

**COMMUNITY SUPERVISION
A WHOLE NEW OUTLOOK**

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COMMUNITY SUPERVISION A WHOLE NEW OUTLOOK

This paper is a product of a collaborative effort of some dear people. I truly do wish to thank them for their effort in helping me compile the material for this paper. The first thank you is to an Assistant District Attorney in Montgomery County, FRANCES B. MADDEN. I think we may have started a new way of looking at community supervision, Montgomery County at least, because of our working together on this project. Second is my protégée, STEVE D. JACKSON, who is earning his stripes by some diligent hard work and personality changes. A former right wing conservative who has made a remarkable transition to the “GREY” area. Last, my future law partner, JAMES D. JONES.

Historically this manual is frequently used as the genesis for the libraries of new attorneys’, as well as reference material for older lawyers. Consequently, this article is written accordingly.¹

I. COMMUNITY SUPERVISION

A. Authority

Community supervision or PROBATION, for those of us schooled before September 1, 1993, is constitutionally provided for in Art.4 §11A of the Texas Constitution:

“The Court of the State of Texas having original jurisdiction of criminal actions shall have the power, after conviction, to suspend the imposition or execution of sentence and to place the defendant upon probation and to reimpose such sentence, under such conditions as the Legislature may prescribe.”

Its hybrid, “deferred adjudication”, is provided for under the Legislature’s power to define crimes and penalties under Art. 3 §1 of the Texas Constitution.²

B. Purpose

The purpose of community supervision, or probation, these terms may be used interchangeably though out this paper, is to mitigate the penalties of

¹ (Note to new attorneys, DO NOT THROW AWAY YOUR OLD CODES).

² (See State ex rel, Smith v Blackwell, 500 SW2d 97, (Tex.Crim.App. 1973).

the criminal law so far as the public interest will permit, and to aid in the reformation of a criminal so that he can take his place in society. Thus, it is thought that the welfare of the state and society will be better served.³ Community supervision is a contractual relationship between the Court and the Defendant.⁴ This concept quite frankly may be quite useful in defending in or prosecuting in revocation or adjudication hearings.

It is well established, and it cannot be reiterated too often, that courts should be committed to the viability of community supervision and shall exercise great discretion in granting this privilege when ever possible.⁵

C. Provisions Are In A Number Of Code Volumes.

The Transportation, Government and Family Codes have special provisions and conditions for probation that must be followed.

D. 1993, 1995 and 1997 Community Supervision Changes

1./ The 73rd Texas Legislature reworked Art.42.12 in 1993, they really overhauled it. Then fine tuning of this article was made by the two subsequent Legislatures in 1995 and 1997. The reason this is actually note worthy is because it will affect how you look at, defend and interpret conditions of community supervision.⁶

2./ The major 1993 changes are in Art. 42.12:

§ 13A Community Supervision for Offenses Committed because of Bias or Prejudice; §14 Substance Abuse Felony Program (SAFP), §15 Procedure relating to State Jail Felony, §21

³ (Interpretive commentary Vernon’s Ann. Texas Constitution).

⁴ Franklin v State, 632 SW2d 839, 841 (Tex.App. - Houston 14, 1982)

⁵ Kelly v State, 483 SW2d 467, (Tex.Crim.App. 1972).

⁶ (Just as an aside the 1993 changes were preceded by the 1989 changes and since probations cannot last longer than 10 years those changes will not be mentioned in this paper.)

Violations of community supervision, §23 Revocation §24 Pilot Supervision Contracts and §29 Liability Protection.

Safety Code §481.134 (c)-(f) **Drug Free Zone subsequent offenses.**

3. The major fine turning 1995 and 1997 changes are under Art. 42.12:

§2 definitions, §3 judge ordered community supervision, §3g judges limitations, §4 (4) jury's limitation, §5 Deferred, §9 aspects of the pre sentence investigation report, §10 Authority to impose, modify or revoke community supervision, §11 some conditions changed, §13 DWI conditions changed, §13B Community supervision for sexual offenses against children, §13C Community supervision for making a firearm accessible to a child, §14 limitations on SAFFP, §15 State Jails again, §19 mandatory fees, §22 extending the term, §22A extending the term for sex offenders.

II. WHO MAY GRANT COMMUNITY SUPERVISION

DELEGATION OF AUTHORITY

You know that the type of offense, will in large part, dictates how and whether community supervision is to be considered as a manner of disposing of the defendants case. As the type of offense, as well as any HISTORY the defendant may have, may mandate that community supervision be sought from a judge or jury.

A. Art. 42.12. §3 Judges' Authority

Judges may give as many bites of the apple of 'regular' community supervision as they deem just, with the following exceptions:

- the term of incarceration may not exceed ten years
- when it is shown that a deadly weapon was used or exhibited; a finding is made that a deadly weapon was used or exhibited; **AND** the affirmative finding must be entered in the judgement⁷;
 - Art. 42.12 **3g** offenses - Penal Code §§ 19.02 **Murder**; 19.03 **Capital Murder**; 20.04 **Aggravated Kidnapping**; 21.11(a)(1) **Indecency with a Child**; 22.011(a)(2) **Sexual Assault**; 22.021 **Aggravated Sexual Assault**; 29.03 **Aggravated Robbery**; and Health and

B. Art. 42.12 §4 The Power Of The Jury

1. Juries on the other hand may only consider community supervision when the following conditions are met: Art 42.12 §4

- the defendant has never before been convicted of a felony
- the term of incarceration may not exceed ten years
- a sworn affidavit must be filed before trial and the jury enters in the verdict a finding that the information in the defendant's motion is true. Art. 42.12, Sec. 4 (e).

Both requirements must be met or the defendant is ineligible for probation. Obviously, direct testimony must be presented as to the truth of the defendant's motion by someone with personal knowledge so that the jury will have evidence upon which to base it's finding. Normally, the defendant will be the only person who can say definitively that he has never been convicted of a felony in this state or any other state. Therefore, the defendant will, in all likelihood if requesting probation, be required to take the stand at punishment and the prosecutor should be prepared for cross-examination and/or impeachment of the defendant.

- the instant charge cannot be that of aggravated perjury for false testimony about the circumstance under which a confession was obtained Art.38.22 §4.

2. Juries may not grant community supervision if:

- A jury **cannot** recommend probation of a defendant is either adjudged guilty under Sec. 481.134(c), (d), (e), or (f), Health and Safety Code (Drug Free Zones), if it is shown that a defendant has previously been convicted of an offense for which punishment was increased under any one of those subsections. Art. 42.12, Sec. 4(d) (4).
- A jury **cannot** recommend probation for a defendant unless the defendant:
 1. **Pretrial** has filed a written, sworn motion with the judge that the defendant has not previously been convicted of a felony in this state of in any other state.

⁷ Art. 42.12 §3g(a)(2)

- A jury **cannot** recommend probation for a defendant who is sentenced to serve a term of confinement under Sec. 12.35, Penal Code (State Jail Felony Punishment).
Art. 42.12, Sec. 4(d) (2).

C. Art. 42.12 §10 (D) Delegation Of Authority

Prior to the 73rd Legislatures changes in Art. 42.12 of the Code of Criminal Procedure, in 1993, the community supervision officers had very little authority and most delegations of court authority were impermissible. Now, however, Art. 42.12 §10 (d) allows for a community supervision officer to “modify the conditions community supervision for the limited purpose of transferring the defendant to different programs within the community supervision continuum of programs and sanctions”. NOTE - the judge as a precedent for the community supervision officer to make these changes, must first give his authorization to modify the conditions.

Defendants placed on probation prior to September 1, 1993, fall under the holding of Lemon v. State, 861 S.W.2d 249 (Tex.Crim.App.1993), in which the court of criminal appeals held that after ordering community service as a condition of probation, a trial court could not forego naming a community services project or organization in its original order. However, when the legislature amended article 42.12 in 1993, it omitted the language relied on in Lemon that required a trial court to name a specific community services project or organization. It appears, therefore, that for defendants receiving community service post September 1, 1993, the holding in Lemon is not applicable. Cotton v. State, 893 S.W.2d 200 (Tex.App.--Fort Worth 1995).

Further, sections 10(d) and (e) of 42.12 allow the judge to delegate authority to either the community supervision officer supervising the defendant or a magistrate to modify the conditions of community supervision for the limited purpose of transferring the defendant to different programs within the community supervision continuum of programs and sanctions. If the modification is agreed by the defendant, then the modification is to be filed with the court in writing by the community supervision officer or magistrate. If the defendant does not agree with the modification, then the matter must be referred to the court for modification pursuant to Sec. 22 of the Article 42.12 following a hearing as set forth in Sec. 21 of Article 42.12. However, whether this delegation of authority must be noted by the judge in the order placing the defendant on community supervision is not addressed in Sec. 10.

Section 11 (a) (10) of Art. 42.12 states that the judge specifies the length of time that a defendant will

participate in any community-based program, including a community-service work program under sec. 16 of Art. 42.12. However, section 16(a) states that the judge must approve of the community service project. Whether this approval of the specific community service project must be noted on the order placing the defendant on community supervision is not addressed by Sec. 16.

The details of a defendant’s participation in a court ordered program do not need to be spelled out in the order placing the defendant on probation. It is not an improper delegation of authority to leave such details to the program or treatment facility. Smith v. State, 932 S.W.2d 279, 283 (Tex.App.--Texarkana 1996); Salmons v. State, 571 S.W.2d 29, 30 (Tex.Crim.App. 1978).

Community supervision officers may now have authority to instruct the defendant on the manner of his / her reporting.⁸

III. SUITABILITY FOR PROBATION-PROSECUTOR’S VIEW POINT

Under certain circumstances, the defendant’s **suitability** for probation may be examined in the punishment phase of a jury trial and the state may present expert testimony regarding the defendant’s suitability for probation. Traditionally, “suitability” for probation is not an issue and evidence going to prove an applicant unsuitable for probation has been objectionable. Murphy v. State, 777 S.W.2d 44, at 64-67 (Tex.Cr.App. 1989). However, the court of Criminal Appeals in Ortiz v. State, 834 S.W.2d 343 (Tex.Cr.App. 1992), on remand, 846 S.W.2d 165 (Tex.App.Houston[1st Dist.] 1993, specifically discussed whether “suitability” for probation may be presented in punishment. In Ortiz, an expert witness (psychiatrist) was called by the State during the punishment phase of trial to testify that the defendant was unsuitable as a candidate for probation. The defendant appealed the trial court’s admission of that testimony. The Court of Criminal Appeals upheld the trial court’s ruling. In the guilt/innocence phase of the trial, the defense had presented expert testimony that the defendant was a victim of “battered wife syndrome”. Family, friends, and co-workers testified at the punishment phase of the trial that the defendant would be a good candidate for probation. The Court of Criminal Appeals stated that despite its ruling in Murphy v. State, supra at 53-64, and similar rulings in a number of cases preceding Murphy, “Nevertheless.. A party may open the door to evidence or, inter alia, probation ‘suitability’ by proffering evidence that

⁸ Art. 42.12 §16

broached the subject, and the opponent, at his option, may either object, in which case the proffered evidence should be excluded, or present evidence in rebuttal. Ortiz, supra at 348. “Appellant directly raised the issue whether she could abide by the terms and conditions of probation, particularly her ability to follow the law. To this extent she tendered her ‘suitability’ for probation as an issue at the punishment phase. Rather than object, the State chose to rebut. Dr. Gripon’s testimony was clearly relevant to appellant’s likely ability to follow the law in the future.” Id. The Court held that to the extent the State’s expert testimony contradicted the defense expert witness, Dr. Meyer’s, conclusions, “...Dr. Gripon’s testimony was ‘relevant.’ Rule 401, supra. It is therefore admissible, except as otherwise provided by, inter alia, statute or rule. Rule 402, supra.”

The Court continued on to state that “suitability” testimony may be more prejudicial than probative, but that this decision is within the discretion of the trial court, and that so long as the record provided a rational basis to support the trial court’s decision pursuant to Rule 702, Tex.R.Crim.Ev.. (That expert testimony will assist the jury), the court’s ruling that “suitability” testimony is admissible or inadmissible will be upheld. Id., at 348.

Should the state decide to use expert “suitability” testimony, the prosecutor must be ready to qualify his expert witness in light of a Daubert hearing which may be requested by the defense. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Tex.R.Crim.Ev., R. 702.)

The State must be prepared, therefore, in a proper case, to offer testimony (expert or otherwise) that the defendant is unsuitable for probation where it is reasonably foreseeable that the defense will offer testimony that the defendant is suitable for probation.

IV. CATEGORIES OF COMMUNITY SUPERVISION

Now, the legislature has declared that there are a minimum of eight categories of community supervision.

A. Art. 42.12 §§3 &4 Regular Community Supervision

The first of these is what is generally known as regular or straight community supervision. The defendant has been found guilty and punishment has been assessed at no more than 10 years confinement. Counsel is cautioned to file defendant’s motion and affidavit for probation as a pretrial motion, but most certainly before voir dire. The consequences of not filing such a motion, when the jury is to assess

punishment may result in a ruling of ineffective assistance of counsel.⁹

B. Art. 42.12 §5 Deferred Adjudication Community Supervision

The second type of community supervision known as deferred adjudication is a judge only grant. Because there is no finding of guilt the contract between the judge and the defendant is unique in what is allowed and what is at stake. The legislature has made notable exceptions to the list of offenses applicable to deferred. The first being that no DWI offense can be deferred.¹⁰ Additionally there are certain drug offenses for which deferred is not available - those having to do with subsequent Drug Free Zone.¹¹

A judge **cannot** grant deferred adjudication to a defendant for which punishment may be increased under Section 481.134(c), (d), (e), or (f), Health and Safety Code (Drug Free Zones) **and** it is shown that the defendant has **been previously convicted of an offense for which punishment was increased** under any one of those subsections. Art. 42.12, Sec. 5(d) (1) (B).

A judge **cannot** grant deferred adjudication to a defendant who is charged in Indecency With a Child, Sexual Assault, Aggravated Sexual Assault, or a sexual offense against a child on certain premises as described in Section 13B(b) of Art. 42.12, **and has previously been convicted of any of the above offenses.** Art. 42.12, Sec. 5(d) (2) (A) and (B).

C. Art. 42.12 §§ 6, 7, 8 & Continuing Court Jurisdiction Shock And Boot Camp

These types of community supervision have incarceration as their common link. The court may as a condition of probation impose a certain term of confinement in a penal institution. The Court may assess that a need exhibited by the defendant dictates specialized confined treatment.

1./‘ Straight up Shock’¹² allows a one time judge assignment. The legislature provided that a court may as a condition of community supervision confine the defendant in prison for up to 180 days by marinating

⁹ Tallant v State, 866 SW2d 642, (Tex.App.- Tyler 1993).

¹⁰ 42.12 §5(d)

¹¹ Health and Safety Code §481.134 (c)-(f)

¹² Art. 42.12 §6

jurisdiction over the defendant for this amount of time.¹³

Defense practitioners and vigilant jurists should watch closely the time constants associated with shock. The repercussions of not bring the defendant back and suspending the execution of the remainder of the sentence could cause irrevocable unintended harm to the defendant.¹⁴

2. "Boot Camp"¹⁵ is a program for the 17 to 26 year old defendant. The judgement must reflect that the defendant is being assigned to the BOOT CAMP program and that the court is not retaining jurisdiction under Art. 42.12 §6. The defendant must be able to participate in strenuous physical activity and the offense cannot be a state jail felony. For this program, the court retains jurisdiction over the defendant for 90 days from the date the defendant actually starts the program. The defendant's progress is reported to the court on the 76th day of the program. t must spend at least 75 days in the program. Unlike 'straight up shock' the result is different if the defendant is not brought back from incarceration and placed on probation before the expiration of 90 days. In this particular situation the plea is deemed involuntary and the judgement is set aside.¹⁶

D. Art. 42.12 § 13A DWI Community Supervision

When granted community supervision after a DWI conviction the defendant faces some mandatory incarceration time provided certain conditions exists:

- if previously convicted of a Ch 49 offense - minium of 3days
- if twice convicted of a Ch 49 offense- minium of 10 days
- if accident involved with serious bodily injury - minium of 30 days
- if death occurs in a Ch 49 offense then - minium of 120 days -

Additionally the terms of the probation must include dependency evaluation and participation in an substance abuse educational program.¹⁷

Two schools of thought on license suspension for adults. The safe course of action is to have the judgement reflect what is to happen with the license. With the under 21 crowd no wiggle room - license will be suspended for 90 days and there will be needed an interlock devise.¹⁸

E. Art. 42.12 §13A Community Supervision For Offenses Committed Because Of Bias Or Prejudice

The court has no desecration but to order a period of incarceration when a defendant has had an affirmative finding made under Art. 42.014. A defendant is precluded from the privilege of probation if it is found that he has had a prior affirmative finding of bias or prejudice upon a subsequent conviction.

The judge has desecration to order that a minimum of 100 community service hours for misdemeanor convictions and 300 community service hours for felony convictions be performed for the person or group that was the target of the defendant's actions.¹⁹

F. Art. 42.12 §13B Community Supervision Sex Offense Related

The focused offenses enumerated are indecency with a child, sexual assault and aggravated sexual assault and there really is not distinguishing as to whether the victim was a child or an adult.²⁰ The thrust of this section is to put predators on notice that their presence in some areas is to be severely restricted. This section keys on children as the victim of the probated offense. It has as a counseling component mandated into its supervision. The defendant, however, can after two years and with good cause shown petition the court to relax the prohibited areas. The court will need to: 1. have the defendant provide detail reasoning as to why entrance into the prohibited area is needed; and have the treatment provider certify to the court that the defendant has progressed to the extent that a chaperoned visit inside the restricted area would be safe.²¹

¹³ There are offenses which exempt the defendant from shock and they are the 3g offenses

¹⁴ Adams v State, 610 SW2d 780, (Tex.Crim.App. 1981)

¹⁵ Art. 42.12 §8

¹⁶ ExParte Bittikoffer, 802 SW2d 701 (Tex.Crim.App. 1991)

¹⁷ 42.12 §13 (f) & (h).

¹⁸ 42.12§13(m)

¹⁹ 42.12§16 (6)(d)

²⁰ Penal Code §§ 21.11, 22.011 & 22.021

²¹ 42.12 §13B(f)

Further, there are extra fees associated with this type of probation. The defendant pays an additional \$5.00 a month for the benefit of the sexual assault program, as well as a fee to cover the cost of public notification of their sex offender registration.²²

The ten year limit on community supervision, does not apply to defendants convicted or deferred under this section. Community supervision, may if the court determines that the defendant has not demonstrated sufficient commitment to avoid future criminal behavior extend the term of community supervision for an additional ten years.²³ Couple this extension with the Chapter 62 registration and you have this defendant possibly in the public light for 30 years.

A satisfactorily completed deferred under this section followed with a subsequent arrest and charge of another sex offense may lead to an enhanced indictment and possible subsequent punishment of life imprisonment.²⁴

If the defendant has been given deferred for specified sex offenses against 'children' then early discharge from community supervision is not available until two thirds of the sentence has been served.²⁵

G. Art. 42.12 §13B Making Firearm Accessible To Children

The focus of this particular community supervision, by implication, is on juveniles. The reasoning is that any one convicted of carrying a weapon on school grounds, **Penal code §46.13**, should be educated in firearm safety. A public safety oriented activity, a NRA approved firearm course or community service may be imposed, at the defendant's cost upon conviction.

Query - what about deferred?

H. Art. 42.12 §14 Substance Abuse Felony Program (SAFP)

First off, convictions for Penal Code violations §§ 21.11, 22.011 or 22.021 cause a defendant to be ineligible for this program. Secondly the court must make an affirmative finding that the defendant has a substance abuse problem which significantly contributed to the offense.²⁶ The "in house secure"

program must be at least ninety days but no longer than a year. Additionally an after care program must be ordered by the judge for the defendant, and he must participate.

I. Art. 42.12 §15 State Jail Probation

This section of the code is full of pit falls. Remember that the jury cannot assess probation for a state jail offense. Thus if the defendant elects to have the jury assess punishment, in a state jail trial, then he arguably leaves the judge no alternative but to assess state jail time as the punishment. Then you have the problem with credit for jail time served and when and how, if at all, it is to be credited.

A simple rule - get defendant out of jail ASAP on state jail offenses because awarding of jail credit is discretionary.²⁷ If the trial court imposes the maximum sentence upon revocation of a state jail community supervision then the court is compelled to make a finding as to whether the defendant was in jail because of inability to make bail. If this is the case, the defendant is to be awarded all the time he spent in jail under this status.²⁸

V. CONDITIONS OF SUPERVISION

A. Reporting to Community Supervision Officer

One of the most basic conditions of probation is that of reporting to the community supervision officer. However, many of the county and district courts in the state are using arguably unenforceable language that allows the community supervision officer to delegate the time and place of reporting. Typical unenforceable language to look for is, "Report as directed by the probation officer" or "as required by the probation officer."²⁹ Both of these conditions have been held invalid.

In 1993 the legislature amended 42.12 §11 (4) to read "report to the supervision officer as directed by the judge or supervision officer..."³⁰ This is a distinct change from the previous language that only allowed for the judge to direct when to report.

Prior to the 1993 legislative amendment the law appeared clear that using "report as directed language" was unenforceable as being an improper delegation of

²² 42.12 §19(e) -(g)

²³ 42.12 §22A

²⁴ Texas Penal Code §12.42(g)

²⁵ 42.12§5(c).

²⁶ 42.12§14(3).

²⁷ 42.12 §15(h)

²⁸ Ex parte Harris, 946 SW2d 79, (Tex.Crim.App. 1997)

²⁹ Harris v State, 608 SW2d 249, (Tex.Crim.App. 1980)

³⁰ Vernon's Annotated Code of Criminal Procedure, Article 42.12, Section 11 (a) (4)

court authority. Further, the language was too vague and indefinite to be enforced as the condition did not adequately inform the defendant as to what he was suppose to do.

Even with the 1193 changes , Harris is still somewhat alive. Unenforceable language will still be “report as directed by the probation officer” or “as required by the probation officer.” There must be more guidance to the probationer than to merely report. Enforceable language will have a specific location to report to as well as a specific time to begin reporting. Enforceable language example - “report to the community supervision office at-----on the 1st day of each month unless otherwise directed to do so in writing.”

B. Community Service Restitution

At the present time, there are two rules of law counsel should know regarding the C.S.R. condition. There, is the pre-September 01, 1993 law and the post September 01, 1993 law. At least for a few more years we need to be aware of how the law applies to each.

1./ Pre September 01, 1993

The controlling case is Lemon v. State, 861 S.W. 2d 249 (Tex.Crim.App. 1993). The Court held that a condition of probation that required the defendant to perform community service as directed by the probation department was an improper delegation of court authority. Further, for the C.S.R. condition to be valid, the trial court must specifically identify the organization that the defendant is to perform work for. Then, and only then, may the community supervision officer attempt to modify or direct where the defendant performs service hours.³¹

There is a catch. Just because the community supervision officer has sent the defendant to a different program or job does not necessarily make it enforceable. Article 42.12 § 10 (d) only allows for a change if the community supervision officer 1) delivers a copy of the conditions to the defendant, 2) files the modified conditions with the sentencing court and 3) notes the date of delivery to the defendant in the officer’s file. If the defendant does not agree then a hearing on the proposed modification must be held pursuant to 42.12 §22.³² It is very rare that the community supervision officer request a hearing to

modify conditions of community supervision. What the officer generally does is tell the defendant the new condition.

2./ Post September 1, 1993 the issue seems to be pretty clear. The current version of Article 42.12 §11 (10) and § 16 allows for the department (community supervision) to designate which project or organization the defendant performs his hours for. Also see Cotton v. State, 893 S.W.2d 200, 203 (Tex.App-Ft. Worth 1995). Art. 42.12 §§11(a) 10 and 16 give the trial court the authority to impose C.S.R. as a condition of probation. §11 (a) (10) states, “Participate, for a time specified by the judge in any community-based program, including a community service work program under Section 16³³ Something of interest though is that the legislature did not remove §10 (d) when they redrafted §11. It would appear that once the initial job is designated by the “department” they must then comply with the language of 42.12 §10 (d) and (e) should they wish to change the probationer’s job.³⁴

Counsel may use this checklist to guide the review of alleged CSR violations :

- I. Pre September 1, 1993 or post September 1, 1993 law. When did the offense occur for which person is on probation.
- II. If Pre 9/1/93 then refer to Lemon v. State.
- III. Verify that community supervision judgment identified specific job.
- IV. If job changed, verify that change was done properly by written agreement and it was filed with the district clerk and that the judge had given prior approval to do the modification
- V. If no agreement filed with the clerk, was a hearing held to modify condition?
- VI. If Post 9/1/93 then refer to Article 42.12 §11 (10) and § 16 and Cotton v. State.
- VII. If job changed, verify that change was done properly by written agreement and it was filed with the district clerk and that the judge had given prior approval to do the modification
- VIII. If no agreement filed with the clerk, was a hearing held to modify condition?

³¹ Lemon v. State, 861 S.W. 2d 249 (Tex.Crim.App. 1993); DeGay v. State 741 S.W.2d 445, 449 (Tex. Crim. App. 1987); Tex.Code Crim.Proc. Ann art. 42.12 § 11 (a)(10) and (17) (Vernon 1988).

³² Tex.Code Crim.Proc. Ann art. 42.12, Section 10 (e), (Vernon 19)

³³ Tex.Code Crim.Proc. Ann art. 42.12, Section 11 (a) (1) (10), (Vernon 1993).

³⁴ Tex.Code Crim.Proc. Ann art. 42.12, Section 11 (a) (1) (10), (Vernon 1993).

C. Random Urinalysis

Article 42.12 §11 (a) (14) gives the court the authority to order the probationer to submit to testing for alcohol or controlled substances.³⁵ The statute **does not allow or reference “random urinalysis.”** Nor does the statute allow for the department to tell the probationer the time and place to give the specimen. I believe that this condition is prime for attack. **The statute merely states, “Submit to testing for alcohol or controlled substances.”**³⁶

There are two violations that probationers usually face regarding random urinalysis testing. The first is the failure to show up for or to give the specimen. This appears to be the easier condition to get around. “The probation condition permitting probation officer to decide if, when and where urine specimen was to be submitted by probationer was improper delegation of trial court’s authority for determining conditions of probation.”³⁷ Ortega v. State, 860 S.W.2d 561 (Tex.App.—Austin 1993) no pet. Further, Ortega held that the condition appeared to be vague and indefinite so that it could not be enforced.³⁸ The Court compared this condition to the reporting condition (pre 9/1/93) and stated that the reporting as directed was too vague to be enforced, thus submitting to a urinalysis at an unknown time and place at the community supervision officer’s discretion did not properly inform the probationer with “sufficient certainty” of what he was required to do.³⁹

Although Ortega was decided prior to the September 1, 1993 legislative changes, which gave more discretion to the community supervision officer, §11 (14) was not included in the changes to allow the officer to direct when and where the probationer was to submit to the test. Therefore Ortega appears to be good law. The Court of Criminal Appeals has not dealt with this topic specifically yet.

I have found no case that has taken the above argument and expounded on it by claiming that the department did not have the authority to request the

specimen in the first place. A creative argument could be made that the positive test results should be quashed due to the fact that the condition as worded was an improper delegation of court authority and not a valid condition to even request the urinalysis in the first place.

An even greater problem exists when the defendant inquires as to whether or not he should take the urinalysis if it is asked of him. Caution should be the watchword. I have found no cases since Ortega in 1993 that have addressed this issue. 42.12 §11 (a) (14) has remained unchanged and looks ripe for attack on a violation of failing to take the test. However, Ortega testified that he knew nothing about the urinalysis test and that is why he did not show up for it.⁴⁰ With the wording of (§11 (a) (14) and Ortega if the defendant informs you that he will definitely test positive, you may have a greater chance of prevailing on a motion to revoke probation then if he tests positive. However, advise your defendant that either way is dangerous; one possibly less so than the other.

D. Injurious or Vicious Habits

What is the community supervision officer alleging as their bases for saying something is a “habit” of the defendant? Obviously they must be made to prove what ever it is, is a “habit!”

“Probation may not be revoked on a finding of violation of any probationary condition other than that alleged or necessarily included within the allegations in the motion to revoke probation.”⁴¹ Meyers v. State, 780 S.W.2d 441 (Tex.App. — Texarkana 1989) citing Garcia v. State, 571 S.W.2d 896 (Tex.Crim.App. [Panel Op.] 1978).⁴² “A habit is a disposition or condition of the body or mind acquired by custom or a usual repetition of the same act or function.”⁴³ “It is a tendency for customary conduct acquired from frequent repetition of the same acts.” Id. at 446; Campbell v. State, 456 S.W.2d 918 (Tex.Crim.App.1970), citing, Black’s Law Dictionary

³⁵ Tex.Code Crim.Proc. Ann art. 42.12, Section 11 (a) (14), (Vernon 1993).

³⁶ Tex.Code Crim.Proc. Ann art. 42.12, Section 11 (a) (14), (Vernon 1993).

³⁷ Ortega v. State, 860 S.W.2d 561 (Tex.App.—Austin 1993) no pet.

³⁸ Ortega v. State, 860 S.W.2d 561 (Tex.App.—Austin 1993) no pet.

³⁹ Ortega v. State, 860 S.W.2d 561 (Tex.App.—Austin 1993) no pet.

⁴⁰ Ortega v. State, 860 S.W.2d 561 (Tex.App.—Austin 1993) no pet.

⁴¹ Meyers v. State, 780 S.W.2d 441 (Tex.App. -- Texarkana 1989) citing Garcia v. State, 571 S.W.2d 896 (Tex.Crim.App. [Panel Op.] 1978).

⁴² Meyers v. State, 780 S.W.2d 441 (Tex.App. -- Texarkana 1989) citing Garcia v. State, 571 S.W.2d 896 (Tex.Crim.App. [Panel Op.] 1978).

⁴³ Id. at 446; Campbell v. State, 456 S.W.2d 918 (Tex.Crim.App.1970), citing, Black’s Law Dictionary (4th ed.).

(4th ed.).⁴⁴ “Evidence of a single act cannot constitute a habit. Id. citing Garcia v. State, 571 S.W.2d 896; Morales v. State, 538 S.W.2d 629 (Tex.Crim.App.1976); Marshall v. State, 466 S.W.2d 582 (Tex.Crim.App.1971).⁴⁵

The State has the burden to prove by a preponderance of the evidence that the defendant has failed to avoid an injurious or vicious habit. If, at the end of the State’s case, the only testimony that has been produced regarding this issue is a one or two time event, it is doubtful this will satisfy their burden..

E. Paying Fines, Fees and Other Costs

A commonly missed defense in Motions to Revoke Probation is that of forcing the State to prove that the Defendant intentionally did not pay.

There are several, but at least two major defenses to not paying fines, fees and other costs. The first is that the State must prove that the probationer’s failure to pay the costs was intentional.⁴⁶ Ortega at 566. The second defense is the affirmative defense of inability to pay.⁴⁷ Id.

“The State has the burden to prove that the probationer intentionally failed to pay fees and costs” Id. 567 ⁴⁸ “The State has the burden even if the probationer fails to raise the issue of inability to pay as an affirmative defense.⁴⁹ Id. Things that constitute intentionally failing to pay: paying some months and not the others and having a job for a couple of months and not paying. Id.⁵⁰ Should you have testimony come out from the community supervision officer that the probationer paid some months and not the others, you probably should put on an affirmative defense, but still argue that the State has not met it’s burden of “intentionally failing to pay.”

⁴⁴ Id.

⁴⁵ Id. citing Garcia v. State, 571 S.W.2d 896; Morales v. State, 538 S.W.2d 629 (Tex.Crim.App.1976); Marshall v. State, 466 S.W.2d 582 (Tex.Crim.App.1971).

⁴⁶ Ortega at 566.

⁴⁷ Ortega at 566.

⁴⁸ Id. 567; See also, Smith v. State, 790 S.W.2d 366, 367 (Tex.App.--Houston [1st Dist.] 1990, pet. ref’d).

⁴⁹ Id. 567; See also Stanfield v. State, 718 S.W.2d 734 (Tex.Crim.App. 1986); Lee v. State, 952 S.W.2d 894 (Tex.App--Dallas 1997); Washington v. State 731 S.W.2d 648, 650 (Tex.App.--Houston [1st Dist.] 1987, no pet.).

⁵⁰ Id.

Ortega differentiates between a fine and other costs and fees. Pursuant to the 14th Amendment, the State must show that the probationer not only willfully refused to pay or that he made no “bona fide” effort to legally acquire the resources to pay the fine.⁵¹ Id.

Generally the State calls the probation officer to the witness stand and he/she testifies to the missed payments. If this is all of the testimony regarding pay history, the burden has not been met.

F. Remain Within The State Of Texas

Article 42.12 §11 (a) (7), “Remain within a specified place.”⁵² is another vague and possibly undelegable condition. Generally this condition is worded, “unless you receive written permission from the community supervision officer.” Although no cases were found on point, this arguably appears to be an improper delegation of court authority. §11 (a) states, “[T]he judge shall determine the conditions... and may, at any time... alter or modify any reasonable condition.⁵³ Thus, unless specifically stated in (a) (7) that the community supervision officer may make this decision, the delegation of this authority would appear to be improper.

G. Submit To Polygraph

Some courts use polygraphs for sex offender probationers. The polygraph appears to be more of a tool than a potential revocation allegation. This tool of the court is sometimes misused as it has the probationer confess to new offenses or to having thoughts about committing new offenses in the pre or post-test interview. The probationer has very little, if any rights during this conversation, as it is not considered a custodial interrogation.⁵⁴ Therefore, statements that probationer makes to their probation officer can be used to revoke their probation.⁵⁵ It would be strongly advised that you warn the defendant that is accepting probation regarding his future statements to his probation officer. Treating the polygraph condition as you would the urinalysis

⁵¹ Id. 567; See also Bearden v. Georgia, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983)

⁵² Tex.Code Crim.Proc. Ann art. 42.12, Section 11 (a) (7), (Vernon 1993).

⁵³ Tex.Code Crim.Proc. Ann art. 42.12, Section 11 (a), (Vernon 1993).

⁵⁴ Holmes v.State, 752 S.W.2d 700 (Tex.App-Waco 1988).

⁵⁵ Id. at 701.

condition may be a wise course of action. Except for one additional argument. An objection should be made to the admissibility of the test results based on the lack of scientific acceptance at this time.⁵⁶ Although none of the cases cited involve probation, the law in Texas appears be clear on the exclusion of polygraph evidence at this time.

H. Violation Of Non Condition

Be careful when you alleged, or are reviewing, violations on the State's Motion to Revoke Community Service. Every so often, the State will allege a violation that is truly not even a condition of probation.

Examples of non-conditions have been found to be:

- Failing to report by mail when conditions states to report in person.
- Leaving the State of Texas without permission when defendant actually had permission to go from Texas to State X but then left State X without permission. This is not a violation of community supervision.⁵⁷
- When the Probationer lives outside of the county he took the probation in and the conditions of probation state to report to county in which he took probation in but the probation officer orally tells probationer to report in county in which he has transferred. There are several similar fact scenarios to this. But the key to look for is who the probationer is to report to in the conditions of community supervision and which county he is being accused of not reporting to.

I. Condition Of Supervision-privacy

During the period of community supervision, the probationer's expectation of privacy is substantially lessened with regard to the degree of intrusion permitted by the probation officer who is supervising the probationer's performance of the terms and conditions of his probation. Probation supervision gives rise to special needs, "permitting a degree of

⁵⁶ Ternard v. State, 802 S.W.2d 678 (Tex.Crim.App 1990) polygraph not to be used for any purpose; Cardenas v. State, 1998 WL 19646 (Tex.App. -- Texarkana 1998) Not released for publication; Berotte v. State, 1997 WL 543042 (Tex.App—Houston [1st Dist] 1997); Darby v. State, 922 S.W.2d 614 (Tex.App--Ft. Worth 1996).

⁵⁷ Burgess v. State, 628 S.W.2d 116 (Tex.App -- Beaumont 1982).

impingement upon privacy that would not be constitutional if applied to the public at large." Garrett v. State, 791 S.W.2d 137 (Tex.Cr.App. 1990). A probationer enjoys only "conditional liberty properly dependent on observance of special [probation] restrictions." Morrissey v. Brewer, 408 U.S. 471, 480, 92 S.Ct. 2593, 33 L.Ed2d 484 (1972). A probation officer can question a probationer as to whether the probationer is violating the terms and conditions of his probation and such questioning is not considered custodial interrogation. Harrison v. State, 929 S.W.2d 80, 83 (Tex.App.--Eastland 1996), rehearing overruled. A probation officer can randomly contact and interview the persons they are supervising and, under certain circumstances, can conduct a warrantless search. Id., at 83. Rehabilitation of the defendant and public safety "demand" that probation officers be allowed to monitor probationers under their supervision. Id.

J. Conditions Of Supervision-Modification

Because the trial court retains continuing jurisdiction over a defendant's probation, it has almost unlimited authority as a matter of law to alter or modify any condition of probation during the probationary period. Stevens v. State, 938 S.W.2d 517 (Tex.App.--Fort Worth 1997), rehearing overruled. Art. 42.12, Sections 10(a) and 11(a). However, once the term of probation expires, the trial court lacks jurisdiction to alter or to modify the defendant's probation. Ex parte Lewis, 934 S.W.2d 801 (Tex.App.--Houston [1 Dist.] 1996).

VI. REVOCATION OR ADJUDICATION

Sometimes the defendant breaches the contract, or at least the community supervision officer thinks he does. When this happens a motion to revoke or a motion to adjudicate is filed. The court may issue an order or arrest and the defendant is arrested and detained.

A. Right To Bail

The right to bail pending a hearing on a motion to revoke is only guaranteed to those who have not been convicted. In Texas, this means that those on regular probation have to RIGHT to bail, but those defendants on deferred do.⁵⁸ The practical matter is that generally bail is afforded all defendants regardless of their confinement status.

⁵⁸ Whitely v Warden 401U.S. 560 (1985)

B. Twenty Day Rule

The defendant must make by motion, his request for a hearing regarding his supervision status. It is of no moment that a motion to revoke has not been filed by the state. If the defendant is detained he may at anytime, file his request and the court must conduct a hearing within 20 days of the filing.⁵⁹ Should the hearing not come about within the allotted time, the defendant's remedy is to have the proceeding dismissed. However, the **proceeding is dismissed without prejudice** and the allegations may be refiled. There is a necessity that the defendant be in custody at the time he files for the 20 day rule to be effective.⁶⁰

C. Speedy Revocation Hearing

Counsel is to be reminded that there is a difference between the 20 day rule hearing and the right of the defendant to a speedy revocation hearing. A petition for writ of mandamus is the vehicle for the speedy revocation hearing. The denial of the right to this hearing has as its **remedy the dismissal** of the allegations **with prejudice**.⁶¹

D. Jurisdiction

The trial court retains jurisdiction to revoke probation even after the probationary period expires **if** the state has filed a motion to revoke **and** a *capias* or arrest warrant was issued **before** the probationary period expired. Sessions v. State, 939 S.W.2d 796 (Tex.App.--El Paso 1997).

E. Due Diligence

Additionally, the state must exercise **due diligence** to apprehend the probationer as well as to hear and determine the allegations in the motion. Prior v. State, 705 S.W.2d 179, 184 (Tex.Crim.App. 1990).

The case law is clear that due diligence must be used. However, the case law vacillates as to whether due diligence is jurisdictional in nature. Harris v. State, 843 S.W.2d 34 (Tex.Crim.App. 1992).

Once the probationer raises the issue of lack of diligence in arresting the probationer and bringing him before the trial court, the burden of proving due diligence is on the state. Any delays in apprehending the probationer must be explained by the state. The fact that the probationer is out of state does not relieve the state of its burden. Merely placing a warrant for

the probationer's arrest in a computer system and updating that system does not satisfy due diligence. Sessions, supra.

VII. THE MOTION ITSELF

A. Timely

The Motion to Adjudicate or Motion to Revoke must be filed timely. That is to say that it, and any amendments it may have, must be filed before the expiration of the period of supervision.⁶²

B. Written

The allegations in the motion may be broad but not vague. If specificity is desired by the defendant it must be asked for by a motion to quash.⁶³

VIII. HEARING ON REVOCATION OR ADJUDICATION

A. Requirements

The law in this state holds that a defendant may be held and subject to a hearing on his community supervision status if:

- 1./ a motion to revoke or adjudicate was filed before the expiration of the supervisory period;
- 2./ an arrest warrant or other similar instrument was issued before the expiration of the supervisory period; and
- 3./ the State has exercised due diligence in securing the presences of the defendant for the hearing.⁶⁴

The burden of proof on the three requirements is upon the state at a preponderance of the evidence level. However, merely showing that the motion was filed, the arrest warrant given to law enforcement and that the defendant did not report, does not satisfy this burden.⁶⁵ It is interesting to note that only in Motions to Revoke hearings is there an enumerated burden. Motion to Adjudicate hearings have no such pronounced burden. Perhaps the argument may be

⁵⁹ Art.42.12 §21(b)

⁶⁰ Aguilar v State, 621 SW2d 781, (Tex.Crim.App. 1981)

⁶¹ Strunk v United States, 412 U.S.434 (1973)

⁶² Guillot v State, 543 SW2d 650, (Tex.Crim.App. 1976)

⁶³ Labelle v State, 692 SW2d 102, (Tex. Crim. App.1985)

⁶⁴ Rodriguez v. State, 804 SW2d 516, (Tex.Crim.App. 1991)

⁶⁵ Id at 519

made, that since you cannot appeal from a motion to adjudicate then why have a burden, but that really seems rather autocratic.

B. Rules Of Evidence Apply

It bears repeating, that the rules of evidence apply in these hearing, from objecting to hearsay, to invoking the rule and having the supervising officer excluded as a non essential party to the state's presentation of its case.⁶⁶

C. Hearing

The proceeding to revoke probation is not criminal or civil but is an administrative proceeding in which the rules of criminal evidence and procedure are generally applicable. Cobb v. State, 851 S.W. 2d 871, 873 (Tex.Crim.App. 1993).

The probationer must be represented by counsel at a hearing on the motion to revoke his probation. Revocation without counsel is invalid. It is the state's burden on appeal to establish that the record affirmatively shows a valid waiver of counsel. Lugaro v. State, 904 S.W.2d 842 (Tex.App.--Corpus Christi 1995).

Allegations contained within the motion to revoke probation must be stated clearly and fully so that the defendant might be informed of the facts against which he will be required to defend, however, the allegations need not be set forth with the same degree of particularity that is required in an indictment or information. Smith v. State, 932 S.@.2d 279 (Tex.App.--Texarkana 1996); LaBelle v. State, 692 S.W.2d 102 (Tex.Crim.App. 1985).

The state's burden at the revocation hearing is by preponderance of the evidence. Brumbalow v. State, 933 S.W.2d 298 (Tex.App.--Waco 1996), rehearing overruled, and review refused. In a probation revocation, the defendant's plea of true alone is sufficient to prove that the defendant violated conditions of his probation. Hays v. State, 936 S.W.2d 469 (Tex.App.--Fort Worth 1996). Evidence at a probationer's revocation hearing was sufficient by preponderance of the evidence to establish that the probationer had been driving while intoxicated even though a jury had acquitted the defendant of the state DWI charges. U.S. v. Teran, 98 F3d 831. Proof of a single violation is sufficient to support revocation of a probation. Burke v. State, 930 S.W.2d 230 (Tex.App.--Houston [14th Dist.] 1996), review ref'd.

Inability of the probationer to make probation fee payments and court costs payments is an affirmative

defense for the probationer to raise and prove by preponderance of the evidence. The state has the burden of proving that the probationer intentionally did not pay the fees, costs, or fines. Lee v. State, 952 S.@.2d 894, 906 (Tex.App.--Dallas 1997); Stanfield v. State, 718 S.W.2d 734, 737 (Tex.Cr.App. 1986).

IX. COLLATERAL ESTOPPEL

When an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Ashe v. Swensen, 397 U.S. 436, 443, 90 S.Ct. 1189, 1194, 25 L.Ed.2d 469 (1970). If in a probation revocation hearing an issue is found by the court to be not true, the state is barred from relitigating that issue at any future trial or hearing, even if the defendant was not placed in jeopardy by the prior probation revocation proceeding. Todd v. State, 956 S.W.2d 777, 781 (Tex.App.--Waco 1997); Ex parte Tarver, 725 S.W.2d 195 (Tex.Crim. App. 1986). The prosecution must, therefore, be sure of its proof on each and every issue litigated in a motion to revoke or face the consequences of being unable to prosecute further a serious offense committed by the probationer upon a finding of "not true" regarding that alleged offense at a probation revocation hearing.

X. ART 42.12 §20 EARLY TERMINATION OF COMMUNITY SUPERVISION

A. Minium Time Frames

Upon conviction and the granting of community supervision the defendant must service a minium of 2 years or one-third the sentence (which ever is less) before eligibility of early termination arises. If, however, there was no adjudication of guilty there is no minium time frame for early termination eligibility.⁶⁷ Those defendants on community supervision for sex offenses against children must serve two-thirds of there community service time before they become eligible for early termination.⁶⁸ Those defendants., however, convicted of DWI related offenses and state jail felonies *are not* eligible for early termination.

B. Advantages

The granting of an early termination of community supervision will restore to the defendant the following civil rights:

⁶⁶ Henley v State, 783 SW2d 750 (Tex.App. Houston 1st)

⁶⁷ 42.12 §5(c).

⁶⁸ Id.

- Voting privileges^{69*}

Some defendants will want to exercise a voting privilege, it is noteworthy that such a privilege is suspended while they are on community supervision and for TWO years after completion of community supervision. However, if the trial court dismissed the accusation when discharging the person from community supervision the defendant's voting right is immediately restored.⁷⁰

- Jury service obligations^{71**72}; and
- Ability to hold public office.

XI. CONCLUSION

“Community supervision, properly used, is a highly effective tool for the prosecution. This paper in n way attempts to be an exhaustive discussion of community supervision. It si rather, from the prosecution's viewpoint, a glimpse of certain aspects of community supervision which the State should consider as basic considerations in its prosecution of cases involving community supervision .“

”Article 42.12 is a highly complex body of legislation. The foregoing contains selected guideposts for prosecutors to consider in community supervision cases. It is hoped that these guideposts will be of assistance.” **FRANCES B. MADDEN**

“I see it happen every week at the courthouse, attorney's talking with their clients or the prosecutors regarding community supervision violations. What I typically hear is as follows: “well they've got ya. You did not do this or you did not do that.” Then I watch revocation hearings where the typical strategy is what I call the “whining and crying” defense. Of course, I use this one too, and I am here to say it should be abandoned as the first line of defense. The attorney who represents defendant's on Motions to Revoke should begin the fight with a review of the defendant's conditions of community supervision. Many of the conditions as written and given to the defendant are unenforceable.” **STEVEN D. JACKSON**

⁶⁹ * Only lost, during period of community supervision, if regular probation is granted, not deferred.

⁷⁰ Election Code §11.002 (4)(A) & (B)

⁷¹ **Only lost, during period of community supervision, if regular probation for any offense, or on deferred for theft or any felony.

⁷² Payton v State, 572 SW2d 677, (Tex.Crim.App, 1978)