based upon their appearance, the nature of the charge, or merely the fact that they are in court at all. None of these people is legally qualified to serve if they cannot put these beliefs aside. Other examples of “challenges for cause” include:

- If a panel member would hold defendant’s invocation of his 5th Amendment right to remain silent against him.
- If a panel member would be unable to consider the full range of punishment. Prospective jurors must be willing to consider the full range of punishment applicable to the offense in order to be qualified. *Banda v. State*, 890 S.W.2d 42 (Tex. Crim.App. 1994).
- Can’t convict on the testimony of one witness. If a potential juror cannot convict based upon one witness whom they believed beyond a reasonable doubt, and whose testimony proved every element of the indictment beyond a reasonable doubt, then the potential juror can be validly challenged for cause. *Castillo v. State*, 913 S.W.2d 529, 533-34 (Tex.Crim.App. 1995).
- Bias or prejudice in favor of or against defendant. It is not unusual for a potential juror to state that a police officer would never lie under oath. If such a statement is made, the potential juror has evidenced bias against defendant. *Hernandez v. State*, 563 S.W.2d 947, 950 (Tex.Crim.App.1978).

Preserving Error on Challenges for Cause

To preserve error with respect to a trial court’s denial of a challenge for cause, an appellant must, under *Allen v. State*, [cite]:

1. Assert a clear and specific challenge for cause.
2. Use a peremptory strike on the complained-of venire member.
3. Exhaust his peremptory strikes.
4. Request additional peremptory strikes.
5. Identify an objectionable juror.
6. Claim that he would have struck the objectionable juror with a peremptory strike if he had one to use

Failure to carry out each of these steps could result in waiver of this important challenge on appeal.

Voir dire tips

Practical Considerations

Good trial lawyers use voir dire to indoctrinate potential jurors as to their views of the law and the evidence in the case. You can also use the process to begin establishing positive feelings toward your case and the client. Because voir dire is the only time during trial that attorneys can speak directly to jurors, it is extremely important that you get everyone to

like you! However, it should be noted that a jury is usually able to spot insincerity. The most important thing to remember when conducting a voir dire is to be yourself and relax. That will do more to get the jury to like you than anything else.

Cover three to five topics

Ask open-ended questions

Use looping. That is, take any answers that the jurors give and loop back to connect it with something another juror said earlier. This will prompt the jurors to start discussions among themselves. You will learn more from their conversations than from your questions.

Elicit information

Establish rapport

Educate by having potential jurors teach each other

Trial Objections

Preserving error

In order to preserve error for appeal, a trial lawyer must know the following three steps:

Make a Timely Objection and State Your Precise Grounds –

If overruled, error is preserved.

If sustained, continue to step 2

If the judge does not make an explicit ruling, request one on the record.

Ask to Have the Jury Instructed to Disregard the Question, Comment or Evidence –

If no instruction is given, error is preserved.

If the judge gives an instruction, continue to step 3

Move for a Mistrial –

You must continue demanding some action in your favor until you get a refusal in order to preserve error.

Specific Objections:

Hearsay

Most everything a police officer knows about a case comes from hearsay. The same goes for the information in their police reports. There is a limited “information acted upon” exception, a non-truth purpose that lets officers relay information that was provided to them to help explain the actions they took. However, if the State offers the evidence for that purpose, make sure you ask for a limiting instruction.

Confrontation

If the State attempts to admit hearsay statements from any person who is not in court testifying, you should make a confrontation clause objection in addition to your hearsay objection. *See* U.S. CONST. amend. VI. The right applies to any testimonial statement by a person, *i.e.*, statements later used (normally by the prosecution) in a criminal case. Non-testimonial statements are those made in situations that do not presume they will be used later in a criminal case, such as statements excited utterances, statements for the purpose of medical diagnosis, and others.

Character Evidence (Rule 404, 403)

Guilt/innocence trials resolve whether this particular person did this particular crime on this particular occasion. Unless the defendant testifies, any character evidence should not be admitted.

Invoking “the Rule” – Rule 614 and Article 36.03 C.C.P.

Witnesses generally are not allowed to remain in the courtroom during the testimony of other witnesses with certain defined exceptions once the Rule (also referred to as the rule against comparative testimony) has been invoked. Either party may request that the Rule be invoked.

Exempt witnesses

The defendant

Any person whose presence is shown to be essential to presentation of cause

The alleged victim, unless the victim is to testify and the court determines the testimony would be materially affected if the victim hears other testimony at the trial

Statutory Rules

The testimony of co-defendants and prison “snitches” must be corroborated and the jury should be so instructed. Tex. Code Crim. Proc. art. 38.075, 38.14

If the defendant has sought drug treatment, statements made during treatment may not be used against him or her. Tex. Code Crim. Proc. art. 38.101; Same for CIs Art. 38.141.

Defendant’s own statement art. 38.21, 38.22

A statement of an accused may be used in evidence against him if it appears that the statement was freely and voluntarily made without compulsion or persuasion, under the rules prescribed. If your client made a statement, refer to the Code of Criminal Procedure sections above to see if it is admissible at trial.

Drug Evidence – Chain of Custody

The State has to establish the chain of custody from seizure to trial before the evidence is admissible. This may be accomplished by witness testimony or a chain of custody affidavit. CCP art. 38.42

Suppression Hearing Tips and Law

The legality of the police conduct surrounding the search or seizure of a defendant in a drug case is frequently dispositive of the entire criminal case. Such issues may include, for example, whether the police lawfully searched a defendant, his vehicle, his residence, etc. If the officer lawfully seized either his person or the drugs, then there is usually little in the way of a legal defense. However, if police conduct was questionable, a motion to suppress is the best way to determine before a trial whether the evidence will be admissible.

A suppression motion is one that asks the trial court to exclude certain evidence from trial because it was illegally obtained by law enforcement in violation of a defendant's rights found either in the U.S. or Texas Constitutions, or the evidentiary statutes found in the Code of Criminal Procedure. If the police violated a defendant's constitutional or statutory rights, then the exclusionary rule prevents any evidence related to that search or seizure from being admitted at trial. Most courts require that Motions to Suppress Evidence be filed before trial. During a hearing on the motion, the Defense has the burden of proof to establish either that the evidence was seized in violation of the Fourth Amendment or that the search or seizure occurred without a warrant. Once the lack of a warrant is established, the burden of proof shifts to the State to prove that any searches or seizures were reasonable. Usually, the State will stipulate that a search or seizure was conducted without a warrant.

Ground for Suppressing Evidence

Traditionally, the courts have described three distinct categories of interactions between police officers and citizens:

- (1) encounters
- (2) investigative detentions, and
- (3) arrests.

State v. Woodard, 341 S.W.3d 404, 410–11 (Tex.Crim.App.2011); *State v. Castleberry*, 332 S.W.3d 460, 466 (Tex.Crim.App.2011).

A fourth category, a community caretaking stop, is carved out as an exception if the officer is primarily motivated to stop and assist an individual whom a reasonable person would believe is in need of help. *See Corbin v. State*, 85 S.W.3d 272, 276 (Tex.Crim.App.2002).

Consensual Encounters

A consensual encounter occurs when “an officer approaches a citizen in a public place to ask questions, and the citizen is willing to listen and voluntarily answers.” *Crain v. State*, 315 S.W.3d 43, 49 (Tex.Crim.App.2010). A citizen may, at will, terminate a consensual encounter. *Woodard*, 341 S.W.3d at 411. Even when the officer does not communicate to the citizen that the request for information may be ignored, the citizen's acquiescence to the officer's request does not cause the encounter to lose its consensual nature. *Id.* If it was an option to ignore the request or terminate the interaction, then a Fourth Amendment seizure has not occurred. *Id.* An officer does not need probable cause or reasonable suspicion to initiate a consensual encounter. *State v. Velasquez*, 994 S.W.2d 676, 678 (Tex.Crim.App.1999); *see also Florida v. Bostick*, 501 U.S. 429, 434 (1991) (“Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free to ‘disregard the police and go about his business,’ the encounter is consensual and no reasonable suspicion is required. The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature.”) (internal citations omitted). “As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification.” *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

An officer may, without reasonable suspicion, request identification and information from a citizen. *Woodard*, 341 S.W.3d at 411. Even if the officer did not tell the citizen that the request for identification or information may be ignored, the fact that the citizen complied with the request does not negate the consensual nature of the encounter. *Id.*

With consent, police officers can detain a citizen, search a citizen's person, and search a citizen's car or home. There are few limits to the scope of consent and the burden falls upon the citizen to revoke consent or limit the scope of consent. Law enforcement does not have to inform the citizen of their right to revoke or limit consent, and so the withdrawal of consent rarely, if ever, occurs.

Investigative Detentions

An investigative detention occurs when an individual is encountered by a police officer, yields to the officer's display of authority, and is temporarily detained for purposes of an investigation. *Johnson v. State*, 912 S.W.2d 227, 235 (Tex.Crim.App.1995). A temporary or investigative detention is a seizure. *Francis v. State*, 922 S.W.2d 176, 178 (Tex.Crim.App.1996); *Josey v. State*, 981 S.W.2d 831, 838 (Tex.App.-Houston [14th Dist.] 1998, pet. ref'd). However, an investigative detention is characterized by a lesser amount of restraint on an individual. See *Berkemer v. McCarty*, 468 U.S. 420, 437–40 (1984); *Francis v. State*, 922 S.W.2d 176, 178 (Tex.Crim.App.1996).

The Fourth Amendment authorizes a brief investigatory detention based on reasonable articulable suspicion in order to determine identity, briefly investigate, and/or maintain the status quo. See *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968). “[T]he police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Davis v. State*, 947 S.W.2d 240, 242 (Tex.Crim.App.1997) (quoting *Terry*, 392 U.S. at 21-22). Because an investigative detention is a seizure, reasonable suspicion must be shown by the officer to justify the seizure. *York v. State*, 342 S.W.3d 528, 535 (Tex.Crim.App.2011); *State v. Larue*, 28 S.W.3d 549, 553 n. 8 (Tex.Crim.App.2000). Police officers may stop and detain a person if they have a reasonable suspicion that a traffic violation is in progress or has been committed. *Garcia v. State*, 827 S.W.2d 937, 944 (Tex.Crim.App.1992).

Whether or not an officer has reasonable suspicion to detain an individual for further investigation is determined from the facts and circumstances known to the officer at the time of the detention. See *Crain v. State*, 315 S.W.3d 43, 48 (Tex.Crim.App.2010). The standard disregards the subjective intent or motive of the officer, and limits the inquiry to the objective justification for the detention. *State v. Elias*, 339 S.W.3d 667, 674 (Tex.Crim.App.2011).

The articulable facts must show unusual activity, some evidence that connects the detainee to the unusual activity, and some indication that the unusual activity is related to a crime. *Martinez v. State*, 348 S.W.3d 919, 923 (Tex.Crim.App. 2011). Articulable facts must amount to more than a mere inarticulate hunch, suspicion, or good faith suspicion that a crime was in progress. *Crain*, 315 S.W.3d at 52. Whether the officer's suspicion to believe that an individual is violating the law is reasonable is evaluated based on “an objective standard that disregards any subjective intent of the officer making the stop and looks solely to whether an objective basis for the stop exists.” *Ford*, 158 S.W.3d at 492.

In determining whether information possessed by police rises to the level of reasonable suspicion, the quality of the information possessed is weighed against the quantity of information possessed. See *Rojas v. State*, 797 S.W.2d 41, 43 (Tex.Crim.App.1990) (balancing quality of information against quantity of information in the probable cause context); see also *Blevins*, 74 S.W.3d at 130. That is, a weakness in the quality of the information possessed may be overcome by the requisite quantity of corroborating facts demonstrating the reliability of the information. See *Smith v. State*, 58 S.W.3d 784, 790 (Tex.App.—Houston [14th Dist.] 2001, pet. ref'd) (balancing quality of information against quantity of information in the investigative stop context). Conversely, when the reliability of the information is increased, less corroboration is necessary. See *Martinez*, 348 S.W.3d at 923; *State v. Sailo*, 910 S.W.2d 184, 188 (Tex.App. —Fort Worth 1995, pet. ref'd).

Courts do not separately evaluate and accept or reject the individual objective facts relied on to establish reasonable suspicion because doing so does not adequately consider the totality of the circumstances; indeed, piecemeal evaluation and rejection of individual factors is prohibited by the Supreme Court. See *United States v. Arvizu*, 534 U.S. 266, 274 (2002); *United States v. Sokolow*, 490 U.S. 1, 9–10 (1989). In *Woods v. State*, the Court of Criminal Appeals rejected the “as consistent with innocent activity as with criminal activity” test for determining reasonable suspicion. *Woods v. State*, 956 S.W.2d 33, 38 (Tex.Crim.App.1997).

Community Caretaking

The United States Supreme Court expressly recognized that police officers do much more than enforce the law, conduct investigations, and gather evidence to be used in criminal proceedings. Part of their job is to investigate accidents—where there is often no claim of criminal liability—to direct traffic and to perform other duties that can be best described as “community caretaking functions.” *Cady v. Dombrowski*, 415 U.S. 433 (1973); *Wright v. State*, 7 S.W.3d 148 (Tex.Crim.App. 1999). As part of their duty to “serve and protect,” police officers may stop and assist individuals whom a reasonable person—given the totality of the circumstances—would believe is in need of help.

A community-caretaking stop does not require the officer to have reasonable suspicion or probable cause to believe that an offense has been committed. See *Corbin v. State*, 85 S.W.3d 272, 276 (Tex.Crim.App.2002).

In determining whether a police officer acted reasonably in stopping an individual to determine if he needs assistance, the following factors are relevant: (1) the nature and level of the distress exhibited by the individual; (2) the location of the individual; (3) whether or not the individual was alone and/or had access to assistance independent of that offered by the officer; and (4) to what extent the individual—if not assisted—presented a danger to himself or others. *Id.*

An individual does not have to break the law to give rise to a “reasonable suspicion.”

In *Derichweiler v. State*, 348 S.W.3d 906 (2011) the Court of Criminal Appeals recently clarified—and simultaneously broadened—the ability of law enforcement to justify an investigative detention. “It is enough to satisfy the lesser standard of reasonable suspicion that the information is sufficiently detailed and reliable—*i.e.*, it supports more than an inarticulate hunch or intuition—to suggest that something of an apparently criminal nature is brewing.”

Probable cause means a “fair probability that contraband or evidence of a crime will be found, and the level of suspicion for an investigative detention is less demanding than probable cause; the standard is ‘some minimal level of objective justification.’” *Foster v. State*, 326 S.W.3d 609 (Tex.Crim.App.,2010) (reasonable suspicion when truck lurched and revved motor even though not in violation of the law) (quoting *Sokolow*, 490 U.S. at 7).

Specific Instances Demonstrating Reasonable Articulate Suspicion to Support Investigative Detention

The Fourth Amendment is satisfied if the officer’s action is supported by a particularized and objective basis for suspecting the person stopped of criminality. If such a particularized and objective basis exists, then the investigatory detention is reasonable as a matter of law, regardless of the officer’s subjective motivation. *Whren v. United States*, 517 U.S. 806, 812–13 (1996).

The following behaviors have been held to support an objective basis for reasonable suspicion:

Any traffic violation: See *Lemmons v. State*, 133 S.W.3d 751, 756 (Tex. App.—Fort Worth 2004, pet. ref’d);

Speeding (without proof of exact speed): *Dillard v. State*, 550 S.W.2d 45, 53 (Tex. Crim. App.1977) (op. on reh’g); *Icke v. State*, 36 S.W.3d 913, 915–16 (Tex. App.—Houston [1st Dist.] 2001, pet. ref’d).

Reliable, corroborated, recent, and specific informant's tip: Factors: 1) the credibility and reliability of the informant, 2) the specificity of the information contained in the tip or report, 3) the extent to which the information in the tip or report can be verified by officers in the field, and 4) whether the tip or report concerns active or recent activity, or has instead gone stale. *United States v. Gonzalez*, 190 F.3d 668, 672 (5th Cir.1999) (citing *Alabama v. White*, 496 U.S. 325, 328–32, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990)); *United States v. Perkins*, 352 F.3d 198, 199 (5th Cir. 2003) (citing same). *Peralta v. State*, No. 08-09-00006-CR, 2010 WL 4851388 (Tex. App.—El Paso Nov. 30, 2010), *Pipkin v. State*, 114 S.W.3d 649 (Tex. App.—Fort Worth 2003) (cellular phone user identified herself and described vehicle where she observed driver smoking crack).

Odor of marihuana: *Razo v. State*, 577 S.W.2d 709, 711 (Tex.Crim.App.1979); *Taylor v. State*, 20 S.W.3d 51, 55–56 (Tex. App.—Texarkana 2000, pet. ref'd); *Small v. State*, 977 S.W.2d 771, 774 (Tex. App.—Fort Worth 1998, no pet.); see *Isam v. State*, 582 S.W.2d 441, 444 (Tex. Crim. App.1979).

Other factors supporting detention

Suspicious Actions in a High Crime Area: See *United States v. Arvizu*, 534 U.S. 266, 277 (2002) (holding that under totality of circumstances, reasonable suspicion existed, and considering border patrol agent's knowledge that road traveled by defendant was commonly used by drug smugglers to avoid border patrol); *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (noting that, while presence in a high-crime area alone is not enough to support reasonable suspicion, fact that incident occurs in a high crime area is relevant factor to be considered in reviewing totality of circumstances); *Valencia v. State*, 820 S.W.2d 397, 400 (Tex. App.—Houston [14th Dist] 1991, pet. ref'd) (considering fact that defendant was “apprehended in a residential neighborhood that was known for its very high crime and its high narcotics trafficking”); *Ortega v. State*, No. 14–97–01084–CR, 1999 WL 717636, at *2 (Tex. App.—Houston [14th Dist.] Sept. 16, 1999, pet. ref'd) (not designated for publication) (holding officer's knowledge that hotel where defendant was apprehended was “a notorious location for illegal narcotics activity”).

Darkness: Law enforcement has greater latitude during nighttime hours—the time when crime is especially likely to occur. See *Amorella v. State*, 554 S.W.2d 700, 701 (Tex. Crim. App.1977) (using the late hour as a factor in determining whether law enforcement officer had reasonable suspicion); see also *Arroyo v. State*, No. 01-10-00136-CR, 2011 WL 286136 (Tex. App.—Houston [1 Dist] Jan. 27, 2011) (Sunday at 4:50 a.m. deemed “a time at which more individuals drive intoxicated”).

Nervousness: Nervousness is a factor to consider in determining reasonable suspicion. *Balentine v. State*, 71 S.W.3d 763, 769 (Tex. Crim. App. 2002); *Illinois v. Wardlow*, 528 U.S. 119, 124, (2000); *Haas v. State*, 172 S.W.3d 42, 54 (Tex. App.—Waco 2005, pet. ref'd). “Extreme nervousness has traditionally been a fact that law enforcement has used in its list of elements leading up to either reasonable suspicion or probable cause.” *Veal v. State*, 28 S.W.3d 832, 837 (Tex. App.—Beaumont 2000, pet. ref'd) (citing *U.S. v. Sokolow*, 490 U.S. 1, 3 (1989)). But nervousness alone does not support a reasonable suspicion determination. *Davis v. State*, 947 S.W.2d 240, 248 (Tex. Crim. App. 1997) (“It is not indicative of guilt for a person to be nervous when confronted by police officers asking questions.”). Nervousness alone is not sufficient to establish reasonable suspicion and is of minimal probative value. *Sieffert v. State*, 290 S.W.3d 478, 485 (Tex. App.—Amarillo 2009, no pet.) (citing *Deschenes v. State*, 253 S.W.3d 374, 383 n. 10 (Tex. App.—Amarillo 2008, pet. ref'd) (and collected cases cited therein)). See also *McQuarters v. State*, 58 S.W.3d 250, 257–58 (Tex. App.—Fort Worth 2001, pet. ref'd) (“nervousness is a weak indicator of hidden narcotics”). Nervous behavior is a pertinent factor in determining reasonable suspicion, but nervousness alone is not sufficient to provide reasonable suspicion. *Green v. State*, 256 S.W.3d 456, 462 (Tex. App.—Waco 2008, no pet.).

Evasive behavior: Nervous, evasive behavior is a pertinent factor in determining reasonable suspicion. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).

Prior criminal history: *United States v. Jones*, 234 F.3d 234, 242 (5th Cir.2000) (noting that prior arrest alone does not amount to reasonable suspicion), but, in certain cases, they can be a factor to consider in determining reasonable suspicion when combined with other factors and especially when those arrests are drug related; *Parker v. State*, 297 S.W.3d 803, 811 (Tex.App.-Eastland 2009, pet. ref'd) (considering lengthy criminal history, including numerous drug offenses, as part of totality of circumstances in reasonable suspicion determination); *Coleman v. State*, 188 S.W.3d 708, 718–19 (Tex.App.-Tyler 2005, pet. ref'd), cert. denied, 549 U.S. 999 (2006) (one of the three factors identified by officer that gave rise to reasonable suspicion was the defendant's prior arrests for drug offenses); *Powell v. State*, 5 S.W.3d 369, 378 (Tex.App.-Texarkana 1999, pet. ref'd) (same), cert. denied, 529 U.S. 1116 (2000) (prior drug offenses and nervousness were factors considered in determining whether post-citation detention was reasonable); see also *Morris v. State*, No. 07–06–00141–CR, 2006 WL 3193724, at *3 (Tex.App.-Amarillo Nov. 6, 2006, no pet.) (mem. op., not designated for publication) (same).

Furtive gestures: Furtive movements during a police stop may be a factor giving rise to reasonable suspicion. *LeBlanc v. State*, 138 S.W.3d 603, 608 n. 5 (Tex.App.-Houston [1st Dist.] 2004, no pet.). Evidence of nervousness, furtive gestures, sudden movements, or flight alone may be innocent, but if these actions are combined with other factors, they can give rise to reasonable suspicion. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000); *Worthey v. State*, 805 S.W.2d 435, 438–39 (Tex.Crim.App.1991); *Valencia v. State*, 820 S.W.2d 397, 400 (Tex.App.-Houston [14th Dist.] 1991, pet. ref'd); *Lippert v. State*, 664 S.W.2d 712, 721 (Tex.Crim.App.1984). Further, a temporary detention is an appropriate method to ensure officer safety under circumstances in which an officer reasonably feels threatened. See *Rhodes v. State*, 945 S.W.2d 115, 117–18 (Tex.Crim.App.1997). *Zone v. State*, 84 S.W.3d 733, 738–39 (Tex.App.-Houston [1st Dist.] 2002), aff'd, 118 S.W.3d 776 (Tex. Crim.App.2003) (defendant being handed something and quickly walking away after police arrived constituted furtive movement giving rise to reasonable suspicion).

Flight: See, e.g., *Washington v. State*, 660 S.W.2d 533, 535 (Tex.Crim.App.1983) (“Flight from a law enforcement officer ‘can provide in appropriate circumstances the key ingredient justifying the decision of a law enforcement officer to take action.’”) (quoting *United States v. Vasquez*, 534 F.2d 1142, 1145 (5th Cir.1976)); *Reyes v. State*, 899 S.W.2d 319, 324 (Tex.App.-Houston [14th Dist.] 1995, pet. ref'd) (characterizing flight as “the straw that broke the camel’s back” in justifying officer’s decision to detain appellant); see also *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (recognizing “nervous, evasive behavior” as “a pertinent factor in determining reasonable suspicion” and characterizing “headlong flight” as “the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such”);

No reasonable suspicion based upon:

Uncorroborated Anonymous Tip: An uncorroborated anonymous tip, standing alone, does not establish reasonable suspicion to believe that a person is engaged or about to be engaged in criminal activity. See *Florida v. J.L.*, 529 U.S. 266, 272 (2000) (“The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.”). Law enforcement “generally cannot rely alone on a police broadcast of an anonymous phone call to establish reasonable suspicion.” *Hall v. State*, 74 S.W.3d 521, 525 (Tex.App.-Amarillo 2002, no pet.) (quoting *Garcia v. State*, 3 S.W.3d 227, 234–35 (Tex.App.-Houston [14th Dist.] 1999), aff'd, 43 S.W.3d 527 (Tex.Crim.App.2001)); see also *Davis v. State*, 989 S.W.2d 859 (Tex.App.-Austin 1999) (phone call accurately describing defendant’s vehicle with the additional claim that it was being driven “recklessly” did not provide sufficient suspicion to stop vehicle when police saw no unusual driving of the vehicle); *Garcia v. State*, 3 S.W.3d 227 (Tex.App.-Houston [14th Dist.] 1999) (anonymous tip was not sufficiently corroborated in this marijuana in home case and subsequent

consent was tainted by the illegal detention); *Hall v. State*, 74 S.W.3d 521 (Tex.App.-Amarillo 2002) (anonymous tip of DWI driver coupled with no poor driving observed by law enforcement did not justify stop of automobile); *Johnson v. State*, 146 S.W.3d 719 (Tex.App.-Texarkana 2004) (anonymous tip did not justify detention); *Swaffar v State*, 258 S.W.3d 254 (Tex.App.-Fort Worth 2008) (anonymous tip of couple fighting in parking lot with man possibly intoxicated coupled with officer observation of no poor driving was not sufficient to justify stop); *State v. Sanders*, No. 04 - 11-00392-CR (Tex.App.-San Antonio, 2011) (officer lacked RS to justify investigatory stop of vehicle, despite officer's observation of D's vehicle crossing highway's center stripe coupled with anonymous caller's tip reporting dangerous driving by a vehicle matching D's vehicle);

Avoiding a consensual encounter: Avoiding police is not unlawful. See *Gurrola v. State*, 877 S.W.2d 300, 302–03 (Tex.Crim.App.1994); *Cook v. State*, 1 S.W.3d 718 (Tex.App.-El Paso 1999) (hand movements indicative of a drug transaction in a high drug transaction area coupled with defendant walking away from approaching officer did not give rise to a reasonable suspicion); *Reyes v. State*, 899 S.W.2d 319, 325 (Tex.App.-Houston [14th Dist.] 1995, pet. ref'd) (holding that flight from authority supports reasonable suspicion for investigative detention); cf *Barrett v. State*, 718 S.W.2d 888, 890 (Tex. App.-Beaumont 1986, pet. ref'd) (court held that defendant's stopping of his vehicle 100 feet behind the stop line for a red light and behind a police car in the adjacent lane, created reasonable suspicion that defendant intended to avoid the police or needed assistance, justifying a brief investigatory detention).

Hunch, suspicion, “spider sense”: An officer's suspicion that “something [is] out of the ordinary” is nothing more than an inarticulate hunch or suspicion—insufficient for a temporary detention. *Sieffer v. State*, 290 S.W.3d 478 (Tex.App.-Amarillo, 2009) (citing *Talbert v. State*, 489 S.W.2d 309, 311 (Tex.Crim.App.1973)). See, e.g., *Davis*, 947 S.W.2d at 245–46 (no reasonable suspicion to detain when officers concluded out-of-state driver was not intoxicated but they also believed the driver was not on a business trip as represented); *White v. State*, 574 S.W.2d 546, 547 (Tex.Crim.App.1978) (reasonable suspicion did not exist where vehicle observed driving aimlessly in mall parking lot even though there had been a rash of purse snatchings in the parking lot); *State v. Losoya*, 128 S.W.3d 413, 415 (Tex.App.-Austin 2004, pet. ref'd) (no reasonable suspicion when officers, acting on an anonymous tip of a “black male” involved in narcotics activity, observed a “black male” make a “hasty” departure from high crime area after observing the police)

Refusal to consent: Refusal to consent to a search, by itself, is insufficient to show reasonable suspicion. See *Wade v. State*, PD-1710-12, 2013 Tex. Crim. App. LEXIS 1314, 2013 WL 4820299 (Tex. Crim. App. Sept. 11, 2013); *Davis v. State*, 947 S.W.2d 240, 241 (Tex. Crim. App. 1997); *Sieffert v. State*, 290 S.W.3d 478, 484 (Tex. App.-Amarillo 2009, no pet.); *Green v. State*, 256 S.W.3d 456, 462 (Tex. App.-Waco 2008, no pet.).

Flight: Flight alone is insufficient to justify an investigatory detention, and flight from a show of authority is only a factor in support of a finding of reasonable suspicion that an individual is involved in criminal activity. *Reyes v. State*, 899 S.W.2d 319, 325 (Tex. App.-Houston [14th Dist.] 1995, pet. ref'd); *Salazar v. State*, 893 S.W.2d 138, 141 (Tex. App.-Houston [1st Dist.] 1995, pet. ref'd, untimely filed); *Castillo v. State*, 2011 WL 4830168 (Tex. App.-San Antonio Oct 12, 2011, no pet.).

Mere conclusions of traffic violation: See *Ford v. State*, 158 S.W.3d 488 (Tex. Crim. App. 2005) (officer's testimony that Defendant was "following too close" to another vehicle is not specific enough and thus conclusory).

Nodding off: *State v. Griffey*, 241 S.W.3d 700 (Tex. App.-Austin 2007) (detention based upon report of falling asleep in drive-through lane at fast food joint, but being awake by the time the cops got there, not reasonable suspicion).

Scope of Investigative Detention: Must be Reasonably Related to Reasonable Suspicion

An investigative detention is reasonable, and thus constitutional, if (1) the officer's action was justified at the detention's inception, and (2) the detention was reasonably related in scope to the circumstances that justified the interference in the first place. *Terry v. Ohio*, 392 U.S. at 19–20. For the officer's initial action to be justified under the first *Terry* prong, courts consider whether there existed specific, articulable facts that, taken together with rational inferences from those facts, reasonably warranted that intrusion. *Id.* at 21. Specifically, the officer must have a reasonable suspicion that some activity out of the ordinary is occurring or has occurred, some suggestion to connect the detainee with the unusual activity, and some indication that the unusual activity is related to a crime. See *Davis v. State*, 947 S.W.2d at 244.

Initial Detention: Temporary and Limited

Under the second *Terry* prong, an investigative detention must be temporary and last no longer than necessary to effectuate the purpose of the stop. See *Kothe v. State*, 152 S.W.3d 54, 63 (Tex. Crim. App. 2004). The scope of the seizure must also be restricted to that necessary to fulfill the seizure's purpose. *Florida v. Royer*, 460 U.S. 491, 500 (1983). Once the reason for a routine traffic stop is resolved, the stop may not then be used as a fishing expedition for unrelated criminal activity. *Davis*, 947 S.W.2d at 243 (quoting *Ohio v. Robinette*, 519 U.S. 33, 41 (1996) (Ginsburg, J., concurring)). During a routine traffic stop, an officer may check for outstanding warrants and demand identification, a valid driver's license, and proof of insurance from the driver. *Kothe* 152 S.W.3d at 63; *Caraway*, 255 S.W.3d at 307.

Prolonged Detention: Must Develop New Reasonable Suspicion

If, during that investigation, an officer develops reasonable suspicion that another violation has occurred, the scope of the initial investigation expands to the new offense. *Goudeau v. State*, 209 S.W.3d 713, 719 (Tex. App.-Houston [14th Dist.] 2006, no pet.). The officer must be able to point to specific articulable facts, which, based on his experience and personal knowledge coupled with logical inferences drawn from these facts, warrant the additional intrusion. *Davis*, 947 S.W.2d at 244. An officer is entitled to rely on all the information obtained during his contact with a motorist in developing the articulable facts justifying continued detention. *Razo v. State*, 577 S.W.2d 709, 711 (Tex. Crim. App. 1979); *Powell v. State*, 5 S.W.3d 369, 377 (Tex. App.-Texarkana 1999, pet. refused).

Arrest

An arrest imposes a greater degree of restriction on an individual's freedom of movement than an investigatory detention. *State v. Sheppard*, 271 S.W.3d 281, 290 (Tex. Crim. App. 2008). An arrest involves an almost total restraint on an individual's freedom of movement. See *Dowhitt*, 931 S.W.2d at 255. Accordingly, an arrest must be justified by probable cause as opposed to reasonable suspicion. *Amores*, 816 S.W.2d at 411.

Probable Cause Needed for Arrest

Probable cause to arrest exists when, at that moment, the facts and circumstances within the knowledge of the arresting officer and of which he has reasonably trustworthy information that would warrant a reasonable and prudent man in believing that

a particular person has committed or is committing a crime. *Jones v. State*, 493 S.W.2d 933, 935 (Tex. Crim. App. 1973); *Gerstein v. Pugh*, 420 U.S. 103, 113 (1975). This includes misdemeanor offenses. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (whether the misdemeanor offense must be committed in the officer's presence has not been decided, *see n. 11*).

The Tex. Code Crim. Proc. Art 14: Requires an officer to have a warrant to arrest a suspect unless an exception applies. Exceptions:

1. He witnesses a felony or offense against the public peace whether or not the witness is a peace officer. Tex. Code Crim. App. article 14.01(a).
2. Witness is a peace officer and he witnesses any offense. (Art. 14.01(b)) In addition, a peace officer may make a warrantless arrest where:
3. The suspect is in a suspicious place: "persons found in suspicious places and under circumstances which reasonably show that such person have been guilty of some felony, breach of peace, intoxication offense, or are about to commit some offense against the laws." Article 14.03(a)(1).
4. There is probable cause to believe:
 - a person has committed assault with bodily injury and there is danger that he will cause further bodily injury.
 - a person has violated a protective order.
 - a person has committed an act of family violence.
 - a person has interfered with another's ability to make an emergency call.
6. An admissible statement to an officer gives him probable cause to believe a person has committed a felony,
7. There is satisfactory proof that the person committed a felony and the offender is about to escape. An officer may only make a warrantless arrest at the suspect's home where there is consent, or exigent

SEARCHES WITHOUT A WARRANT

Just as a person may consent to a conversation with a police officer, a person may similarly consent—or fail to adequately object—to a request to search their pockets, belongings, handbags, car, home, cellphone, computer, or office. Absent consent, the police still have the power in certain circumstances to search a person's clothing, car, and home.

1. Searching a person
 - Frisk for Weapons (before arrest): When a reasonable person in the officer's circumstances would have believed there was a danger to the officer's safety or the safety of others (objective standard). *Terry v. Ohio*, 392 U.S. 1 (1968).
 - Plain Feel (during frisk): If in the course of a lawful frisk of a defendant's clothing a police officer feels an object whose contour or mass make it immediately apparent that it is contraband, it may be seized. *Minnesota v. Dickerson*, 508 U.S. 366 (1993); *Griffin v. State*, 215 S.W. 3d 403 (Tex. Crim. App. 2006).
 - Search Incident to Arrest (after arrest): Once a person is arrested the police may perform a thorough search of the person before they are booked into jail. *Arizona v. Gant*, 129 S.Ct. 1710 (2009).
2. Searching a car
 - a. Search Incident to Arrest: In *Gant*, the Supreme Court narrowed the search incident to arrest exception as it pertains to vehicle searches. A search incident to arrest is permissible in two contexts:
 - b. A search for weapons based on concerns about officer safety. An officer may search the car for weapons if the defendant is within reaching distance of the passenger compartment.

A search for evidence of the offense that the defendant was arrested for. Where an officer has probable cause to

believe that a driver is committing or has committed a crime, and also has probable cause to believe that the car contains contraband or evidence of that crime, he may search the entire car, and any container inside that could reasonably hold the evidence or contraband. *US v. Ross*, 456 U.S. 798 (1982); *Carroll v. US*, 267 U.S. 132 (1925).

However, where the defendant was arrested for a traffic offense, there is no reasonable basis to believe that the car contains evidence of that offense. *Gant*, 129 S.Ct. 1710.

Inventory Search: to protect defendant's interest in property, to protect police from unmeritorious claims, and to protect against dangerous objects that might be inside the car. The burden is on the state to show that (1) standardized inventory procedures are in place, and (2) that those procedures were followed. *Benavides v. State*, 600 S.W.2d 809 (Tex. Crim. App. 1980); *State v. Stauder*, 264 S.W.3d 360 (Tex. App.-Eastland 2008, pet. ref'd).

3. Searching a residence

Circumstances present urgency that would prevent officers from getting a warrant; officers have probable cause to believe that items relating to the crime will be found or that the suspect will be found; and the search is limited in scope by the nature of the emergency.

Example: The odor of marijuana standing alone isn't enough to give officers the right to enter a residence and search without a warrant. *Steelman v. State*, 93 S.W.3d 102 (Tex. Crim. App. 2002); *Moulden v. State*, 576 S.W.2d 817 (Tex.Crim.App. 1978).

Emergency Exception: Where an officer reasonably believes someone inside is seriously injured or is in immediate danger of being seriously injured. The reason for entry must be divorced from detection, investigation, or acquisition of evidence. *Gonzalez v. State*, 148 S.W.3d 702 (Tex. App.-Austin 2004, pet. ref'd); *Laney v. State*, 117 S.W.3d 854 (Tex. Crim. App. 2003).

Search incident to arrest: Police may search area of house where Defendant could reasonably reach to retrieve a weapon or dispose of drugs. *Chimel v. California*, 395 U.S. 752 (1969).

Protective sweep: Police may conduct a protective sweep of the house to make sure no one is hiding. This is a very cursory, visual sweep. *Maryland v. Buie*, 494 U.S. 325 (1990).

Client Information Form

Today's Date:	Place of meeting:
Full Name: (Last) (First) (Middle)	Social Security Number:
Aliases/Nicknames:	Date of Birth: Present Age:
Mailing Address:	Present Address: _____ <input type="checkbox"/> Co. Jail E-mail:
Home Phone: ()	Cell Phone: ()
Employer: Job: Income (specify if yearly/monthly/weekly, gross (pre-tax), net (after-tax)):	Work Phone: () Supervisor:
Marital status: <input type="checkbox"/> Single/never married <input type="checkbox"/> Married <input type="checkbox"/> Separated <input type="checkbox"/> Divorced <input type="checkbox"/> Widowed	Household Size: <input type="checkbox"/> Client <input type="checkbox"/> Spouse/Significant Other <input type="checkbox"/> Minor Children: # _____ <input type="checkbox"/> Other Dependents: # _____ Total household size:
Bond: <input type="checkbox"/> Held without bond <input type="checkbox"/> Secured bond set at: \$ <input type="checkbox"/> Personal bond set at: \$ <input type="checkbox"/> Has posted bond. <input type="checkbox"/> Has not posted bond (being held). Bondsman: Phone: ()	Race/ethnicity: <input type="checkbox"/> Black <input type="checkbox"/> Hispanic <input type="checkbox"/> White <input type="checkbox"/> Native American <input type="checkbox"/> Asian <input type="checkbox"/> Other Sex: <input type="checkbox"/> Male <input type="checkbox"/> Female Principal language: <input type="checkbox"/> English <input type="checkbox"/> Spanish
Arrest date: Offense (specify if felony/misdemeanor):	Arresting agency: <input type="checkbox"/> City Police Department <input type="checkbox"/> City Sheriff's Office <input type="checkbox"/> Federal (specify): <input type="checkbox"/> State (specify):
Court: <input type="checkbox"/> _____ County Court at Law <input type="checkbox"/> _____ District Court # _____ <input type="checkbox"/> Other: Previous Offenses:	NEXT STEP 1. CALENDAR NEXT COURT DATE 2. SET UP FILE 3. HAVE REP AGREEMENT SIGNED
Next court date, time, and purpose:	

THE LAW OFFICE OF JOHN DOE

101 Main St., Suite 101
Anywhere, TX 06010
Telephone: (555) 555-5555
Facsimile: (222) 222-2222
jdoe@johndoelaw.com

Court Coordinator, County Court at Law #2
Anywhere County, Texas

Re: The State of Texas v. Jane Doe, Cause Number 00-00101

To Whom It May Concern:

Please accept this letter as confirmation that my office represents Jane Doe in the above-referenced matter.

I request that all future correspondence regarding Jane Doe be forwarded to my office at the above-listed address.

We hereby enter a plea of Not Guilty and request that the case be reset to a pre-trial setting.

Thank you very much for your attention to this matter. If there are any questions or concerns, or if I can be of service to the Court, please do not hesitate to contact my office.

Respectfully Submitted,

John Doe

THE STATE OF TEXAS	§	IN THE COUNTY COURT
	§	
VS.	§	AT LAW #2 OF
	§	
JANE SMITH	§	ANYWHERE COUNTY, TEXAS

**NOTICE OF APPEARANCE OF COUNSEL AND FORMAL REQUEST FOR COMPLIANCE
WITH ARTICLE 39.14 OF THE TEXAS CODE OF CRIMINAL PROCEDURE**

Now comes, John Doe, attorney at law and enters this his appearance as the attorney of record for Jane Smith, Defendant, herein, representing her in the above entitled case, and requesting that he be notified of any and all settings and notifications in the above entitled and numbered cause.

In addition to this attorney's appearance, this document shall also serve as a formal request upon the prosecuting attorney to comply with 39.14 of the Texas Code of Criminal Procedure to produce and permit the inspection and/or the electronic duplication, copying, and photographing, by and on behalf of the defendant the following:

- a. Any offense reports of any law enforcement officer or officers or investigators involved in the investigation, arrest, and detainment of the defendant herein;
- b. Any documents, papers, written or recorded statements of the defendant;
- c. Any documents, papers, written or recorded statements of any witness which the prosecuting attorney may call as a witness herein;
- d. Any photographs, audio or video recordings of the defendant, witnesses, victims, or alleged crime scenes;
- e. Any books, accounts, ledgers, photographs, or other tangible objects involved in the investigation and/or prosecution of this offense;
- f. Any tangible property of any type seized during any arrest, search, detainment of the defendant herein;
- g. Any evidence which is exculpatory, impeachment or mitigating document, item or information in the possession, custody, or control of the State, any law enforcement agency, or any State agency that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged;
- h. The names, current addresses, current telephone numbers, of any witness which may be called by the prosecution in this cause pursuant to Rules 702, 703, and 705 of the Texas Rules of Evidence;
- i. The criminal history of each and every witness the prosecution may call as a witness in this cause;

but not including the work product of counsel for the State in the case and their investigators employed by the prosecuting attorney for the State, nor their notes, nor written communications between the State and an agent, representative, or employee of the State that constitute or contain evidence material to any matter involved in this cause. However, it does extend to all items requested herein and are in the possession, custody, or control of the State or any person under contract with the State. The State may provide electronic duplicates of any documents or other information.

This request extends to any time before, during, or after trial that the State, its agents, servants, and employees discover any additional document, item, or information required to be disclosed pursuant to Article 39.14 of the Texas Code of Criminal Procedure under Subsection (h) requiring the prosecuting attorney for the State to promptly disclose the existence of the document, item, or information to the defendant, his attorney of record, and the court.

Additionally, the defendant, by and through his attorney of record hereby requests that the State electronically record or otherwise document any document, item, or other information provided pursuant hereto, setting forth each document, item, or other information and the date and time same was provided to defendant's attorney of record.

This request is made pursuant to the requirements of Article 39.14 of the Texas Rules of Criminal Procedure and the attorney for defendant requests that the prosecuting attorney for the State comply with these requests within 14 days of this request, or that the prosecuting attorney for the State file a formal motion to extend the time from the aforementioned 14 days, for the furnishing of same and request a formal hearing for the reasons for noncompliance and/or extending the time for compliance.

Respectfully submitted,

By: _____

John Doe

ATTORNEY FOR DEFENDANT

Texas Bar No. 00000001

101 Main St., Suite 101

Anywhere, TX 06010

Tel. 555-555-5555

CERTIFICATE OF SERVICE

I, John Doe, Attorney for Defendant herein, do hereby certify that a true and correct copy of this Notice of Appearance of Counsel and Formal Request for Compliance with Article 39.14 of the Texas Code of Criminal Procedure was delivered to the County Court at Law #2 of Anywhere County, Texas, and the District Attorney of Anywhere County, Texas, on January 4, 2013, as provided by the Texas Rules of Criminal Procedure.

JOHN DOE

Attorney for Jane Smith

CAUSE NUMBER 00-000000

THE STATE OF TEXAS	§	IN THE COUNTY COURT
	§	
VS.	§	AT LAW #2
	§	
JANE DOE	§	ANYWHERE COUNTY, TEXAS

MOTION TO SUPPRESS

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Jane Doe, Defendant, and respectfully moves this Honorable Court to suppress all evidence resulting from the illegal search of the automobile involved in the incident of May 31, 2012 and any containers residing in said automobile as follows:

1. All physical evidence including, but not limited to, any illegal narcotics seized on or about May 31, 2012 from the automobile and any containers residing in said automobile by law enforcement officers of the Anywhere County Sheriff's Office.
2. All testimony of any law enforcement officers, their agents, and all other persons working in connection with such officers and agents, as to the finding of any physical evidence at the scene of the illegal search challenged herein.
3. The results of any and all scientific tests or procedures conducted on any item of physical evidence seized under the illegal warrantless search challenged herein.
4. All statements, either written or oral of the Defendant, any alleged co-conspirators, co-defendants, or accomplices obtained as a result of the illegal warrantless search challenged herein.
5. Any physical evidence or the testimony of any person discovered by law enforcement officers as a result of information gained through the illegal search of the Defendant challenged herein.

In support of the motion, the Defendant would show this Honorable Court that the evidence seized was the result of a warrantless search without probably cause in violation of the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 9, 10 and 19 of the Constitution of the State of Texas and under Article 38.23 of the Texas Code of Criminal Procedure. Said search was not the result of a valid consent by the Defendant. Further, the scope of said search exceeded that authorized by law for a warrantless search.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that this Honorable Court suppress such matters at trial of this cause, and for such other and further relief in connection therewith that is proper.

Respectfully submitted,

John Doe
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion was hand delivered to the Anywhere County District Attorney's Office, Anywhere, Texas, on October 31, 2013.

John Doe
Attorney for Defendant

CAUSE NUMBER 00-000000

THE STATE OF TEXAS

§

IN THE COUNTY COURT

VS.

§

AT LAW #2

§

JANE DOE

§

ANYWHERE COUNTY, TEXAS

§

ORDER

On this _____ day of _____, 2013, came to be heard the foregoing Motion and it appears to the Court that the same should be GRANTED/DENIED.

Judge Presiding

CAUSE NUMBER 00-000000

THE STATE OF TEXAS

§

IN THE COUNTY COURT

VS.

§

AT LAW #2

§

JANE DOE

§

ANYWHERE COUNTY, TEXAS

§

NOTICE OF APPEAL

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Jane Doe, Defendant, and respectfully gives notice of his/her desire to appeal the verdict, judgment and sentence in this case, including any pre-trial matters ruled upon by the trial court.

Respectfully submitted,

John Doe
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion was hand delivered to the Anywhere County District Attorney's Office, Anywhere, Texas, on October 31, 2013

John Doe
Attorney for Defendant

THE STATE OF TEXAS	§	IN THE COUNTY COURT
	§	
VS.	§	AT LAW #2 OF
	§	
JANE SMITH	§	ANYWHERE COUNTY, TEXAS

MOTION TO WITHDRAW AS COUNSEL

John Doe, Attorney for the Defendant, moves that he be allowed to withdraw as counsel and shows the Court as follows:

I.

The Defendant is charged with Possession of Marihuana in the above style in the County Court at Law #2. Mr. John Doe was appointed as counsel for the Defendant on the current charge on January 1, 2013.

II.

Mr. Doe was appointed as counsel for defendant on another pending charge on September 28, 2012. He was subsequently appointed to represent defendantn on the Possession of Marihuana when he was so charged. The interests and claims of both defendant and Mr. Spoon in this incident make it impossible for Mr. Doe to adequately represent both Defendants in the same cause number.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully prays the Court grant this Motion to Withdraw as Counsel.

Respectfully submitted,

By: _____
 John Doe
 Texas Bar No. 00000001
 101 Main St., Suite 101
 Anywhere, TX 06010
 Tel. 555-555-5555
 Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that on January 4, 2013, a true and correct copy of this Motion to Withdraw as Counsel was served by personal delivery on the Assistant District Attorney handling this case.

 John Doe

THE STATE OF TEXAS	§	IN THE COUNTY COURT
	§	
VS.	§	AT LAW #2 OF
	§	
JANE SMITH	§	ANYWHERE COUNTY, TEXAS

ORDER ON MOTION TO WITHDRAW AS COUNSEL

On this day, came to be heard Attorney's Motion to Withdraw as Counsel and the Court, after due consideration of the same, is of the opinion that the said motion is GRANTED/DENIED.

Signed on the _____ Day of _____, 2013.

JUDGE PRESIDING

Representation Agreement

The Court has appointed _____ (“Attorney”) to represent _____ (“Client”).

Client hereby agrees that Attorney will provide the following legal services to Client:

1. **Attorney’s Fees.** There is no charge for Attorney services. Because Client is indigent, all expenses will be paid for by the Court. However, this in no way excludes the Client from the responsibility of paying court costs, restitution, fees, or fines.
2. **Client Cooperation.** Client promises to cooperate with Attorney on this case. This means keeping scheduled appointments, giving Attorney any documents, papers or other requested information, and letting Attorney know how to contact Client at all times. Client also agrees not to talk with an opposing party or lawyer without first consulting Attorney and to notify Attorney immediately if anyone tries to contact Client directly.
3. **Withdrawal.** Having agreed to the above cooperation, Attorney reserves the right to withdraw from the case if Attorney determines on the basis of discovered facts or changed circumstances that in the Attorney’s professional judgment warrant the withdrawal.
4. **Scope of Representation.** Attorney has been appointed to represent you with respect to the above-captioned case *only*. Unless otherwise agreed to in writing, Attorney will not represent you in any other cases or with other matters. This includes, but is not limited to, “collateral proceedings” such as license revocation hearings, civil lawsuits connected with this or any other case, or deportation proceedings. Attorney would be glad to refer you to another attorney to help you with those matters.
5. **Privilege.** Anything Client says to Attorney during the course of representation will be kept confidential. However, there are a number of important exceptions to this rule which Client must be aware of. For example, if you tell me you are going to commit a crime, that fact is not confidential and must be reported to the police in certain circumstances. And, if other people are present during an attorney-client discussion, that conversation is not privileged and may be testified to. ***Do not discuss your case with anyone, including friends and family.*** People you talk to can be subpoenaed (forced) to testify against you. Criminal defendants and inmates at the jail may be looking to make a deal with the prosecutor in exchange for testimony about what you have said. Do not contact anyone involved in this case, such as the victim, witnesses, or police officers. Victims and witnesses may perceive your contact as intimidation.
6. **No Promises as to Results.** Attorney has made, and will make, ***no promises*** as to the outcome of the case. Attorney cannot promise an acquittal, probation, or any other outcome. In large part, the ultimate result of the case depends on what Client does now and how Client behaves in jail or pretrial release officer, whether Client is arrested for any new offenses, and whether Client stays clean and sober.

THIS AGREEMENT is effective from the date(s) indicated by the signature of the respective parties.

Attorney

Date

Defendant/Client Signature

Printed Name

Date

Health and safety code

Sec. 481.115. OFFENSE: POSSESSION OF SUBSTANCE IN PENALTY GROUP 1. (a) Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally possesses a controlled substance listed in Penalty Group 1, unless the person obtained the substance directly from or under a valid prescription or order of a practitioner acting in the course of professional practice.

(b) An offense under Subsection (a) is a state jail felony if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, less than one gram.

(c) An offense under Subsection (a) is a felony of the third degree if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, one gram or more but less than four grams.

(d) An offense under Subsection (a) is a felony of the second degree if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, four grams or more but less than 200 grams.

(e) An offense under Subsection (a) is a felony of the first degree if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, 200 grams or more but less than 400 grams.

(f) An offense under Subsection (a) is punishable by imprisonment in the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than 10 years, and a fine not to exceed \$100,000, if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, 400 grams or more.

Sec. 481.1151. OFFENSE: POSSESSION OF SUBSTANCE IN PENALTY GROUP 1-A. (a) Except as provided by this chapter, a person commits an offense if the person knowingly possesses a controlled substance listed in Penalty Group 1-A.

(b) An offense under this section is:

(1) a state jail felony if the number of abuse units of the controlled substance is fewer than 20;

(2) a felony of the third degree if the number of abuse units of the controlled substance is 20 or more but fewer than 80;

(3) a felony of the second degree if the number of abuse units of the controlled substance is 80 or more but fewer than 4,000;

(4) a felony of the first degree if the number of abuse units of the controlled substance is 4,000 or more but fewer than 8,000; and

(5) punishable by imprisonment in the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than 15 years and a fine not to exceed \$250,000, if the number of abuse units of the controlled substance is 8,000 or more.

Sec. 481.116. OFFENSE: POSSESSION OF SUBSTANCE IN PENALTY GROUP 2. (a) Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally possesses a controlled substance listed in Penalty Group 2, unless the person obtained the substance directly from or under a valid prescription or order of a practitioner acting in the course of professional practice.

(b) An offense under Subsection (a) is a state jail felony if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, less than one gram.

(c) An offense under Subsection (a) is a felony of the third degree if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, one gram or more but less than four grams.

(d) An offense under Subsection (a) is a felony of the second degree if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, four grams or more but less than 400 grams.

(e) An offense under Subsection (a) is punishable by imprisonment in the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than five years, and a fine not to exceed \$50,000, if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, 400 grams or more.

Sec. 481.1161. OFFENSE: POSSESSION OF SUBSTANCE IN PENALTY GROUP 2-A. (a) Except as authorized by this chapter, a person commits an offense if the person knowingly possesses a controlled substance listed in Penalty Group 2-A, unless the person obtained the substance directly from or under a valid prescription or order of a practitioner acting in the course of professional practice.

(b) An offense under this section is:

- (1) a Class B misdemeanor if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, two ounces or less;
- (2) a Class A misdemeanor if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, four ounces or less but more than two ounces;
- (3) a state jail felony if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, five pounds or less but more than four ounces;
- (4) a felony of the third degree if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, 50 pounds or less but more than 5 pounds;
- (5) a felony of the second degree if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, 2,000 pounds or less but more than 50 pounds; and
- (6) punishable by imprisonment in the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than 5 years, and a fine not to exceed \$50,000, if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, more than 2,000 pounds.

Sec. 481.117. OFFENSE: POSSESSION OF SUBSTANCE IN PENALTY GROUP 3. (a) Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally possesses a controlled substance listed in Penalty Group 3, unless the person obtains the substance directly from or under a valid prescription or order of a practitioner acting in the course of professional practice.

(b) An offense under Subsection (a) is a Class A misdemeanor if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, less than 28 grams.

(c) An offense under Subsection (a) is a felony of the third degree if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, 28 grams or more but less than 200 grams.

(d) An offense under Subsection (a) is a felony of the second degree, if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, 200 grams or more but less than 400 grams.

(e) An offense under Subsection (a) is punishable by imprisonment in the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than five years, and a fine not to exceed \$50,000, if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, 400 grams or more.

Sec. 481.118. OFFENSE: POSSESSION OF SUBSTANCE IN PENALTY GROUP 4. (a) Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally possesses a controlled substance listed in Penalty Group 4, unless the person obtained the substance directly from or under a valid prescription or order of a practitioner acting in the course of practice.

(b) An offense under Subsection (a) is a Class B misdemeanor if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, less than 28 grams.

(c) An offense under Subsection (a) is a felony of the third degree if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, 28 grams or more but less than 200 grams.

(d) An offense under Subsection (a) is a felony of the second degree, if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, 200 grams or more but less than 400 grams.

(e) An offense under Subsection (a) is punishable by imprisonment in the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than five years, and a fine not to exceed \$50,000, if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, 400 grams or more.

Sec. 481.120. OFFENSE: DELIVERY OF MARIHUANA. (a) Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally delivers marihuana.

(b) An offense under Subsection (a) is:

(1) a Class B misdemeanor if the amount of marihuana delivered is one-fourth ounce or less and the person committing the offense does not receive remuneration for the marihuana;

(2) a Class A misdemeanor if the amount of marihuana delivered is one-fourth ounce or less and the person committing the offense receives remuneration for the marihuana;

(3) a state jail felony if the amount of marihuana delivered is five pounds or less but more than one-fourth ounce;

(4) a felony of the second degree if the amount of marihuana delivered is 50 pounds or less but more than five pounds;

(5) a felony of the first degree if the amount of marihuana delivered is 2,000 pounds or less but more than 50 pounds; and

(6) punishable by imprisonment in the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than 10 years, and a fine not to exceed \$100,000, if the amount of marihuana delivered is more than 2,000 pounds.

Sec. 481.121. OFFENSE: POSSESSION OF MARIHUANA. (a) Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally possesses a usable quantity of marihuana.

(b) An offense under Subsection (a) is:

(1) a Class B misdemeanor if the amount of marihuana possessed is two ounces or less;

(2) a Class A misdemeanor if the amount of marihuana possessed is four ounces or less but more than two ounces;

(3) a state jail felony if the amount of marihuana possessed is five pounds or less but more than four ounces;

(4) a felony of the third degree if the amount of marihuana possessed is 50 pounds or less but more than 5 pounds;

(5) a felony of the second degree if the amount of marihuana possessed is 2,000 pounds or less but more than 50 pounds; and

(6) punishable by imprisonment in the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than 5 years, and a fine not to exceed \$50,000, if the amount of marihuana possessed is more than 2,000 pounds.

Sec. 481.125. OFFENSE: POSSESSION OR DELIVERY OF DRUG PARAPHERNALIA. (a) A person commits an offense if the person knowingly or intentionally uses or possesses with intent to use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, or conceal a controlled substance in violation of this chapter or to inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter.

(b) A person commits an offense if the person knowingly or intentionally delivers, possesses with intent to deliver, or manufactures with intent to deliver drug paraphernalia knowing that the person who receives or who is intended to receive the drug paraphernalia intends that it be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, or conceal a controlled substance in violation of this chapter or to inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter.

(c) A person commits an offense if the person commits an offense under Subsection (b), is 18 years of age or older, and the person who receives or who is intended to receive the drug paraphernalia is younger than 18 years of age and at least three years younger than the actor.

(d) An offense under Subsection (a) is a Class C misdemeanor.

(e) An offense under Subsection (b) is a Class A misdemeanor, unless it is shown on the trial of a defendant that the defendant has previously been convicted under Subsection (b) or (c), in which event the offense is punishable by confinement in jail for a term of not more than one year or less than 90 days.

(f) An offense under Subsection (c) is a state jail felony.

Sec. 481.133. OFFENSE: FALSIFICATION OF DRUG TEST RESULTS. (a) A person commits an offense if the person knowingly or intentionally uses or possesses with intent to use any substance or device designed to falsify drug test results.

(b) A person commits an offense if the person knowingly or intentionally delivers, possesses with intent to deliver, or manufactures with intent to deliver a substance or device designed to falsify drug test results.

(c) In this section, "drug test" means a lawfully administered test designed to detect the presence of a controlled substance or marihuana.

(d) An offense under Subsection (a) is a Class B misdemeanor.

(e) An offense under Subsection (b) is a Class A misdemeanor.

Sec. 481.134. DRUG-FREE ZONES. (a) In this section:

(1) "Minor" means a person who is younger than 18 years of age.

(2) "Institution of higher education" means any public or private technical institute, junior college, senior college or university, medical or dental unit, or other agency of higher education as defined by Section 61.003, Education Code.

(3) "Playground" means any outdoor facility that is not on the premises of a school and that:

(A) is intended for recreation;

(B) is open to the public; and

(C) contains three or more play stations intended for the recreation of children, such as slides, swing sets, and teeter-boards.

(4) "Premises" means real property and all buildings and appurtenances pertaining to the real property.

(5) "School" means a private or public elementary or secondary school or a day-care center, as defined by Section 42.002, Human Resources Code.

(6) "Video arcade facility" means any facility that:

(A) is open to the public, including persons who are 17 years of age or younger;

(B) is intended primarily for the use of pinball or video machines; and

(C) contains at least three pinball or video machines.

(7) "Youth center" means any recreational facility or gymnasium that:

(A) is intended primarily for use by persons who are 17 years of age or younger; and

(B) regularly provides athletic, civic, or cultural activities.

(b) An offense otherwise punishable as a state jail felony under Section 481.112, 481.113, 481.114, or 481.120 is punishable as a felony of the third degree, and an offense otherwise punishable as a felony of the second degree under any of those sections is punishable as a felony of the first degree, if it is shown at the punishment phase of the trial of the offense that the offense was committed:

(1) in, on, or within 1,000 feet of premises owned, rented, or leased by an institution of higher learning, the premises of a public or private youth center, or a playground; or

(2) in, on, or within 300 feet of the premises of a public swimming pool or video arcade facility.

(c) The minimum term of confinement or imprisonment for an offense otherwise punishable under Section 481.112(c), (d), (e), or (f), 481.113(c), (d), or (e), 481.114(c), (d), or (e), 481.115(c)-(f), 481.116(c), (d), or (e), 481.1161(b)(4), (5), or (6), 481.117(c), (d), or (e), 481.118(c), (d), or (e), 481.120(b)(4), (5), or (6), or 481.121(b)(4), (5), or (6) is increased by five years and the maximum fine for the offense is doubled if it is shown on the trial of the offense that the offense was committed:

(1) in, on, or within 1,000 feet of the premises of a school, the premises of a public or private youth center, or a playground; or

(2) on a school bus.

(d) An offense otherwise punishable under Section 481.112(b), 481.113(b), 481.114(b), 481.115(b), 481.116(b), 481.1161(b)(3), 481.120(b)(3), or 481.121(b)(3) is a felony of the third degree if it is shown on the trial of the offense that the offense was committed:

- (1) in, on, or within 1,000 feet of any real property that is owned, rented, or leased to a school or school board, the premises of a public or private youth center, or a playground; or
- (2) on a school bus.
- (e) An offense otherwise punishable under Section 481.117(b), 481.119(a), 481.120(b)(2), or 481.121(b)(2) is a state jail felony if it is shown on the trial of the offense that the offense was committed:
 - (1) in, on, or within 1,000 feet of any real property that is owned, rented, or leased to a school or school board, the premises of a public or private youth center, or a playground; or
 - (2) on a school bus.
- (f) An offense otherwise punishable under Section 481.118(b), 481.119(b), 481.120(b)(1), or 481.121(b)(1) is a Class A misdemeanor if it is shown on the trial of the offense that the offense was committed:
 - (1) in, on, or within 1,000 feet of any real property that is owned, rented, or leased to a school or school board, the premises of a public or private youth center, or a playground; or
 - (2) on a school bus.
- (g) Subsection (f) does not apply to an offense if:
 - (1) the offense was committed inside a private residence; and
 - (2) no minor was present in the private residence at the time the offense was committed.
- (h) Punishment that is increased for a conviction for an offense listed under this section may not run concurrently with punishment for a conviction under any other criminal statute.

Sec. 483.041. POSSESSION OF DANGEROUS DRUG. (a) A person commits an offense if the person possesses a dangerous drug unless the person obtains the drug from a pharmacist acting in the manner described by Section 483.042(a)(1) or a practitioner acting in the manner described by Section 483.042(a)(2).

(b) Except as permitted by this chapter, a person commits an offense if the person possesses a dangerous drug for the purpose of selling the drug.

(c) Subsection (a) does not apply to the possession of a dangerous drug in the usual course of business or practice or in the performance of official duties by the following persons or an agent or employee of the person:

- (1) a pharmacy licensed by the board;
- (2) a practitioner;
- (3) a person who obtains a dangerous drug for lawful research, teaching, or testing, but not for resale;
- (4) a hospital that obtains a dangerous drug for lawful administration by a practitioner;
- (5) an officer or employee of the federal, state, or local government;
- (6) a manufacturer or wholesaler licensed by the Department of State Health Services under Chapter 431 (Texas Food, Drug, and Cosmetic Act);
- (7) a carrier or warehouseman;
- (8) a home and community support services agency licensed under and acting in accordance with Chapter 142;
- (9) a licensed midwife who obtains oxygen for administration to a mother or newborn or who obtains a dangerous drug for the administration of prophylaxis to a newborn for the prevention of ophthalmia neonatorum in accordance with Section 203.353, Occupations Code;
- (10) a salvage broker or salvage operator licensed under Chapter 432; or
- (11) a certified laser hair removal professional under Subchapter M, Chapter 401, who possesses and uses a laser or pulsed light device approved by and registered with the department and in compliance with department rules for the sole purpose of cosmetic nonablative hair removal.

(d) An offense under this section is a Class A misdemeanor.

FEDERAL RULES OF EVIDENCE¹

General Provisions

- 103(a)(2) – allows an **Offer of Proof** to be made after a court ruling on evidence
- 104(b) – under the rule of **Conditional Relevance**, the court may admit evidence that is not yet relevant with the understanding that later evidence will make it relevant (a common mock trial problem)
- 105 – when the court has **Limited Admissibility** of certain evidence to be used for a specific purpose, either party may request a limiting instruction to the jury
- 106 – if one party enters **Part of a Document of Recorded Statement**, the other party has the option of entering any other part of that document of statement that fairly ought to be considered

Judicial Notice

- 201 – a party may ask the court to take **Judicial Notice** of facts that are *generally known or capable of objective determination*

Relevance

[REMEMBER: Relevance is all about tying your evidence to a specific element of the charge.]

- 401 – **Relevant Evidence Defined** *as evidence that has a tendency to make a material fact more or less probable than it would be without the evidence*
- 402 – **Relevant Evidence Inadmissible**
- *403 – evidence is **Substantially More Prejudicial than Probative** or a **Needless Presentation of Cumulative Evidence**
- 404 – **Propensity Evidence** is not admissible to prove action and conformity therewith (with limited exceptions – See Rule 404(b)) [REMEMBER: This is a rule about the defendant. For the rules about other witnesses, see the Witness Rules in the 600s.]

Witnesses

- 602 – the witness **Lacks Personal Knowledge** necessary to testify to a particular fact (also “**Speculation**”)
- 608 – **Opinion and Reputation Character Evidence** of a witness (other than the accused) may go only to *truthfulness*; **Specific Instances of Conduct** of a witness may not be proved by extrinsic evidence (“**Bolstering**”), but may be used to establish untruthfulness in cross-examination
- 611(b) – unless allowed by the court, the **Scope of Cross-Examination** is limited to (1) *the subject matter of direct examination*; or (2) *impeachment* (same for redirect, with respect to cross)
- 611(c) – **Leading Questions** not allowed on direct examination, *except as necessary to develop testimony*
- 612 – writings used to **Refresh Recollection** (why you refresh a witness’ memory thusly)
- 613 – **Impeachment by Prior Inconsistent Statement** (why you impeach with a deposition thusly)
- 615 – (“**The Rule**”) all witnesses in a case may be excluded from the courtroom while not testifying, except (1) a party or party’s representative; (2) *a party whose presence is essential to putting on a case (usually an expert)*; or (3) *a person authorized by statute to be present*

Expert Witnesses

- 701 – a **Lay Opinion** or inference must be (1) *rationaly based on the witness’ perception*; (2) *helpful to a clear understanding of the witness’ testimony*; and (3) *not scientific, technical, or specialized*
- 702 – (Daubert factors) to qualify an **Expert Witness** to testify to a scientific, technical, or specialized opinion, a party must show that (1) *the testimony is based on sufficient facts or data*; (2) *the testimony is the product of reliable methods*; and (3) *the witness applied those methods reliably in this case*

¹ The Texas and Federal Rules are similar in most respects. Know and understand the differences before using this guide

- 703 + 705 – an expert does not need to testify to the **Underlying Facts or Data** relied on in order to testify to a conclusion, but the facts and data may be testified to, even if otherwise inadmissible, (1) *if the court finds the testimony more probative than prejudicial*; or (2) *on cross-examination*
- 704 – an expert may testify to an **Opinion on the Ultimate Issue**, except in a criminal case an expert may not testify to the defendant’s mental state *if that mental state is an element of the offense*

Hearsay

- 801(c) – **Hearsay Defined** as *an out-of-court statement offered to prove the truth of the matter asserted*
- 801(d)(2) – **Admission by Party Opponent** is not hearsay
- 802 – **Hearsay** is (generally) **Inadmissible** [REMEMBER: Hearsay is all about RELIABILITY. If it’s reliable, it should be admitted.]
- 803(1) – (Hearsay exception) **Present Sense Impression** is admissible if the declarant’s statement describes an event or condition *while or immediately after the declarant perceives the event or condition*
- 803(2) – (Hearsay exception) **Excited Utterance** is admissible if *the statement relates to a startling event or condition AND the declarant makes the statement while under the stress of the event or condition*
- 803(3) – (Hearsay exception) **Then Existing Mental, Emotional, or Physical Condition** is admissible if the statement was made *about the declarant’s state of mind, emotion, sensation, or physical condition when the statement was made*
- 803(5) – **Recorded Recollection** is admissible if (1) *made or adopted by witness while events still fresh*; (2) *witness had knowledge of contents at time made or adopted*; (3) *witness no longer has recollection of events*; may only be offered into evidence by adverse party
- 803(6) – (Hearsay exception) **Records of Regularly Conducted Activity** (also “**Business Records**”) are admissible if (1) *made at or near the time of the event described*; (2) *by a person with knowledge of the contents*; (3) *made in regular course of business*; and (4) *kept in regular course of business*
- 803(8) – **Public Records and Reports** are admissible if (1) *sets forth activities of office or agency*; (2) *matters observed pursuant to a duty imposed by law, excluding police observations*; or (3) *factual findings in a civil case*
- 803(9) – **Records of Vital Statistics** are admissible if *made to a public office as required by law*
- 804 – (Hearsay exception IF declarant unavailable) **Statement Against Interest** is admissible if *at the time of the statement it was so contrary to the declarant’s pecuniary or proprietary interests that a reasonable person in the declarant’s position would not have made the statement unless it were true*
- 805 – **Hearsay Within Hearsay** requires a hearsay exception for each level of hearsay to be admissible
- *807 – (Hearsay exception) **Residual Exception** allows the court to accept hearsay evidence that, though not covered by a hearsay exception, (1) *proves a material fact*; (2) *is the most probative evidence available that proves that fact*; and (3) *it serves the interest of justice to admit the evidence*

Authenticity

- 901 – evidence is not admissible unless there is evidence that it is **Authentic** (which is why you ask “What is it?” and “Is it in the same condition?”) [REMEMBER: You will need to lay a basic foundation for your evidence despite the fact that it may be stipulated as authentic.]

Contents of Writings, Recordings, and Photographs

- 1001(4) **Duplicate Defined** + 1003 **Admissibility of Duplicate** + 402 (“Would it be helpful?”) = Admissible Use of Demonstrative

*These are usually weak and should only be used as a last resort, except that a 403 Cumulative objection is usually a good one to make.

Objector

Respondant

PRELIMINARY MATTERS

We ask to invoke the rule.

We object to the exclusion of [a witness], because this witness is **[a party or party representative or a person whose presence is essential to our case's presentation (like an expert)]** and is allowed to be present in the courtroom under Rule **615**.

RELEVANCE

Objection, Relevance. Under Rule **402**, this evidence is not admissible because it **does not have a tendency to make [the fact] more or less probable**.

This evidence goes to [a specific element of the offense charged].

Objection, Relevance. Under Rule **403**, this evidence is not admissible because its **prejudicial effect substantially outweighs its probative value**.

This evidence goes to [a specific element of the offense charged] and is therefore **highly probative**.

Objection, Cumulative. Under Rule **403**, this evidence is not admissible because it is **cumulative**. The jury already has [the evidence], and this will **place undue emphasis on this evidence**.

[This evidence] is being offered to aid the jury in its understanding of the evidence by pointing out [parallels, distinctions, etc.] **that the jury would not necessarily be able to infer for itself from of the the face evidence**.

Objection, Relevance. Under Rule **403**, this evidence is not admissible because it **will cause the jury to confuse the issues**. The defendant has been charged with [the offense charged], and this evidence will prejudice the jury by [explain how the evidence will confuse the jury].

This evidence goes to [a specific element of the offense charged], and the **jury is competent** to understand not only how this evidence shows [the element], but also that the defendant is on trial for [the offense charged].

CHARACTER EVIDENCE

(For Criminal Defendant)

Objection, Improper Character Evidence. Under Rule **404**, this evidence is inadmissible because it is **propensity evidence offered to show the defendant's action and conformity therewith**.

Under Rule **404(a)(1)**, this evidence is admissible to **rebut the evidence offered by the defense** of the defendant's good character.

OR

Under Rule **404(b)**, this evidence is admissible as proof of the defendant's **[motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake of accident]**. [Briefly explain how the evidence shows the item stated.]

Objector

(For a Witness other than Criminal Defendant)
Objection, Improper Character Evidence. Under Rule **404**, this evidence is inadmissible because it is **propensity evidence offered to show the defendant's action and conformity therewith**.

Under Rule **608(b)**, opposing counsel may not prove this using **extrinsic evidence**.

(For any admissible Character Evidence)
Objection, Improper Character Evidence. Under Rule **405**, proof of **specific instances** of conduct is only admissible if the character trait proved is an **essential element of the claim/defense**. [The trait] is not an element of [the claim/defense].

Objection, Bolstering. We have not called this witness' character into question.

IMPROPER OPINION/OTHER WITNESS ISSUES

Objection, Speculation. This testimony is inadmissible under Rule **602** because this witness **lacks the personal knowledge to testify to** [these facts].

(If the foundation for personal knowledge argued by opposing counsel is lacking,) Opposing counsel has laid [**no/insufficient**] **foundation** to show personal knowledge of this witness.

Respondant

This evidence does go to the witness' **character for truthfulness**, because [briefly explain, hopefully showing that there is evidence that the witness lied, committed fraud, or something of the like].

Rule **608(b)** allows questioning about **specific instances** of conduct (that go to the witness' truthfulness) during cross-examination.

[The trait] goes to [an element of the claim/defense] by [explain briefly if necessary].

(For Criminal Defendant) The defendant's **character has been called into question by the charges and indictment against him**. We are allowed to rebut these charges with evidence of good character under Rule **608(a)**.

(For a Witness other than Criminal Defendant)
Opposing counsel has **called this witness' character into question** by [explain how]. We are allowed to rebut this evidence with evidence of good character under Rule **608(a)**.

This witness has already testified that [facts showing that the witness would have personal knowledge of the facts testified to].

Objector

Objection, Improper Lay Opinion. This witness has not been accepted as an expert. Because this opinion is based on [**scientific, technical, or specialized**] knowledge, it is inadmissible under Rule 701.

Objection, this witness has not been Properly Qualified as an Expert Witness. Rule 702 requires that a witness show that [(1) **his testimony is based on sufficient facts or data**, (2) **his testimony is the product of reliable principles or methods**, or (3) **he applied the principles or methods reliably to the facts of the case**] before giving an expert opinion. Opposing counsel has not shown this.

In that case, we'd like to take this witness on **voir dire**. (After you are granted permission to voir dire, go directly into questioning. After you have concluded your questioning, renew your objection.)

(If you're desperate), Objection, Improper Expert Testimony. Rule 702 allows expert testimony only if [scientific, technical, or specialized] knowledge will **assist the jury to either understand the evidence or determine a fact issue**. This expert's testimony does neither because it does not go to any of the elements in the case. (Really a relevance objection.)

Objection, Hearsay.

Although this witness may be able to give an expert opinion, the **underlying facts and data** of that opinion are not admissible, because they are **more prejudicial than probative** under Rule 703 and will [explain prejudicial effect on jury].

Respondant

This opinion is not based on [scientific, technical, or specialized] knowledge, because [briefly explain]. Rule 701 allows a lay witness to testify to an opinion that is **rationally based on the witness' perception** and **helpful to the jury in understanding the witness' testimony**, and this opinion fits those criteria.

The witness has testified that [explain how you have shown the specific element objected to].

(Respond to the renewed objection by reviewing briefly how you have shown all three elements of Rule 702.)

The expert's testimony **will aid the jury in understanding why** [explain how the testimony ties to an element of the offense charged].

Under Rule 703, the **underlying facts and data** of an expert's opinion are admissible **if their probative value outweighs their prejudicial effect**. This expert witness' explanation of the facts and data underlying his opinion **will aid the jury in understanding the opinion**.

(If you're desperate), the **jury is competent** to understand the opinion without confusing its probative value with any prejudice.

Objector

Objection, Improper Opinion. Under Rule 704, this testimony is inadmissible because it **goes to the defendant's mental state or condition**, which is an element of the offense charged. This is an issue for the jury alone to determine.

Objection, Calls for a Legal Conclusion. This witness **has invaded the province of the jury** by testifying that [an element of the offense] has been met.

Objection, Improper Impeachment. Under Rule 613(b), extrinsic evidence, like the sworn statement used by opposing counsel, is **inadmissible unless counsel allows the witness the opportunity to explain the inconsistency**.

FORM OF QUESTION

Objection, Leading.

Objection, Compound Question.

Objection, Vague.

Objection, (to a witness' answer) Non-responsive.

Objection, Outside the Scope of Direct Examination (or Cross-examination if objecting to Re-direct).

Objection, Assumes Facts Not in Evidence.

Respondant

This testimony goes to the defendant's mental state generally, but it does not go to whether or not the defendant had the mental state, namely [the mental state required for the offense charged], at the time of the offense. It does not make a legal conclusion, but merely aids the jury in understanding the events surrounding the offense charged.

The witness is not testifying to a legal conclusion, but to a fact. What conclusion is to be drawn from that testimony is up to the jury.

Opposing counsel will be afforded the opportunity to address this on re-direct.

This question is **foundational**. Rule 611(c) allows leading questions on direct examination when **necessary to develop the witness' testimony**.

OR

The question does not suggest an answer.

It is necessary to ask the question in this way so that it is not misleading.

The question refers to the witness' prior testimony.

The answer was responsive to the question asked. The witness was qualifying his answer.

Rule 611(b) allows cross-examination on any issue affecting the **credibility of the witness**.

We have shown that [explain foundation].

WRITINGS AND RECORDINGS

Objection. Under Rule **106**, this entire [document or recording] must be admitted, because admitting only part of it **does not fairly represent its contents.**

Objection, this is Not the Best Evidence of [the fact]. Under Rule **1003**, the [**document or recording**] **itself is the most reliable verification evidence of the contents** of the [document of recording], so opposing counsel should offer it instead of [the alternative evidence offered].

HEARSAY

Objection, Hearsay.

The state of mind of [the listener] is **irrelevant** and **does not go to any element of the offense charged** against the defendant.

Opposing counsel has not laid proper **foundation** to show that [the party opponent] has adopted this statement in any way.

This statement is **not being offered to prove the truth of the matter asserted.** It doesn't matter to us whether [the fact asserted] is actually true, but, rather, we are offering the statement for the **effect on the listener**, to show why he **subsequently responded** the way he did. (You can be more specific about the reaction you intend to elicit if it is persuasive.)

Rule **106** does not require that the entire [document or recording] be entered, but only those parts which **ought in fairness to be considered contemporaneously with it.** The portions of the [document or recording] that opposing counsel seeks to introduce do not enhance or diminish its contents, and will serve only to waste the jury's time. [Briefly explain if necessary.]

Rule **1003** permits exceptions to the best evidence rule. In this case, the [document or recording] [**has been lost or destroyed, is not obtainable by judicial process, is in possession of opposing counsel, or is not closely related to the controlling issue**] and therefore [the alternative evidence offered] is admissible instead.

OR

Because this [document or recording] is offered against [our party], we are not required to produce the original under Rule **1007.**

If so), opposing counsel has not laid proper **foundation.**

If so), opposing counsel has not laid proper **foundation.**

If so), opposing counsel has not laid proper **foundation.**

Objector

(If you're desperate), the state of mind of (usually) the lead investigator of this offense is relevant because it aids the jury in understanding why the defendant was charged and **why we are here today**.

OR

This is an **admission by a party opponent under Rule 801(d)(2)(A)**.

OR

This is an **adoptive admission** under Rule **801(d)(2)(B)**.

We have shown that [explain how the party opponent has **manifested an adoption or belief in the truth of the statement**].

OR

This is an exception to hearsay. Under Rule **803(1)**, this is a **present sense impression**.

The statement was made by [the declarant] **[while or immediately after the declarant perceived the event]**.

OR

Respondant

If so), opposing counsel has not laid proper **foundation**.

If so), opposing counsel has not laid proper **foundation**.

We have shown that this was **administered by a personal authorized** to administer [the religious rite] and that it was **made at or near [the event in question]**, which are the only two elements required under Rule **803(12)**. (If needed), this rule applies to [the evidence] because it is evidence of a religious rite similar to a sacrament, which is the word used by the rule.

OR

This is an exception to hearsay. Under Rule **803(21)**, this is a statement that speaks to the defendant's **reputation as to character [among his associates or in the community]**.

OR

(If you really have nothing), under the Rule **807 residual exception** to hearsay, this statement has a circumstantial guarantee of trustworthiness because it is **offered to prove a material fact**, namely [the fact], the statement is **more probative in proving fact] than any other evidence available**, and **the general interests of justice will best be served** by admission of the statement. Additionally, we have **given opposing counsel advance notice of our intent to introduce this statement**

Objector

Respondant

This is an exception to hearsay. Under Rule **803(5)**, this is a recorded recollection.

We have shown that this is a record **concerning a matter about which [the witness] once had knowledge, but now has insufficient recollection to testify accurately** and that **the statement was made at a time when the matter was fresh in [the witness'] mind**. (If allowed, the record may not be admitted, but it may be read into the record.)

OR

This is an exception to hearsay. Under Rule **803(6)**, this is a **record of regularly conducted activity**.

We have shown that the document was **made at or near [the event in question], made by a person with knowledge of the facts therein, made in the regular course of business, and kept in the regular course of business**. (If needed), this is a **qualified witness** and need not be the records custodian under Rule **803(6)**.

OR

This is an exception to hearsay. Under Rule **803(11)**, this is a **record of a religious organization**.

We have shown that this is a **regularly kept record of a religious organization**, which is the only element required under Rule **803(11)**.

OR

This is an exception to hearsay. Under Rule **803(12)**, this is a **marriage, baptismal, or similar certificate**.

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