

PRETRIAL MOTIONS IN STATE COURT

BETTY BLACKWELL

Attorney at Law
Board Certified in Criminal Law
1306 Nueces Street
Austin, Texas 78701

State Bar of Texas
29TH ANNUAL ADVANCED CRIMINAL LAW COURSE
July 28-31, 2003
Dallas, Texas

CHAPTER 4.1

BETTY BLACKWELL
1306 Nueces Street
Austin, Texas 78701
(512) 479-0149
FAX: (512) 320-8743

BIOGRAPHICAL INFORMATION

EDUCATION

Summa Cum Laude From Texas A&M With a B.A. Degree
J.D. with Honors, The University of Texas Law School
Board Certified in Criminal Law

PROFESSIONAL ACTIVITIES

Chairman of the Criminal Justice Section of the State Bar of Texas, 2001
President of the Texas Criminal Defense Lawyers Association, 2001
Governor's Appointee to rewrite the Code of Criminal Procedure, 1996
Governor's Appointee to the Texas Punishment Standards Commission to Rewrite the Penal Code, 1994
Past Chairman of the Criminal Law & Procedure Section of the Travis County Bar Association
Past President and Founding Member of the Austin Criminal Defense Lawyers Association
Penal Code Committee of the State Bar of Texas
Legislative Chairman for the Texas Criminal Defense Lawyers Association, 1991
Voted Best Criminal Lawyer in Austin by the Austin Chronicle, 1994
Voted Best Trial Lawyer in Austin by the Travis County Women Lawyers Association, 1992
Committee for Indigent Representation in Criminal Matters for the State Bar of Texas
Presidential Award of Merit - TCDLA 1990, 1992, 1993, 1994, 1998, 2000
Ambassador Award, Austin Criminal Defense Lawyers Association, 1994

LAW RELATED PUBLICATIONS

Co-author with Judge Tom Blackwell and Judge Michael McCormick of Texas Practice Volume 7, 7A and 8, published by West Publishing Co.
Author/speaker for the State Bar of Texas Advanced Criminal Law
Author/speaker for Texas Criminal Defense Lawyers Association, Advanced Criminal Law Seminar, Legislative Update - 1993, 1994, 1996, 1997, 1998
Former Adjunct Professor of Law, University of Texas, Criminal Defense Clinic - 1992

TABLE OF CONTENTS

I. TIME LIMITATIONS	1
II. PROCEDURE IN A PRETRIAL HEARING	1
III. ENTRAPMENT	1
IV. MOTIONS TO QUASH	2
V. INSANITY NOTICE	2
VI. JEOPARDY	2
VII. MOTIONS TO SUPPRESS	3
VIII. MOTION TO SUPPRESS EVIDENCE OBTAINED FROM A SEARCH OR ARREST WARRANT	3
A. Good Faith Exception to the Warrant Requirement	3
B. Inevitable Discovery	4
C. Community Care Taking Function	4
D. State Constitutional Grounds	4
IX. MOTION TO SUPPRESS CONFESSION	4
A. Motion to Suppress Identification	4
B. Motion to Suppress Breath Test	5
C. Motion to Suppress DNA Test	5
D. Procedures	5
X. NOTICE REQUESTS	5
XI. ENTRAPMENT	5
XII. MOTION FOR SPEEDY TRIAL	6
XIII. DISCOVERY	6
A. Not Discoverable	6
B. Motion for Names of Expert Witnesses & Reciprocal Discovery	7
XIV. VENUE	7
XV. STATE’S RIGHT TO APPEAL	7
XVI. ELECTION FOR THE JURY TO ASSESS PUNISHMENT AND APPLICATION FOR PROBATION	7
XVII. 2003 LEGISLATION	8
XVIII. CONCLUSION	8
APPENDICES:	
Motion to Suppress Illegal Arrest	9

Motion to Suppress Illegal Search	9
Motion to Suppress Confession	10
Motion to Suppress Identification	11
Motion to Suppress Intoxilyzer Test	12
Motion to Suppress DNA Test	13
Motion for Notice	14
Request for Notice	15
Motion to Dismiss-Entrapment	16
Motion for a Speedy Trial	17
Motion to Dismiss for Failure to Provide a Constitutional Speedy Trial	18
Motion for Discovery and Inspection	19
Motion to Produce Exculpatory and Mitigating Evidence	24
Motion for Independent Expert Analysis	25
Motion for Independent Quantitative Weight Analysis	26
Motion for Names of State’s Witnesses	26
Motion for Disclosure of any Agreement With Witnesses	27
Motion to Require the Prosecution to Reveal Agreement With Witness	27
Defendant’s Motion for Change of Venue	28
Election for Jury to Assess Punishment	28

TABLE OF AUTHORITIES

<i>Ake v. Oklahoma</i> , 470 U.S. 68, 105 S.Ct. 1087 (1985)	7
<i>Ashe v. Swenson</i> , 397 U.S. 436, 90 S.Ct. 1189 (1970)	3
<i>Barker v. Wingo</i> , 407 U.S. 514, 92 S.Ct. 2182 (1972)	6
<i>Bell v. State</i> , 442 S.W.2d 716 (Tex.Cr.App. 1969)	1
<i>Blockburger v. U.S.</i> , 284 U.S. 299, 52 S.Ct. 180 (1932)	3, 4
<i>Bosley v.State</i> , 414 S.W.2d 468 (Tex.Cr. App. 1967)	5
<i>Brady v. Maryland</i> , 373 U.S. 83, 83 S.Ct. 1194 (1963)	6
<i>Brown v. Ohio</i> , 432 U.S. 161, 97 S.Ct. 2221 (1977)	3
<i>Brown v. State</i> , 880 S.W.2d 249 (El Paso-App. 1994)	5
<i>Buchanan v. State</i> , 911 S.W.2d 11 (Tex.Cr.App. 1995)	5
<i>Castillo v. State</i> , 818 S.W.2d 803 (Tex.Cr.App. 1991)	3
<i>Crawford v. State</i> , 892 S.W.2d 1 (Tex.Cr.App. 1994)	6
<i>Crist v. Bretz</i> , 437 U.S. 28, 98 S.Ct. 2156 (1978)	3
<i>Curry v. State</i> , 808 S.W.2d 481(Tex.Cr. App. 1991)	3
<i>Daubert v. Merrell Dow Pharmaceutical</i> , 509 U.S. 579, 113 S.Ct. 2786 (1993)	5
<i>Emery v. State</i> , 881 S.W.2d 702 (Tex.Cr.App. 1994)	6
<i>England v. State</i> , 887 S.W.2d 902 (Tex.Cr App. 1994)	6
<i>Erdman v. State</i> , 861 S.W.2d 890 (Tex.Cr.App. 1993)	5
<i>Etheridge v.State</i> , 903 S.W.2d 1 (Tex.Cr.App. 1994)	7
<i>Ex Parte Ramos</i> , 806 S.W.2d 845 (Tex.Cr.App. 1991)	3
<i>Ex parte Tarver</i> , 725 S.W.2d 195 (Tex.Cr.App. 1986)	3
<i>Flores v. State</i> , 827 S.W.2d 416 (Corpus Christi-App. 1992)	3
<i>Foster v. State</i> , 779 S.W.2d 845 (Tex.Cr.App. 1989)	1, 7
<i>Garcia v. State</i> , 829 S.W.2d 796 (Tex.Cr.App. 1992)	4
<i>Granados v. State</i> , 85 S.W.3d 217(Tex. Cr. App. 2002)	5

<i>Garner v. State</i> , 858 S.W.2d 656 (Ft. Worth-App. 1993)	3
<i>Graham v. State</i> , 769 S.W.2d 594 (Corpus Christi-App. 1989)	7
<i>Griffin v. State</i> , 765 S.W.2d 422 (Tex.Cr.App. 1989)	1
<i>Griffith v. State</i> , 976 S.W.2d 686 (Tyler-App. 1997)	6
<i>Gutierrez v. State</i> , 979 S.W.2d 659 (Tex.Cr.App. 1998)	7
<i>Hartman v. State</i> , 946 S.W.2d 60 (Tex.Cr.App. 1997)	5
<i>Hayden v. State</i> , 66 S.W.3d 269 (Tex. Cr.App. 2001)	5
<i>Heitman v. State</i> , 815 S.W.2d 681 (Tex.Cr.App. 1991)	4
<i>Jackson v. Denno</i> , 378 U.S. 368, 84 S.Ct. 1774 (1964)	4
<i>Jaubert v. State</i> 74 S.W.3d. 1 (Tex. Cr. App. 2002)	5
<i>Jordan v. State</i> , 897 S.W.2d 909 (Ft. Worth-App. 1995)	7
<i>Juarez v. State</i> , 758 S.W.2d 772 (Tex.Cr.App. 1988)	3
<i>Kelly v. State</i> , 824 S.W.2d 568 (Tex.Cr.App. 1992)	5
<i>Loserth v. State</i> , 985 S.W.2d 536 (San Antonio-App. 1998)	4
<i>McNeil v. State</i> , 650 S.W.2d 405 (Tex.Cr.App. 1983)	4
<i>McVickers v. State</i> , 874 S.W.2d 662 (Tex.Cr.App. 1993)	5
<i>Madrano v. State</i> , 67 S.W.3d 892(Tex. Cr. App. 2002)	7
<i>Martinez v. State</i> , 437 S.W.2d 842 (Tex.Cr.App. 1969)	4
<i>Meshell v. State</i> , 739 S.W.2d 246 (Tex.Cr.App. 1987)	6
<i>Michigan v. Jackson</i> , 457 U.S. 625, 106 S.Ct. 1404 (1986)	4
<i>Nix v. Williams</i> , 467 U.S. 431, 104 S.Ct. 2501 (1984)	4
<i>Oldham v. State</i> , 5 S.W.3d 840 (Houston-App, 14 th Dist. 1999)	6
<i>Passmore v. State</i> , 617 S.W.2d 682 (Tex.Cr.App. 1981)	6
<i>Polk v. State</i> , 704 S.W.2d 929 (Dallas-App. 1986)	3
<i>Postell v. State</i> , 693 S.W.2d 462 (Tex.Cr.App. 1985)	1, 7
<i>President v. State</i> , 926 S.W.2d 805 (Austin-App. 1996)	5

<i>Proctor v. State</i> , 967 S.W.2d 840 (Tex.Cr.App. 1998)	2
<i>Redman v. State</i> , 533 S.W.2d 29 (Tex.Cr.App. 1976)	6
<i>Riggall v. State</i> , 590 S.W.2d 460 (Tex.Cr.App. 1979)	1
<i>Russell v. State</i> , 717 S.W.2d 7 (Tex.Cr.App. 1986)	1
<i>Scott v. State</i> , 825 S.W.2d 521 (Dallas-App. 1992)	6
<i>Simmons v. U.S.</i> , 390 U.S. 377, 88 S.Ct. 967 (1968)	1
<i>Smith v. State</i> , 541 S.W.2d 831 (Tex.Cr.App. 1976)	6
<i>Soto v. State</i> , 681 S.W.2d 602 (Tex.Cr.App. 1984)	1
<i>Stansbury v. California</i> , 511 U.S. 318, 114 S.Ct. 1526 (1994)	4
<i>State v. Baize</i> , 947 S.W.2d 307 (Amarillo-App. 1997)	7
981 S.W.2d 204 (Tex.Cr.App. 1998)	7
<i>State v. Brabson</i> , 966 S.W.2d 493 (Tex.Cr.App. 1998)	3
<i>State v. Brunner</i> , 917 S.W.2d 103 (San Antonio-App. 1996)	3, 5
<i>State v. Daugherty</i> , 931 S.W.2d 268 (Tex.Cr.App. 1996)	4
<i>State v. Perkins</i> , 911 S.W.2d 548 (Ft. Worth-App. 1995)	6
<i>State v. Turner</i> , 898 S.W.2d 303 (Tex.Cr.App. 1995)	2
<i>State v. Williams</i> , 938 S.W.2d 456 (Tex.Cr.App. 1997)	6
<i>Strickler v. Greene</i> , 527 U.S. 263, 119 S.Ct. 1936 (1999)	6
<i>Studer v. State</i> , 799 S.W.2d 263 (Tex.Cr.App. 1990)	2
<i>Taylor v. State</i> , 886 S.W.2d 262 (Tex.Cr.App. 1994)	1
<i>Terrell v. State</i> , 521 S.W.2d 618 (Tex.Cr.App. 1975)	6
<i>Texas v. Cobb</i> , 532 U.S. 162, 121 S.Ct. 1335 (2001)	4
<i>Tharp v. State</i> , 935 S.W.2d 157 (Tex.Cr.App. 1996)	3
<i>Thomas v. State</i> , 841 S.W.2d 399 (Tex.Cr.App. 1992)	6
<i>Torres v. State</i> , 980 S.W.2d 873 (San Antonio-App. 1998)	1
<i>U.S. v. Bagley</i> , 473 U.S. 667, 105 S.Ct. 3375 (1985)	6

U.S. v. Dixon,
 509 U.S. 688, 113 S.Ct. 2849 (1993) 3

U.S. v. Leon,
 468 U.S. 897, 104 S.Ct. 3405 (1984) 3

Ussery v. State,
 651 S.W.2d 767 (Tex.Cr.App. 1983) 7

Valle v. State,
 950 S.W.2d 413 (Houston-App. 1997) 5

Wagner v. State,
 687 S.W.2d 303 (Tex.Cr.App. 1984) 2

Wilson v. Arkansas,
 514 U.S. 927, 115 S.Ct. 1914 (1995) 3

Wright v. State,
 7 S.W.3rd 148 (Tex.Cr.App. 1999) 4

PRETRIAL MOTIONS IN STATE COURT

Article 28.01 of the Code of Criminal Procedure establishes the procedure for pretrial hearings in State Court in Texas.

The Court **may** set the case for a pretrial hearing after notice to both sides. This is not mandatory. *Bell v. State*, 442 S.W.2d 716 (Tex.Cr.App. 1969). The hearing can not be set without providing 10 days notice to the Defendant in which he is to file written motions. The Defendant is allowed at least 10 days after arrest and 10 days after the service of the indictment to file his motions. Article 27.11 and 27.12C.C.P.

All matters must be filed 7 days prior to the hearing and if not, then **they are not allowed to be filed, except by permission of the court for good cause shown.**

The pretrial hearing shall be to determine any of the following:

1. Arraignment and appointment of counsel,
2. Pleadings of the Defendant,
3. Special pleas i.e., former jeopardy,
4. Motion to quash the indictment or information,
5. Motion for continuance,
6. Motions to suppress evidence,
7. Motions for change of venue,
8. Motions for discovery,
9. Motions on entrapment,
10. Motions for interpreter.

I. TIME LIMITATIONS

Failure to timely file a motion allows the trial court the discretion to refuse to consider the motions that were not filed and presented at the scheduled 28.01 hearing. *Postell v. State*, 693 S.W.2d 462 (Tex.Cr. App. 1985). Local rules may try to change these time periods. They can not override the statutory time periods.

However, in some cases, the Court of Criminal Appeals has held that Article 28.01 will not bar consideration if it has “become a question of constitutional dimension”. *Foster v. State*, 779 S.W.2d 845 (Tex.Cr.App. 1989). This is a change of venue case.

II. PROCEDURE IN A PRETRIAL HEARING

The presence of the attorneys and the Defendant is required during the hearing. *Riggall v. State*, 590 S.W.2d 460 (Tex.Cr.App. 1979). Counsel for the Defendant has the right to open and conclude the

argument upon all pleadings. Art. 28.02 C.C.P. A Defendant may testify at a pretrial hearing without being subject to cross examination on matters not covered. The Defendant does not give up his 5th amendment privilege against self incrimination simply because he wishes to testify about a 4th amendment violation or an illegal confession. *Simmons v. U.S.*, 390 U.S. 377, 88 S.Ct. 967 (1968). See also Rules of Evidence Rule 104 (d).

The Defendant has the initial burden of raising an issue at the pretrial hearing. The burden of persuasion may shift to the State, for example:

1. In a motion to suppress, if the Defendant shows that the arrest and/or search were without a warrant, the burden shifts to the State to show a lawful exception. *Russell v. State*, 717 S.W.2d 7 (Tex.Cr.App. 1986).
2. If the Defendant objects to the admissibility of a confession, the State has the burden of proving that the confession is voluntary. Article 38.21 & 38.22 and *Griffin v. State*, 765 S.W.2d 422 (Tex.Cr.App. 1989).
3. Once entrapment is raised, the burden is on the State to disprove entrapment beyond a reasonable doubt. *Soto v. State*, 681 S.W.2d 602 (Tex.Cr. App. 1984).

III. ENTRAPMENT

In 1998 the San Antonio Court of Appeals considered the issue of entrapment in *Torres v. State*, 980 S.W.2d 873. The Court held,

“Having found that Torres lacked the necessary criminal intent and that inducement was met under the England test, we find that sufficient evidence existed to support a defense of entrapment. We cannot sustain, based on these facts, that a rational trier of fact could have found the essential elements of the offense and against Torres's defense beyond a reasonable doubt. For the reasons stated above, we reverse the judgment of the trial court and order dismissal of all charges.” at page 877.

In *Taylor v. State*, 886 S.W.2d 262 (Tex.Cr.App. 1994) the issue presented was whether the State could appeal a trial court's pretrial dismissal granted on the basis of entrapment.

In prosecution for delivery of controlled substance, the District Judge at the pretrial hearing found evidence sufficient to sustain entrapment defense, and entered order dismissing indictment. State appealed. The Court

of Appeals, Second Supreme Judicial District, Fort Worth, dismissed State's appeal for want of appellate jurisdiction, and State petitioned for discretionary review. The Court of Criminal Appeals held that pretrial order dismissing prosecution on ground of entrapment was not appealable. Affirmed.

White, J., dissented.

Particular Motions

IV. MOTIONS TO QUASH

Article 1.14 states that the objection to the indictment or information must be made before the date on which the trial on the merits commences, or it is waived. However, it also states that the time period can be shortened by the trial court if a hearing is set pursuant to Article 28.01. If a pretrial hearing is set, then the motion to quash must be filed 7 days prior to the hearing and heard at that time or it is waived. See *State v. Turner*, 898 S.W.2d 303 (Tex.Cr.App. 1995) which held that a motion to quash based on the statute of limitations was waived when it was filed on the day of trial. The court also suggested that the mere filing of a motion is not sufficient and that a hearing or a request for a hearing must be made prior to trial in order to preserve error.

Statute of Limitations must be asserted at or before the day of trial. *Proctor v. State*, 967 S.W.2d 840 (Tex.Cr.App. 1998) or the defense is forfeited even on a plea of guilty.

“ In short, we conclude, and hold, that the statute of limitations belongs in the third category of rules. The defense it creates is forfeited if not asserted at or before the guilt/innocence stage of trial. Before trial, a Defendant may assert the statute of limitations defense by filing a motion to dismiss under Article 27.08(2) of the Texas Code of Criminal Procedure. At trial, the Defendant may assert the defense by requesting a jury instruction on limitations if there is some evidence before the jury, from any source, that the prosecution is limitations-barred. If there is some such evidence and the Defendant requests a jury instruction on the limitations defense, then the State must prove beyond a reasonable doubt that the prosecution is not limitations-barred. Compare Tex. Penal Code § 2.03. Finally, the Defendant may, either before trial or at trial, waive the statute of limitations defense. This procedural scheme will serve adequately to effectuate the purposes of the statute of limitations, while bringing some clarity and simplicity to this area of the law. Anything in our prior decisions to the contrary is overruled.”

Proctor v. State, 967 S.W.2d 840 (Tex.Cr.App. 1998).

----- Excerpt from page 967 S.W.2d 844.

Studer v. State, 799 S.W.2d 263 (Tex.Cr.App. 1990) held that the failure to object **even to the absence of an essential element in the indictment**, waived the defect. The State can appeal the trial court's dismissal of an indictment or information if the motion to quash is granted. CCP 44.01

See West's Texas Practice, Volume 7, Chapter 51, for the specific allegations that can be raised in a Motion to Quash and for what allegations are not subject to a Motion to Quash.

V. INSANITY NOTICE

Article 46.03 Sec. 2(a) of the Code of Criminal Procedure provides that a Defendant planning to offer evidence of insanity, shall file a notice of his intention:

1. At least 10 days prior to trial, or
2. If the court sets a pretrial hearing before the 10-day period, the Defendant shall give notice at the hearing.
3. If the Defendant raises the issue of his incompetency to stand trial before the 10-day period, he shall at the same time file notice of his intention to offer evidence of the insanity defense.

Sec. (b) Unless notice is timely filed pursuant to Subsection (a) of this section, **evidence on the insanity defense is not admissible** unless the Court finds that good cause exists for failure to give notice.

See form West Texas Practice, Volume 7, Section 79.02.

The notice must be given no less than 10 days prior to the date the case is **set** for trial, not the actual trial date. *Wagner v. State*, 687 S.W.2d 303 (Tex.Cr.App. 1984).

*** See new SB 1057 for new procedures relating to incompetency in criminal cases.

VI. JEOPARDY

Under Article 27.05, the Defendant's special plea that he has already been prosecuted for the same or different offense arising out of the same criminal episode that was or should have been consolidated into one trial, and that the former prosecution:

1. Resulted in acquittal;
2. Resulted in conviction;
3. Was improperly terminated; or
4. Was terminated by a final order or judgment for the Defendant and that necessarily required

a determination inconsistent with a fact that must be established to secure conviction. This is collateral estoppel.

The plea must be verified by affidavit of the Defendant, and all issues of fact can be presented to the trier of fact. Article 27.06 & 27.07. These are specifically listed in 28.01 as must be filed with pretrial motions. If the judge does not grant on legal grounds, any factual dispute can then be submitted to the jury.

Double Jeopardy is prohibited in the U.S. Constitution, Amendment V & XIV and in the Texas Constitution, Article I, Sec.14. Because this involves constitutional issues, a violation of a state statute that requires such motion be filed at a certain time, should not prevent subsequent consideration of the issue.

Jeopardy attaches in a jury trial when the jury is impaneled and sworn, and in a bench trial when the first witness is sworn. *Crist v. Bretz*, 437 U.S. 28, 98 S.Ct. 2156 (1978).

To determine whether the State is attempting to punish an accused twice for the same offense, the court must examine each of the statutes to determine whether each requires proof of an additional element that the other does not. This is known as the Blockburger test. *Blockburger v. U.S.*, 284 U.S. 299, 52 S.Ct. 180 (1932) readopted in *U.S. v. Dixon*, 509 U.S. 688, 113 S.Ct. 2849 (1993).

Retrial after a mistrial can violate double jeopardy unless the Defendant consents or if the mistrial was granted by some form of manifest necessity. *Garner v. State*, 858 S.W.2d 656 (Ft. Worth-App. 1993).

Double Jeopardy includes collateral estoppel which means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated again between the same parties. *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189 (1970). A finding that a probation could not be revoked because the assault had not been committed, precluded a subsequent trial based on the assault. *Ex parte Tarver*, 725 S.W.2d 195 (Tex.Cr. App. 1986). ALR decisions do not collaterally estop the State from pursuing the D.W.I. case because the license suspension is not punishment, *Tharp v. State*, 935 S.W.2d 157 (Tex.Cr.App. 1996) and because the hearings do not involve the same parties since D.P.S. represents the State at the license hearing and the local prosecutor is not involved. *State v. Brabson*, 966 S.W.2d 493 (Tex. Cr. App. 1998).

Double Jeopardy may also be raised by habeas corpus either preconviction or post-conviction, *Ex Parte Ramos*, 806 S.W.2d 845 (Tex.Cr. App. 1991) since a constitutional right is involved. *Brown v. Ohio*, 432

U.S. 161, 97 S.Ct. 2221 (1977). The denial of the writ can be appealed before the trial on the merits.

VII. MOTIONS TO SUPPRESS

“No evidence obtained by an officer or other person in violation of any provision of the Constitution or law of the State of Texas, or of the Constitution or laws of the U.S. of America shall be admitted in evidence against the accused in the trial of any criminal case.” Article 38.23 of the Code of Criminal Procedure, which legislatively enacts U.S. Constitution, Amendment IV & XIV and Article 1, Section 9 & 19 of the Texas Constitution.

A trial court in conducting a motion to suppress, can determine the merit of the motion on the motions themselves, upon opposing affidavits, or upon oral testimony, at the court’s discretion. Article 28.01 (6). *State v. Brunner*, 917 S.W.2d 103 (San Antonio-App. 1996).

On the motion to suppress, the Defendant has the initial burden to establish that a search or seizure occurred and that no warrant was obtained; then the burden shifts to the State. If the State produces a warrant the burden shifts to the Defendant to show the warrant was invalid, but where there is no warrant, the burden is on the State to prove the legality of the arrest and/or search.

The common law of “knock and announce” principle forms part of the Fourth Amendment and is a factor to be considered in determining reasonableness of the search. *Wilson v. Arkansas*, 514 U.S. 927, 115 S.Ct. 1914 (1995).

Hearsay is admissible on the issue of probable cause to arrest or search or show consent to search. *Juarez v. State*, 758 S.W.2d 772 (Tex.Cr.App. 1988).

VIII. MOTION TO SUPPRESS EVIDENCE OBTAINED FROM A SEARCH OR ARREST WARRANT

Where the affidavit contains both tainted and lawful information, if the lawful information independently establishes probable cause, the affidavit is not invalid. *Castillo v. State*, 818 S.W.2d 803 (Tex.Cr.App. 1991).

A. Good Faith Exception to the Warrant Requirement

U.S. v. Leon, 468 U.S. 897, 104 S.Ct. 3405 (1984).

Article 38.23(b) of the Texas Code of Criminal Procedure does not codify the Leon standard into Texas Law. *Curry v. State*, 808 S.W.2d 481 (Tex.Cr. App. 1991). Under Texas law, the affidavit supporting the warrant must state probable cause. *Flores v. State*, 827 S.W.2d 416 (Corpus Christi-App. 1992). *Polk v. State*,

704 S.W.2d 929 (Dallas-App. 1986)pdr-refused, held that the fact that police relied upon a warrant which proved to be invalid did not render admissible a confession which was fruit of the illegal arrest.

B. Inevitable Discovery

Federal law recognizes inevitable discovery as an exception to the exclusionary rule, see *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501 (1984).

There is no inevitable discovery exception to the Texas statutory exclusionary rule. *Garcia v. State*, 829 S.W.2d 796 (Tex.Cr.App. 1992). The Court held that the doctrine is a species of the harmless error rule which holds that constitutional violations in the seizure of evidence are inconsequential for purposes of admissibility, not when the outcome of the trial was probably unaffected by the illegality but, rather, when the outcome of police investigation was probably unaffected by it. However, this was rejected by the Court of Criminal Appeals as a reason to adopt this federal rule into state law. Per J. Benavides, with three Judges concurring, one Judge concurring the result, and two concurring specially. Rehearing denied. The rule was again recognized in *State v. Daugherty*, 931 S.W.2d 268 (Tex.Cr.App. 1996) rehearing denied.

C. Community Care Taking Function

Texas Court of Criminal Appeals has recognized a limited adoption of the federal rule that allows a warrant less stop and detention for the limited purpose of community care taking. *Wright v. State*, 7 S.W.3rd 148 (Tex.Cr. App. 1999).

D. State Constitutional Grounds

Motions to suppress should include both state and federal grounds as the state constitution can provide more protection than the federal constitution. *Heitman v. State*. Defendant was convicted in Dallas County of possession of methamphetamine with intent to deliver, and he appealed. The Court of Appeals, 776 S.W.2d 324, reversed and remanded. On discretionary review the Court of Criminal Appeals, Miller, J., held that: (1) when analyzing and interpreting search and seizure provision of the Texas Constitution, Court of Criminal Appeals will not be bound by United States Supreme Court decisions addressing the comparable Fourth Amendment issue, and (2) remand was required for consideration of Defendant's claim that inventory search violated search and seizure provision of the Texas Constitution. Reversed.

Heitman v. State, 815 S.W.2d 681 (Tex.Cr.App. 1991).

IX. MOTION TO SUPPRESS CONFESSION

Sometimes referred to as the *Jackson v. Denno* hearing, because in 1964 the Supreme Court mandated that the hearing on confessions must be made out of the presence of the jury. 378 U.S. 368, 84 S.Ct. 1774. This hearing can be held pretrial. If held during the trial it must be held outside the presence of the jury. This hearing is not waived by failing to file a pretrial motion. *McNeil v. State*, 650 S.W.2d 405 (Tex.Cr.App. 1983).

Article 38.22 of the Code of Criminal Procedure, Fifth Amendment to U.S. Constitution, and Article 10 of the Texas Constitution, in reference to statements of the Defendant, all require that the Defendant be **in custody**. Whether a Defendant is in custody depends upon the objective circumstances and not upon the objective views of the officers. *Stansbury v. California*, 511 U.S. 318, 114 S.Ct. 1526 (1994).

Once charges are filed, the right to counsel attaches and if it has been invoked, any subsequent police initiated interrogation to obtain a confession, is not an effective waiver of counsel **unless** the counsel has first given permission. *Michigan v. Jackson*, 457 U.S. 625, 106 S.Ct. 1404 (1986).

This rule was amended by the Supreme Court on April 2, 2001, in *Texas v. Cobb*, where five justices ruled that the Sixth Amendment right to counsel is "offense specific" and the fact that the Defendant had an attorney on the underlying burglary charge did not require the police to notify that attorney or obtain his/her permission to speak to the Defendant about capital murder charges arising out of the same burglary. Since burglary and capital murder are not the same offense under *Blockburger*, the Sixth Amendment right to counsel did not bar the police from interrogating the respondent about the murders, and his confession was therefore admissible. Court should enter findings of facts and conclusions of law on the admissibility of the confession. 532 U.S. 162, 121 S.Ct. 1335 (2001).

A. Motion to Suppress Identification

Defendant is entitled to a hearing out of the presence of the jury to determine if the out of court identification procedures tainted the in-court identification. *Martinez v. State*, 437 S.W.2d 842 (Tex.Cr.App. 1969).

Displaying a single photograph of the Defendant is impermissibly suggestive, and is reversible error unless the State can show the identification was not tainted by the procedure, *Loserth v. State*, 985 S.W.2d 536 (San Antonio-App. 1998).

B. Motion to Suppress Breath Test

In *Hartman v. State*, 946 S.W.2d 60 (Tex.Cr.App. 1997) the Court of Criminal Appeals held that all scientific evidence admitted at trial must satisfy Rule 702 of the Rules of Evidence. Rule 702 requires:

1. That the underlying scientific theory must be valid;
2. The technique applying the theory must be valid; and
3. The technique must have been properly applied on the occasion in question. This rule applies to the admission of a breath test into evidence.

The results of a breath test will not be admitted if the test was obtained involuntarily. In *Erdman v. State*, 861 S.W.2d 890 (Tex.Cr.App. 1993) the Court of Criminal Appeals held that telling a suspect that “if they pass the breath test they will be free to leave and if they refuse to take a breath test, they will go to jail”, was coercive and the results of the test were not admissible.

C. Motion to Suppress DNA Test

Rule 702 applies to the introduction of DNA testing. *Kelly v. State*, 824 S.W.2d 568 (Tex.Cr.App. 1992) and *Daubert v. Merrell Dow Pharmaceutical*, 509 U.S. 579, 113 S.Ct. 2786 (1993).

D. Procedures

Motions to suppress need not be made at pre-trial if timely made at trial. *Bosley v. State*, 414 S.W.2d 468 (Tex.Cr. App. 1967). The Court may determine the merits of a motion to suppress on the merits of the motion itself, upon opposing affidavits, or upon oral testimony. This can be important in a warrantless arrest situation where the officer fails to appear at the scheduled hearing. The court has the authority to grant the motion to suppress, only upon the motion itself without any testimony. Motorist charged with driving while intoxicated filed pretrial motion to suppress blood test results. The County Court at Law No. 8, Bexar County, Karen Crouch, J., entered order granting motorist's motion based on allegations in motion itself and without receipt of any other evidence, and State appealed. The Court of Appeals, Charles F. Campbell, J. (Assigned), held that motorist satisfied his initial burden of rebutting presumption of proper police conduct merely by announcing that he was ready to proceed on his suppression motion, and trial court could grant motion, without receipt of any additional evidence, based on allegations in motion itself. Affirmed. 917 S.W.2d 103,

State v. Brunner, (San Antonio-App. 1996) -PDR-refused.

The Rules of Evidence do not apply to pretrial hearings on the motion to suppress evidence. *Granados v. State*, 85 S.W.3d 217 (Tex. Cr. App. 2002) distinguished *McVickers v. State*, 874 S.W.2d 662 (Tex.Cr.App. 1993) saying that Rule 1101(b) Texas Rules of Evidence was not incorporated into the current rules of evidence.

Rule 103 of the Texas Rules of Evidence, states that once an objection is made outside the presence of the jury, it is not necessary to preserve error to repeat the objection when the evidence is admitted.

X. NOTICE REQUESTS

Under the Rules of Evidence, the accused may request reasonable notice of the State's intention to introduce extraneous transactions or evidence of prior convictions. Rule 404(b) & 609(f). No request is required and the statute requires the State to give notice of the child victim's statements, under 38.072 C.C.P. and of the Defendant's electronic recorded statement Chapter 38.22 Sec. 5(a).

The Defendant may request a pretrial hearing on the admissibility of such evidence.

If this request is in the form of a motion, then the Defendant must obtain a ruling from the trial court. *Valle v. State*, 950 S.W.2d 413 (Houston-App. 1997). However, if it is addressed to the attorney for the State, there is no requirement for any action by the court. *President v. State*, 926 S.W.2d 805 (Austin-App. 1996). An open file policy by the State does not satisfy notice requirements. *Buchanan v. State*, 911 S.W.2d 11 (Tex.Cr.App. 1995).

Failure to provide written notice upon request precludes the State from using prior conviction against the Defendant. *Brown v. State*, 880 S.W.2d 249 (El Paso App. 1994).

Notice is only required of extraneous offenses that the state intends to use in its case in chief. They are not required to give notice if it is used in cross examination or in rebuttal. *Jaubert v. State*, 74 S.W.3d 1 (Tex. Cr. App. 2002). The notice is satisfied if it is contained in written statements given to the defense. The state does not have to specifically state that they intend to use this evidence if it was produced to the defense in response to a request for notice. *Hayden v. State*, 66 S.W.3d 269 (Tex. Cr. App. 2001).

XI. ENTRAPMENT

At a pretrial hearing on Entrapment, the Defendant has the burden to establish as a matter of law that “he

was induced to do so by a law enforcement agent using persuasion or other means likely to cause persons to commit the offense.” If this burden is met, the case is dismissed. If there is a disputed factual issue, the defense must be presented to the jury. *Redman v. State*, 533 S.W.2d 29 (Tex.Cr.App. 1976).

The Texas statute is both objective and subjective. The Defendant has the burden of producing evidence that the conduct of the police was such as to induce an ordinary person to commit the offense (objective), and that but for this inducement the Defendant would not have engaged in the conduct (subjective). *England v. State*, 887 S.W.2d 902 (Tex.Cr.App. 1994).

XII. MOTION FOR SPEEDY TRIAL

The right to a speedy trial is guaranteed in the Sixth & Fourteenth Amendments to the U.S. Constitution, in Article I, Section 10 of the Texas Constitution, and Article 1.05 of the Code of Criminal Procedure. In determining whether the constitutional right to a speedy trial has been violated four factors are to be considered, i.e., the length of the delay, the reason for the delay, the assertion of the right to a speedy trial by the Defendant, and the possible prejudice to the Defendant due to the delay. *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182 (1972). The Texas Speedy Trial Act has been declared unconstitutional in *Meshell v. State*, 739 S.W.2d 246 (Tex.Cr.App. 1987).

The right to a speedy trial attaches once the Defendant has been charged or arrested. *Emery v. State*, 881 S.W.2d 702 (Tex.Cr.App. 1994). However, if not raised, the right is waived. *Oldham v. State*, 5 S.W.3d 840 (Houston-App. 14th Dist. 1999). PDR refused. If the court determines that the length of the delay deserves a speedy trial analysis, it is the State’s burden to excuse the delay. *Griffith v. State*, 976 S.W.2d 686 (Tyler App. 1997). Dismissal was proper in the case of a misdemeanor possession of marijuana which was delayed for 33 months after arrest. *State v. Perkins*, 911 S.W.2d 548 (Ft. Worth-App. 1995).

The Interstate Agreement on Detainers Act provides that a trial must be commenced within 120 days of the arrival of the prisoner in the receiving state and a Defendant is entitled to discharge with prejudice on a failure to comply. *State v. Williams*, 938 S.W.2d 456 (Tex.Cr.App. 1997). Article 51.14 of the Texas Code of Criminal Procedure, Article IV (c) provides that for good cause shown, the court having jurisdiction may grant any necessary or reasonable continuance. (E) provides that if the trial is not commenced, then the court shall enter an order dismissing the same with prejudice. The Interstate Agreement on Detainers Act is not unconstitutional, *id.*

XIII. DISCOVERY

Article 39.14 of the Code of Criminal Procedure provides that documents, papers, written statements of the Defendant, books, accounts, letters, photographs, object and tangible things, not privileged are discoverable. The Article specifically excludes witness statements and work product. The motion for discovery must specifically state the items sought and it must show that the items are in the possession of the State.

The defense is entitled to inspection and copying and has the right to have his own expert conduct independent examinations. *Terrell v. State*, 521 S.W.2d 618 (Tex.Cr.App. 1975)-for drugs. It is error to deny the Defendant’s timely motion for an independent chemical analysis of contraband. *Scott v. State*, 825 S.W.2d 521 (Dallas-App. 1992).

The State’s witnesses and their criminal records are subject to discovery, *Passmore v. State*, 617 S.W.2d 682 (Tex. Cr.App. 1981).

A. Not Discoverable

The defense is not entitled to police reports, grand jury testimony, State’s expert witnesses, child protective services files, or prior juror service or reports not in the prosecution’s possession.

Article 38.22 C.C.P. provides for a copy of both written and/or oral confessions to be made available prior to trial. The Texas Rules of Evidence provides for discovery. Rule 508 provides for discovery of the identity of an informant in certain circumstances.

Article 20.02 & 20.12 C.C.P. provide for mandatory recording of the accused before the grand jury. The discovery of the testimony is required on a showing of particularized need.

Article V of the U.S. Constitution requires disclosure of exculpatory and mitigating evidence under the doctrine in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). The State violates this right when (1) there has been a request and failure to disclose, (2) evidence favorable to the Defendant, (3) the evidence must have been wilfully or inadvertently suppressed by the State and (4) the evidence creates a probability sufficient to undermine the confidence in the outcome of the proceedings. *Thomas v. State*, 841 S.W.2d 399 (Tex.Cr.App. 1992), including confidential crime stoppers information. see *Crawford v. State*, 892 S.W.2d 1 (Tex.Cr.App. 1994). *Strickler v. Greene*, 527 U.S.263, 119 S.Ct. 1936 (1999).

Knowingly suppressing a plea agreement between the prosecution and a witness, is error. *U.S. v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375 (1985) and *Smith v. State*, 541 S.W.2d 831 (Tex.Cr.App. 1976).

Defendant's due process right to secure potentially exculpatory evidence during the trial is not waived by failing to file a pretrial discovery motion. *Crawford v. State*, 892 S.W.2d 1 (Tex. Cr. App. 1994).

Work product privilege will not shield the State from the requirement that exculpatory or mitigation evidence be disclosed. *Jordan v. State*, 897 S.W.2d 909 (Ft. Worth-App. 1995).

B. Motion for Names of Expert Witnesses & Reciprocal Discovery

As of September 1, 1999 there is now reciprocal discovery of expert witnesses provided in Article 39.14(b) for the names and addresses of expert witnesses under Rule 702, 703, and 705, to be called by the other party. This applies to the defense, if the State makes the motion.

The Defense has the right to ask that the court pay for the scientific evidence, including experts that the defense needs to present their evidence, if the Defendant is indigent. *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087 (1985).

XIV. VENUE

Change of venue is listed in Article 28.01 as a pretrial motion. However, because it involves a constitutional question, it can be raised at any time and is not limited by the statutory time requirements. *Foster v. State*, 779 S.W.2d 845 (Tex. Cr. App. 1989). Chapter 31 of the Code of Criminal Procedure sets out the mechanism to be used. To be entitled to a change of venue because of pre-trial publicity, the Defendant must establish that whatever publicity existed permeated the community to such extent that the venire person's initial opinion, if any, could not be set aside. *Etheridge v. State*, 903 S.W.2d 1 (Tex. Cr. App. 1994). Applicant must show that the prejudice in the community is such that the likelihood of a fair and impartial jury is doubtful. *Ussery v. State*, 651 S.W.2d 767 (Tex. Cr. App. 1983).

Failure to file a State's controverting affidavit, is reversible error if the court denies a proper venue motion without a hearing. However, if the trial judge offers the Defendant an opportunity to proceed on the motion and the defense refuses, the venue motion is waived. *Gutierrez v. State*, 979 S.W.2d 659 (Tex. Cr. App. 1998).

XV. STATE'S RIGHT TO APPEAL

Article 44.01(a) allows the state to appeal a pretrial order that "grants a motion to suppress evidence, a confession, or an admission", if jeopardy has not attached and the appeal is not for delay and the evidence is of substantial importance to the case. In *Roberts*

v. State, 940 S.W.2d 655 (Tex. Cr. App. 1996), the Court of Criminal Appeals had ruled that the State could not appeal the trial court's finding that a civil deposition was hearsay and therefore inadmissible. The 1987 statute referred only to motions to suppress not motions to exclude evidence. February 6, 2002 the Court of Criminal Appeals, in *Medrano v. State*, 67 S.W.3d 892 (Tex. Cr. App. 2002), overrules *Roberts*. In *Medrano*, the eyewitness failed to identify anyone at two lineups. The witness was then hypnotized and on the 3rd attempt, was able to identify Mr. Medrano. The trial court suppressed the identification. The Court of Appeals dismissed the appeal for want of jurisdiction. The evidence was excluded evidence not the suppression of illegally obtained evidence. The Court of Criminal Appeals granted the State's P.D.R. overruling *Roberts* and greatly expanding the state's right to appeal. There is a strong dissent by Judge Womack that points out that three legislatures have met without amending the statute since the *Roberts* decision. He accuses the majority of abandoning the doctrine of *stare decisis*.

XVI. ELECTION FOR THE JURY TO ASSESS PUNISHMENT AND APPLICATION FOR PROBATION

Article 27.02 of the Code of Criminal Procedure lists these two items as pleadings and motions of the **Defendant**. **Article 28.01 says that the** pretrial hearing shall be to determine any of the following:

(2) Pleadings of the Defendant.

Therefore, the time limitations contained in 28.01 have been held to apply to the Defendant's election for the jury to assess punishment. In that, if there is a pretrial hearing set and held pursuant to 28.01, if this is not on file seven days in advance, then the right to have the jury assess punishment is **waived**. *Postell v. State*, 693 S.W.2d 462 (Tex. Cr. App. 1985).

Article 37.07 Section 2 (b) applies if there is no pretrial hearing, the election must be made prior to the commencement of voir dire. This provision was added by the legislature after the decision in *Postell*. The appellate court has held that the provisions of 28.01 still apply. *Graham v. State*, 769 S.W.2d 594 (Corpus Christi-App. 1989). There is an argument that *Postell* was overruled by the amendment to 37.07 C.C.P. Under 37.07 the Defendant may change his/her election with the consent of the State. If such is done without the State's consent it is not an "illegal sentence" which would allow the State to appeal the sentence. See *State v. Baize*, 947 S.W.2d 307 (Amarillo, App. 1997) affirmed by the Court of Criminal Appeals, 981 S.W.2d 204 (1998).

XVII. 2003 LEGISLATION

SB 1057 rewrites the code for incompetency in criminal cases. If it is uncontested, the determination now can be made without a jury.

HB 297 allows for modification of an emergency protective order. A family court order entered subsequent to the protective order can override the conditions of the protective order. The emergency protective order may be transferred to the court assuming jurisdiction over the criminal case, where it can be modified.

HB982 amends Article 14.04 of the Code of Criminal Procedure allowing for the warrantless arrest of a person who confesses to a felony offense.

HB2668 reestablishes the mandatory probation for a person convicted of a states jail felony drug charge unless there is a prior conviction for a felony.

HB2795 amends last session's SB7 in relation to appointment of counsel in indigent cases. The time periods imposed under Article 15.17 do not apply to a person arrested that is taken to a hospital, clinic or other medical facility until the records show the person has been released from such facility.

HB2192 amends the controlled substances act.

HB2474 amends Article 16.02 of the Penal Code to provide a defense to computer trespassing if it is done by law enforcement personnel pursuant to Article 18.20 or with consent. Article 18.20 is expanded to allow interception of computer information by a federal law enforcement officer and Article 18.21 is amended.

SB1045 that would have created the Texas Innocence Commission died in the house committee after passing the Senate.

XVIII. CONCLUSION

Therefore, the number and type of pretrial motions is only limited by the imagination of the defense attorney. Many times, a pretrial hearing will decide important evidentiary issues that can resolve the case without a trial. Waiting until immediately prior to trial or during the trial can needlessly waste juror's valuable time. The accused also benefits in participating in the hearings in knowing that their motions are being heard, provides for the sense of a fair trial.

APPENDIX

THE FOLLOWING MOTIONS ARE REPRINTED WITH PERMISSION OF THE AUTHORS OF WEST'S TEXAS PRACTICE, VOL. 7, 7A, &8, JUDGE MICHAEL MCCORMICK, JUDGE THOMAS D. BLACKWELL, AND BETTY BLACKWELL

MOTION TO SUPPRESS ILLEGAL ARREST

To the Honorable Judge of Said Court:

The defendant, A.B., by and through his counsel respectfully moves this Honorable Court to suppress all evidence seized as the result of a search of the following premises [*describe the premises searched*] on the ___ day of ___, A.D. 19_, and the search of the person of the defendant [*or the search of the person of C.D.*] and all statements either written or oral made after the arrest of the defendant [*or the arrest of C.D.*].

The defendant relies upon the following reasons to support aforesaid motion.

I.

That the defendant was arrested without warrant and without probable cause in violation of the IV, V and XIV Amendments to the Constitution of the United States.

II.

That the search of his person and the premises in question incident to such arrest was therefore illegal and all the fruits of the search must be suppressed.

III.

That if such arrest or search were upon an arrest warrant or a search warrant the affidavit therefor did not allege sufficient facts to establish probable cause.

IV.

All statements either written or oral made after his, the said A.B.'s arrest [*or the arrest of C.D.*] are fruits of the illegal arrest and search and are therefore inadmissible as fruits of the poisonous tree.

Respectfully submitted,

Attorney for Defendant

[CERTIFICATE OF SERVICE]

[ORDER OF THE COURT]

§ 52.03 Motion to Suppress Illegal Search

[*Caption*]

MOTION TO SUPPRESS EVIDENCE

To the Honorable Judge of said Court:

Now comes the Defendant, A.B., by and through his attorney of record, and moves the court to suppress all evidence, materials and statements obtained from premises at ___ Street, city of ___, ___ County, Texas, on or about the ___ day of ___, 19___, by any law enforcement officer, on the following grounds:

I.

The law enforcement officers before and on the occasion in question unlawfully trespassed upon said premises and intruded upon the privacy of this Defendant without lawful authority, without probable cause and without a valid search warrant. The trespass and intrusion were followed by entry, search of premises and seizure of materials without consent or lawful authority and without a search warrant or probable cause.

II.

Defendant incorporates herein by reference the purported affidavit for search warrant made by ___ on or about the ___ day of ___, 19___, together with a search warrant issued by ___ Judge of ___ Court, and would show that the affidavit for search warrant and the warrant are legally insufficient and the allegations therein are invalid in that the same do not contain sufficient underlying facts adequately to inform the magistrate of how the alleged informant obtained his information and does not contain sufficient underlying facts to establish the credibility and reliability of the alleged informant.

III.

The trespass, intrusion, invasion, search of the premises and seizure of materials therefrom on the occasion in question violated the rights of this Defendant under the First, Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution and under Article I, Sections 9, 10 and 19 of the Texas Constitution.

IV.

Such search and seizure is therefore unlawful and all fruits thereof must be suppressed. All statements, either written or orally made, and all materials and substances seized during and after such acts were fruits of the initial violation of rights of this Defendant.

Wherefore, premises considered, Defendant prays that upon hearing, this motion be granted and that the evidence referred to herein be in all things suppressed and the District Attorney and his witnesses be ordered not to disclose to the Jury or Court or in any way to allude to the fact of any materials or statement obtained thereby.

Attorney for Defendant

[CERTIFICATE OF SERVICE]

[ORDER OF THE COURT]

§ 52.04 Motion to Suppress Confession

[Caption]

MOTION TO SUPPRESS CONFESSION

To the Honorable Judge of Said Court:

Now comes A.B., defendant in the above entitled and numbered cause, by and through his attorney of record, and requests the court to conduct a preliminary hearing out of the presence of the jury, to the end that the confession illegally obtained from the defendant during a custodial interrogation be suppressed, and the defendant would show the following:

I.

The alleged confessions, both oral and written, were the product of an unlawful arrest, illegal detention, and an unlawful search and seizure in direct violation of the Fourth and Fourteenth Amendments to the United States Constitution.

II.

The alleged confessions both oral and written are not the product of a free and voluntary decision of the Defendant, but were obtained by a direct violation of the Defendant's privilege against self-incrimination of the United States Constitution, Fifth Amendment.

III.

The Defendant was not immediately taken before a magistrate and given a warning of his constitutional and statutory rights as guaranteed by the United States Constitution and the Code of Criminal Procedure of the State of Texas.

IV.

The Defendant was not given a legally sufficient warning of constitutional and statutory rights as guaranteed by the United States Constitution and the Code of Criminal Procedure of the State of Texas by the person to whom Defendant allegedly gave an oral [*or* written] confession.

V.

The confession and statements were taken when the Defendant was without counsel, when he had not intelligently and knowingly waived his right of counsel.

VI.

That the alleged confession and statements were obtained in violation of the Defendant's rights under 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 Chapter 14 and Articles 38.21 and 38.22 of the Texas Code of Criminal Procedure.

Wherefore, premises considered, Defendant moves the court to hear evidence and make specific findings as to controverted issues of fact concerning the voluntariness of the alleged confession, and that on final hearing said statement be suppressed, and the state's attorney be instructed not to mention the same in the presence of the jury nor offer any evidence obtained thereby to the jury.

Attorney for Defendant

[CERTIFICATE OF SERVICE]

[ORDER OF THE COURT]

§ 52.06 Motion to Suppress Identification

[*Caption*]

MOTION TO SUPPRESS IDENTIFICATION

To the Honorable Judge of said Court:

Now comes A.B., Defendant in the above entitled and numbered cause, by and through his attorney of record and files this motion to suppress the illegal identification of the Defendant in this case and would show the court the following:

I.

After a formal complaint [*or* information *or* indictment] had been filed in this case on the ____ day of ____, 19__, the Defendant was arrested on said complaint and was taken to the ____ [*specify law enforcement agency*] where a line-up was conducted and at that time Defendant's counsel was not present [*or* defendant was without counsel and had not waived his right to counsel].

II.

Prior to the line-up the ____ [*law enforcement agency*] showed the witness, X, photographs of the Defendant and such picture spread was so impermissibly suggestive as to require the exclusion of any in-court identification.

III.

The line-up was conducted without any safeguards to prevent misidentification and in fact was so impermissibly suggestive as to require the exclusion of any in-court identification. The line-up was impermissibly suggestive in the following manner, to wit: ____ [*specify*].

IV.

The line-up procedure and the photographic spread were conducted in violation of the Defendant's rights under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States; so that the tainted identification of the Defendant by the witness X should be suppressed and witness X prohibited from making any in-court identification of the Defendant.

Wherefore, Premises Considered, Defendant prays that the Court conduct a hearing out of the presence of the jury to the end that the identification at the pre-trial line-up be suppressed and that the Witness X be prohibited from making an in-court identification of the Defendant.

Attorney for Defendant

[CERTIFICATE OF SERVICE]

[ORDER OF THE COURT]

§ 52.12 Motion to Suppress Intoxilyzer Test

[*Caption*]

MOTION TO SUPPRESS INTOXILYZER TEST

To the Honorable Judge of Said Court:

Now comes A.B., defendant in the above entitled and numbered cause, and files this motion to suppress a intoxilyzer test administered to the defendant in this case and in support of this motion would show the court the following:

I.

That before a intoxilyzer test is admissible before the jury, it is necessary for the State to prove a proper predicate as required by *French v. State*, 484 S.W.2d 716; *Cody v. State*, 548 S.W.2d 401; and *Hill v. State*, 256 S.W.2d 93.

II.

The defendant alleges that the proper procedures were not used and that the State will be unable to prove a proper predicate for the admission of the intoxilyzer test.

III.

In order to prevent the risk of prejudicing the jury with testimony concerning an inadmissible intoxilyzer test, it is requested that a hearing be had in advance of trial or out of the presence of the jury to determine the admissibility of such test.

Wherefore, Premises Considered, Defendant prays that the Court conduct a hearing in advance of trial or out of the presence of the jury to determine whether or not the State can prove a proper predicate for the admission of the results of the intoxilyzer test, and failing to prove such predicate that such testimony be suppressed.

Attorney for Defendant

[CERTIFICATE OF SERVICE]

[ORDER OF THE COURT]

§ 52.12A Motion to Suppress DNA Test

[CAPTION]

MOTION TO SUPPRESS DNA TEST

To the Honorable Judge of Said Court:

Now comes the Defendant in the above entitled and numbered cause, by and through his attorney of record, and files this his Motion to suppress a DNA test conducted in this case and would respectfully show the court the following:

I.

That before a DNA test is admissible before the jury the Defendant, under Texas Rules of Criminal Evidence, Rules 1.04 and 705(b), is entitled to a preliminary hearing out of the presence of the jury to determine the admissibility of the test conducted in this case.

II.

Admissibility of novel scientific evidence, such as a DNA test, is no longer governed by *Frye v. United States*, 293 Fed. 1013 (D.C.Cir.1923), but is governed by Rule 702 of the Texas Rules of Criminal Evidence. *Kelly v. State*, 824 S.W.2d 568 (Cr.App.1992). *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

III.

The burden of proof is on the State to prove by "clear and convincing" evidence that the scientific test is valid and reliable. *Kelly v. State*.

IV.

The factors to be considered by the trial judge in determining reliability include:

1. The extent to which the underlying scientific techniques are accepted as valid by the relevant scientific community.
2. The qualifications of the expert testifying.
3. The existence of literature supporting or rejecting the underlying scientific theory and technique.
4. The potential rate of error of the technique.
5. The availability of other experts to test and evaluate the technique.
6. The clarity with which the underlying technique can be explained to the court.
7. The experience and skill of the persons who applied the technique on the occasion in question.

Other factors are:

- 1. Whether there are testing errors that could lead to false results.
- 2. The care with which the technique was employed in this case.

V.

Texas Rules of Criminal Evidence, Rule 403, provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury ..."

Wherefore, Premises Considered, the Defendant respectfully prays that the Court conduct a hearing in advance of trial or out of the presence of the jury to determine whether the State can prove by "clear and convincing" evidence that the required predicate has been established and that the testing errors do not outweigh its probative value; and failing to make such proof that such evidence be suppressed.

Attorney for Defendant

[CERTIFICATE OF SERVICE]

[ORDER OF THE COURT]

§ 53.02 Motion for Notice

[Caption]

MOTION FOR NOTICE

To the Honorable Judge of Said Court:

Now comes A.B., defendant in the above entitled and numbered cause, by and through his attorney of record, and pursuant to Texas Rules of Criminal Evidence and the Texas Code of Criminal Procedure requests the Court to order the attorney for the State to give, in proper form, timely written notice to the Defendant of the proposed use of evidence specifically:

I.

Pursuant to Texas Rules of Criminal Evidence, Rule 404(b), written notice by the State, at least ten days prior to commencement of trial, of its intent to introduce evidence in its case in chief of any other crimes, wrongs, or acts allegedly committed by the defendant other than those alleged in the indictment [*or* information].

GRANTED ____ DENIED ____

II.

Pursuant to Texas Rules of Criminal Evidence, Rule 609(f) written notice by the State, at least ten days prior to commencement of trial, of its intent to use evidence of any prior convictions for the purpose of attacking the credibility of the following witnesses:

Name: A.B., Defendant—Date of Birth.

Name: ____ [*specify*] ____—Date of Birth.

GRANTED ____ DENIED ____

III.

Pursuant to Vernon's Ann.C.C.P art. 37.07, Sec. 3(g) written notice by the State, at least ten days prior to commencement

of trial, of its intent to introduce, at the punishment phase of the trial, evidence of extraneous crimes or bad acts allegedly committed by the defendant.

GRANTED ___ DENIED ___

IV.

The requested notice is specifically authorized by law, and the failure to provide such notice would deprive the defendant of his right to a fair trial, effective representation by counsel and due process of law as guaranteed by Article I, Sections 10 and 19 of the Texas Constitution, and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

Wherefore, Premises Considered, Defendant prays this Court order the Attorney for the State to provide the above requested information.

Attorney for Defendant

[CERTIFICATE OF SERVICE]

[ORDER OF THE COURT]

§ 53.02A Request for Notice From the State

[CAPTION]

REQUEST FOR NOTICE

TO THE ATTORNEY REPRESENTING THE STATE:

Now comes [A.B.], defendant in the above entitled and numbered cause, by and through his attorney of record, and pursuant to Texas Rules of Criminal Evidence and the Texas Code of Criminal Procedure requests the attorney representing the State to give to the Defendant in proper form, timely written notice to the Defendant of the proposed use of the following evidence:

I.

Pursuant to Vernon's Ann.C.C.P art. 37.07, Sec. 3(g) written notice by the State, at least ten days prior to commencement of trial, of its intent to introduce, at the punishment phase of the trial, evidence of extraneous crimes or bad acts allegedly committed by the defendant. Extraneous acts that have not resulted in a final conviction shall specify the date on which and the county in which the act occurred and the name of the alleged victim.

II.

Pursuant to Texas Rules of Criminal Evidence, Rule 404(b), written notice by the State, at least ten days prior to commencement of trial, of its intent to introduce evidence in its case in chief of any other crimes, wrongs, or acts allegedly committed by the defendant other than those alleged in the indictment [or information].

III.

Pursuant to Texas Rules of Criminal Evidence, Rule 609(f) written notice by the State, at least ten days prior to commencement of trial, of its intent to use evidence of any prior convictions for the purpose of attacking the credibility of the following witnesses:

Name: [A.B.], Defendant—[Date of Birth].

Name: [specify] —[Date of Birth].

IV.

The requested notice is specifically authorized by law, and the attorney representing the State is obligated to provide this information now requested.

Attorney for Defendant

[CERTIFICATE OF SERVICE]

§ 54.02 Motion to Dismiss—Entrapment

[*Caption*]

MOTION TO DISMISS—ENTRAPMENT

To the Honorable Judge of said Court:

Now comes A.B., Defendant in the above entitled and numbered cause, by and through his attorney of record and files this his Motion to Dismiss because the Defendant was entrapped into the commission of the offense and would show the following:

I.

The defendant's involvement in the conduct charged was induced by law enforcement agents using persuasion and other means likely to cause him to commit the offense, and such persuasion and means were independent of and exceeded conduct merely affording a person the opportunity to commit an offense.

II.

The facts of this case will reveal entrapment as a matter of law solely for the Court.

Wherefore, premises considered, the Defendant prays that the Court conduct a hearing in advance of trial to determine whether as a matter of law the Defendant was entrapped and upon a finding that the Defendant was entrapped the Court acquit the defendant and dismiss the case; or in the event the Court rules that the Defendant was not entrapped as a matter of law, that the Court submit the defense of entrapment to the jury as a question of fact.

Attorney for Defendant

[CERTIFICATE OF SERVICE]

[ORDER]

§ 54.03 Motion for a Speedy Trial

[Caption]

DEFENDANT'S MOTION FOR A SPEEDY TRIAL

To the Honorable Judge of Said Court:

Now comes A.B., Defendant in the above entitled and numbered cause, by and through his attorney of record and files this his motion for a speedy trial and would show the Court the following:

I.

On the ___ day of ___ A.D., 19_ the Defendant was charged with the offense of ___, alleged to have been committed on or about the ___ day of ___ A.D., 19_.

II.

The Defendant was arrested on the ___ day of ___ A.D., 19_ and confined in the County Jail of ___ County, Texas, to await trial on said charge.

III.

The Defendant was denied reasonable bond and has remained confined in said jail since his arrest. The Defendant has now been confined for ___ days waiting trial, and at all times the Defendant has been ready for trial.

IV.

The Defendant is being prejudiced by the State's delay because defense witnesses are becoming unavailable and such witnesses as remain will have forgotten facts that would be beneficial to the Defendant.

Wherefore the Defendant prays that he be granted a speedy trial on said charge or that said indictment [information] be dismissed and that the Defendant be released from confinement.

Attorney for Defendant

The State of Texas)
County of _____)

Before me, the undersigned authority, on this day personally appeared A.B., who after being duly sworn stated:

"I am the Defendant in the above entitled and numbered cause. I have read the foregoing motion for a speedy trial and swear that all of the allegations of fact contained therein are true and correct."

Defendant

Subscribed and Sworn to before me on this the ___ day of ___ A.D., 19_.

Notary Public in and for ___ County, Texas

[CERTIFICATE OF SERVICE]

[ORDER OF THE COURT]

§ 54.04 Motion to Dismiss—Failure to Provide a Speedy Trial

[Caption]

MOTION TO DISMISS FOR FAILURE TO PROVIDE A CONSTITUTIONAL SPEEDY TRIAL

To the Honorable Judge of Said Court:

Now comes A.B., defendant in the above entitled and numbered cause, by and through his attorney of record and files this his motion to dismiss and would show the Court the following:

I.

On the ___ day of ___, 19_, the defendant was charged with the offense of ___, alleged to have been committed on or about the ___ day of ___, 19_.

II.

The defendant was arrested on the ___ day of ___, 19_, and was confined in the County Jail of ___ County, Texas to await trial on said charge [*or was released on bond pending the trial of said charge.*]

[Set Out Any Additional Facts That Are Material to the Motion.]

III.

[Where Delay Was Between Filing of the Charge and Arrest:]

The Defendant has been living in ___ County, Texas since the filing of the charge. He has had a Texas driver's license and he has not used an alias at any time. He has rented a place to live in his name and has received mail in his name at that address. Defendant has made no effort to avoid arrest in this case, and the unreasonable delay in arrest has been due solely to the State's lack of diligence.

[Or Where Delay Was Between Arrest and the Setting of the Case for Trial;]

The Defendant has at all times since his arrest been available and ready for trial, but the State has not exercised due diligence in preparing for trial, in securing the attendance of witnesses or the presence of the Defendant. The Defendant has not attempted to avoid prosecution, and the unreasonable delay in bringing the case to trial has been due solely to the State's lack of diligence.

IV.

The Defendant has been prejudiced by the State's unreasonable delay because defense witnesses are becoming unavailable and such witnesses as remain will have forgotten the facts that would be beneficial to the Defendant. The State's failure to provide a speedy trial is in direct violation of the Sixth and Fourteenth Amendments to the U.S. Constitution, and Art. 1, Sec. 10 of the Texas Constitution and Art. 1.05 of the Texas Code of Criminal Procedure.

V.

The Defendant's constitutional rights have been seriously violated, resulting in impairment to his defense and in undue oppression and concern.

Wherefore, Defendant prays that said charge be dismissed with prejudice [and the Defendant be released from confinement].

Attorney for Defendant

[CERTIFICATE OF SERVICE]

[ORDER OF THE COURT]

Note: Selection of the proper form and its use and modification to suit individual facts and circumstances requires careful review of all the language by the user.]

§ 56.02 Motion for Discovery and Inspection

[Caption]

MOTION FOR DISCOVERY AND INSPECTION

To the Honorable Judge of Said Court:

COMES NOW, ____, Defendant in the above-entitled and numbered cause, by and through his attorney of record, ____, and moves the Court to order the District Attorney to make available and to permit the Defendant by and through his attorney to inspect and copy or photograph the following:

1. A list of names, addresses, and telephone numbers, of all prospective prosecution witnesses who have knowledge of the facts of the present cause, and who in reasonable likelihood will be used at any stage of the trial as witnesses in any capacity for the prosecution.

GRANTED ___ DENIED ___

2. The names, addresses, and telephone numbers of all persons interviewed by any employee, agent, or official of the State of Texas or subdivision thereof or the United States government, concerning this case who in reasonable likelihood may not be used as a witness at the trial of this case, but who may have knowledge of facts material to the guilt or innocence of the Defendant or his reputation or criminal record, if any.

GRANTED ___ DENIED ___

3. The criminal record of any prospective witness, including indictments, convictions, acquittals or charges now pending against any State witness which information might conceivably be useful to the defense to determine whether there exists bias or prejudice on the part of the State's witnesses.

GRANTED ___ DENIED ___

4. Any evidence as to the competency of any prospective witness including a history of mental illness or psychiatric care which the State may have.

GRANTED ___ DENIED ___

5. Any agreement between the State and any prospective witness in this case which could in any manner affect the testimony, attitude, or conduct of the witnesses.

GRANTED ___ DENIED ___

6. All written statements concerning the events of the alleged offense herein purportedly made by Defendant to any peace officer, or employee, agent or official of the State of Texas or of the United States.

GRANTED ___ DENIED ___

7. All notations, memorandums and recordings of any oral statements concerning the events of the alleged offense herein purportedly made by defendant to, or in the presence of any peace officer, or employee, agent or official of the State of Texas or of the United States.

GRANTED ___ DENIED ___

8. All written or oral statements concerning the events of the alleged offense herein purportedly made by Defendant to

any person other than a peace officer, or employee, agent or official of the State of Texas or of the United States.

GRANTED ___ DENIED ___

9. Evidence in the form of taped and/or wire recordings or transcriptions of conversations to which the Defendant was a party which recordings were obtained as a result of bugging, electronic eavesdropping or wiretapping, including conversations overheard or evidence secured as a result of such conversations.

GRANTED ___ DENIED ___

10. The criminal record of the Defendant, including all events, incidents, or occasions known to the State which might possibly be used in impeachment of the Defendant or any defense witnesses.

GRANTED ___ DENIED ___

11. All written statements concerning the events of the alleged offense herein purportedly made by any Co-Defendant or party to the offense and not a Defendant to any peace officer, or employee, agent or official of the State of Texas or of the United States.

GRANTED ___ DENIED ___

12. All notations, memorandums and recordings of any oral statements concerning the events of the alleged offense herein purportedly made by any Co-Defendant or party to the offense and not a Defendant, to any peace officer, or employee, agent or official of the State of Texas or of the United States.

GRANTED ___ DENIED ___

13. All written or oral statements concerning the events of the alleged offense herein purportedly made by any Co-Defendant or party to the offense and not a Defendant, to any person other than a peace officer, or agent, employee or official of the State of Texas or of the United States.

GRANTED ___ DENIED ___

14. The names and addresses of all identification witnesses, the time and place of any photographic or corporal identification, any and all written notices of any statements made by the witnesses who viewed the Defendant in a lineup or showup as well as the police lineup sheet (and/or photographs) with pertinent information concerning the procedure followed during the identification process and the participants in the lineup, including their race, age, sex, height, weight, hair color, eye color, clothes, distinguishing marks, in order that defense counsel may make some determination concerning any undue suggestion or impropriety which would render the lineup process as violative of the Defendant's right to due process of law.

GRANTED ___ DENIED ___

15. Any and all photographs or photographic spreads used by State or local officers and displayed to any witness for the purpose of obtaining identification of the Defendant plus the name and address of all identification witnesses as well as the time and place of any photographic identification and the names of the persons who demonstrated the photographs to the witnesses.

GRANTED ___ DENIED ___

16. The results of any breath, blood or urine test, or DNA test results, administered to the Defendant or Victim herein.

GRANTED ___ DENIED ___

17. All fingerprints, palm prints, foot prints and tire tracks of all persons and vehicles which were obtained from the scene of the alleged offense herein or from anything removed from the scene of the alleged offense herein or fruits thereof, if any.

GRANTED ___ DENIED ___

18. The results of the comparison of all latent fingerprints, palm prints, foot prints and tire tracks obtained with known prints, together with the name, address, and telephone number of persons making the comparison.

GRANTED ___ DENIED ___

19. All articles of a tangible nature and papers seized at the scene of the alleged offense herein, at the scene of the arrest or booking procedure, or taken from Defendant's person or property at any time.

GRANTED ___ DENIED ___

20. All diagrams, drawings, plats, maps, photographs and videotapes made of the scene of the alleged offense herein.

GRANTED ___ DENIED ___

21. All photographs motion pictures and videotapes of the Defendant, witnesses, or alleged victim, taken by any law enforcement agency as part of its investigation or booking procedures in this case.

GRANTED ___ DENIED ___

22. All weapons alleged by the State to have been used by the Defendant in the commission of the offense with which the Defendant is herein indicted. The exact location where said weapon was recovered.

GRANTED ___ DENIED ___

23. All results of firearms examinations and ballistics tests conducted with any weapon as part of the State's investigation of this case.

GRANTED ___ DENIED ___

24. The results of any chemical or scientific tests of any nature performed by the State in connection with this case, including a full description of all items and substances tested, the dates and location of the tests, the type of test performed, the name and address of the individuals who performed the test, and a full description of the equipment and its operation which was used to perform said tests.

GRANTED ___ DENIED ___

25. All reports of psychological and psychiatric examinations of the Defendant done under the direction of the State of Texas or any of its agents which reports are now in the possession of the District Attorney of ___ County, Texas, or an agency of the State.

GRANTED ___ DENIED ___

26. All medical reports of the Defendant and the victim (including victim's autopsy protocol, if any) relating to the injuries (and treatment) received as the results of the events of the alleged offense herein.

GRANTED ___ DENIED ___

27. The Texas Department of Public Safety and the ___ Police Department arrest and conviction record and the Federal Bureau of Investigation arrest and conviction record of the victim herein.

GRANTED ___ DENIED ___

28. All warrants of arrest, search warrants and affidavits in support thereof together with any consent to search used or exhibited at the time of the arrest of the Defendant or in the investigation of the alleged offense herein.

GRANTED ___ DENIED ___

29. Any exculpatory and/or mitigating evidence the existence of which is known or by the exercise of due diligence

could be known by the prosecution herein. The following specific information is requested, to-wit: ___ [specify].

GRANTED ___ DENIED ___

30. For the purpose of cross-examination and impeachment after a witness called by the State has testified, that the following be made available to the defendant, i.e.: prior written, taped or video statement of the witness; any notations or memorandum of oral statements of the witness; and any material used to refresh the memory of the witness or used before the jury.

GRANTED ___ DENIED ___

31. The contraband confiscated together with all items of evidence on which chemical, toxicological or scientific tests of any nature have been performed by the State in connection with this case in order that Defendant's experts may examine and make an independent chemical, toxicological and scientific test and analysis of said items.

GRANTED ___ DENIED ___

32. Any outcry statements made by a witness and purportedly admissible in evidence under the provisions of V.A.C.C.P., art. 38.07.

GRANTED ___ DENIED ___

33. Any recording of an oral statement of a child victim purportedly made under the provisions of V.A.C.C.P., art. 38.071.

GRANTED ___ DENIED ___

34. Notice pursuant to V.A.C.C.P., art. 38.072 of any child victim's statement.

GRANTED ___ DENIED ___

35. [Specify other items:] ___

In support of this Motion, the Defendant would show the Court as follows:

1. The items requested are in the exclusive possession, custody, and control of the State of Texas or the United States Government by and through its agents, the police and the prosecuting attorneys office, and the Defendant has no other means of ascertaining the disclosures requested.

2. The items requested are not privileged or exempt from discovery.

3. The items and information are material to this cause and the issues of guilt or innocence and punishment to be determined in this cause.

4. The Defendant cannot be ready to go to trial without such information and inspection, nor can the Defendant adequately prepare his defense to the charges against him.

5. That absent such discovery Defendant's rights under Article 39.14, Tex.Code Crim.Pro. Ann., Article 1, Section 10 of the Constitution of the State of Texas, and the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States of America will be violated, to his irreparable injury and thus deprive the Defendant of a fair trial herein.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that the court set a timely Pre-Trial Hearing on said Motion, and that on hearing the court enter the following order:

(a) The District Attorney permits the Defendant to inspect, copy or photograph the items enumerated in this Motion prior to the trial in this cause which are in the possession or subject to the control of the State of Texas or any agency thereof.

(b) That an "in camera" inspection of all evidence sought to be discovered but withheld by the prosecution be allowed.

(c) That this Order for Discovery be an ongoing one and the Prosecution, Police, and their agents be ordered to advise the Defendant's attorneys of any new evidence coming into their possession or knowledge subsequent to the granting to this Order, which evidence would be subject to discovery under this Order, and to then permit appropriate inspection, photographing, and copying of same. Further, that the State be ordered to exercise reasonable diligence in ascertaining any of the matters of discovery of which is sought herein.

(d) That any and all evidence requested but not Ordered subject to discovery by this Honorable Court be included in the Appellate record of this cause for review by the Appellate Court; and for any and all further relief to which this Court may deem the Defendant entitled.

Attorney for Defendant

SUBSCRIBED AND SWORN TO before me by the said ____, Attorney for Defendant, this the ____ day of ____, 19__.

Notary Public in and for ____
County, Texas

CERTIFICATE OF SERVICE

By affixing my signature above, I do hereby certify that a true and correct copy of the above and foregoing MOTION FOR DISCOVERY AND INSPECTION was delivered to the Office of the District Attorney for ____ County, Texas, on this ____ day of ____, 19__.

ORDER SETTING HEARING

On this the ____ day of ____, 19__, came on to be heard the Defendant's Motion for Pre-Trial Hearing to consider certain matters in advance of any trial upon the merits; it is hereby ordered that the above entitled cause be set for Pre-Trial Hearing on the Defendant's Motion For Discovery and Inspection before this Court, at ____ o'clock, _M., on the ____ day of ____, 19__.

Judge Presiding

ORDER

On the ____ day of ____, 19__, came on to be heard the foregoing Motion for Discovery and Inspection, and the Court having heard and considered the same;

IT IS ORDERED that: The items noted "Granted" are hereby GRANTED, and the items noted "Denied" are hereby DENIED.

As to paragraphs (a), (b), (c) and (d) of the Prayer, the following action is taken, to-wit:

- (a) Granted ____ Denied ____
- (b) Granted ____ Denied ____
- (c) Granted ____ Denied ____
- (d) Granted ____ Denied ____

Judge Presiding

[Caption]

MOTION TO PRODUCE EXCULPATORY AND MITIGATING EVIDENCE

To the Honorable Judge of said Court:

Now comes the Defendant, A.B., by and through his attorney of record and moves this Court to direct the State of Texas by and through its District Attorney to disclose to the Defendant and his attorney any exculpatory and/or mitigating facts within the possession, custody, or control of the District Attorney or any of his agents, including but not limited to the Department of Public Safety and its agencies, Texas Rangers, City of ___ Police Department, ___ County Sheriff's Department, the ___ County District Attorney's Office, and others, the existence of which is known, or by the exercise of due diligence may become known to said District Attorney.

I.

The following specific information is requested to show, to wit:

- The arrest and search of the Defendant was illegal.
- The State's evidence was illegally obtained.
- The identification procedure was impermissibly suggestive.
- Statements of the Defendant were not legally obtained.
- Entrapment was employed by law enforcement agents.
- Exculpatory evidence inconsistent with Defendant's guilt.
- Mitigating evidence relative to the offense and punishment.
- Immunity, deals, promises, inducements or other agreements with State's witnesses.
- ___ [*specify other information*].

Wherefore, premises considered, Defendant prays that the court order the prosecution to disclose all exculpatory and mitigating evidence known by them or any of their agents or law enforcement officers.

Attorney for Defendant

[CERTIFICATE OF SERVICE]

[ORDER OF THE COURT]

§ 56.06 Motion for Independent Forensic Analysis

[Caption]

MOTION FOR INDEPENDENT EXPERT ANALYSIS

To the Honorable Judge of Said Court:

Now comes A.B., Defendant in the above entitled and numbered cause, by and through his attorney of record and moves the court to authorize an independent expert to make a forensic analysis on certain physical evidence in the custody of law enforcement officials in this case, and would show the following:

I.

The Defendant stands charge with the offense of _____. Certain physical evidence, material to the case, is in the possession of _____ [specify such as Texas Department of Public Safety Crime laboratory].

II.

The material evidence consists of the following, to wit:

a controlled substance, to wit: _____.

Blood stains.

Semen stains.

Hair.

Fingerprints.

Firearm.

_____ ballistic evidence.

_____ [specify other].

III.

The Defendant requests that _____ [name], an expert in forensic analysis, be authorized and directed to make an independent examination and to testify as to the results of his examination of the physical evidence described above.

[Or The defendant is indigent and requests the Court to appoint _____ [name], an expert in forensic analysis, to make an independent examination and to testify as to the results of his examination of the physical evidence described above.]

Wherefore Premises Considered, Defendant prays this motion be granted.

Attorney for Defendant

[CERTIFICATE OF SERVICE]

[ORDER]

§ 56.07 Motion for Independent Quantitative Weight Analysis

[Caption]

MOTION FOR QUANTITATIVE WEIGHT ANALYSIS

To the Honorable Judge of Said Court:

Now comes A.B., defendant in the above entitled and numbered cause by and through his attorney of record and moves the court to authorize an independent quantitative weight analysis of the controlled substance made a basis of this case and would show the court the following:

I.

The defendant stands charged with the possession of over 4 ounces of marijuana. This marijuana is in the possession of the State.

II.

The defendant requests that ___ [name] be authorized and directed to conduct a weight analysis of the alleged marijuana after the removal of all non-germinable seeds and mature stalks.

Wherefore, premises considered, the defendant prays this motion be granted.

Attorney for Defendant

[CERTIFICATE OF SERVICE]

[ORDER OF THE COURT]

§ 56.11 Motion for Names of State's Witnesses

[Caption]

MOTION FOR NAMES OF STATE'S WITNESSES

To the Honorable Judge of said Court:

Now comes A.B., the Defendant in the above entitled and numbered cause, by and through his attorney of record, and files this his motion for the names of the State's witnesses and would show the following:

I.

The names of all witnesses upon whose testimony the State intends to rely in proving its case are known or can be known by the Dist. Atty. Defendant would show the Court that it may be necessary to depose said witnesses and the Defendant must know the names of said witnesses and their addresses in order to know whether or not a deposition is needed.

II.

Defendant would further show the Court that if the Defendant is to have effective assistance of counsel it is absolutely necessary that the names of the witnesses the State intends to call be furnished to Defendant prior to trial so that a proper investigation can be made for Defendant.

III.

Defendant requests that the Court order the District Attorney to ascertain the names of all witnesses and to produce such names of said witnesses and their addresses for the Defendant's attorney.

Wherefore, Defendant, before this cause is called for trial, prays the Court to direct the District Attorney's Office to furnish the names of all witnesses, whether direct or rebuttal, that the State intends to call or may call or that there is a possibility that they will be called during the trial of this cause and that the State furnish also the addresses of such witnesses for the use of the Defendant and his attorney.

Attorney for Defendant

[CERTIFICATE OF SERVICE]

[ORDER OF THE COURT]

§ 56.14 Motion for Disclosure of Any Agreement With Witnesses

[Caption]

MOTION TO REQUIRE THE PROSECUTION TO REVEAL AGREEMENT WITH WITNESS

To the Honorable Judge of said Court:

Now comes the Defendant, A.B., by and through his attorney of record and moves the Court to require the prosecution to reveal any agreement with the witness, C.D., in the nature of concessions by the State of Texas to the witness which could influence the witness' testimony, and in support of this motion would show unto the Court the following:

I.

The witness, C.D., is a cooperating conspirator in the offense with which the Defendant is charged. The witness will testify on direct examination as a key prosecution witness and his testimony seeks to inculcate and implicate the Defendant as having engaged in the criminal conduct alleged herein.

II.

If the prosecution has either made, promised or implied that it will make concessions to the witness in order to induce his testimony, the defense has a right to know the nature of the concessions that have been made, promised or implied to the witness and any discussions which the prosecution has had with the witness or his representatives in order to prove that the witness' testimony was biased by such discussions. Without disclosure defense counsel can only speculate that the concessions probably involve either pending or future charges against the witness. The disclosure is vital to proof on the issue of credibility. To deny disclosure of information which could influence the witness' testimony violates the accused's right to due process of law.

Wherefore, premises considered, the Defendant prays that the Court issue an order requiring the prosecutor to reveal the exact nature of all negotiations and discussions with the witness, C.D., or his attorney concerning any promises or expectations, express or implied, of concessions which could or might be expected to occur in the event that the witness, C.D., cooperated with the prosecution by testifying against the Defendant herein.

Attorney for Defendant

[CERTIFICATE OF SERVICE]

[ORDER OF THE COURT]

§ 59.06 Application by the Defendant Because of Prejudice Against Him

[Caption]

DEFENDANT'S MOTION FOR CHANGE OF VENUE

Now comes A.B., the defendant in the above entitled and numbered cause, and states under oath that there exists in this ___ county so great a prejudice against him that he cannot obtain a fair and impartial trial of this cause in said county, and would show the court the following:

I.

[Set out the fact that has caused the prejudice, such as massive news media publicity prior to trial, etc.]

Wherefore he asks the court to change the venue of this cause to some county that is free from this and other objections.

Defendant

Sworn to and subscribed before me by A.B., the defendant in the above entitled and numbered cause, on this the ___ day of ___, A.D. 19_.

Notary Public

ATTACHED AFFIDAVITS:

§ 59.07 Supporting Affidavit

[Caption]

AFFIDAVIT

We, C.D. and E.F., do solemnly swear that we are residents of ___ County, Texas; that we are informed of the contents of the application for a change of venue this day filed by the defendant A.B. in the above entitled and numbered cause, and we are cognizant of the matters therein stated, and that there does in fact exist in said ___ County, Texas, so great a prejudice against him, the said A.B., defendant, that he cannot obtain a fair and impartial trial of said cause in said county.

C ___ D ___

E ___ F ___

Sworn to and subscribed before me by C.D. and E.F. on this the ___ day of ___, A.D. 19_.

[Official designation of the officer administering oath]

[See Chapter 42 for Proper Captions & Signatures]

§ 49.08 Motion to Elect the Jury to Assess Punishment

[Caption]

ELECTION FOR JURY TO ASSESS PUNISHMENT

To the Honorable Judge of said Court:

Now comes the Defendant, A.B., in the above entitled and numbered cause, and in accordance with article 37.07 of the Code of Criminal Procedure and before the commencement of the voir dire examination of the jury panel, elects in writing that the punishment, if any, in this cause be assessed by the jury.

Respectfully submitted

Defendant

Attorney for Defendant

ORDER

On this ____ day of ____, 19__, came on to be heard the foregoing motion, and the same having been timely filed is granted.

Judge Presiding