Texas Criminal Procedure   
  
by corbin b.p. dodge  
  
*For more outlines, visit* [www.corbin-dodge.com](http://www.corbin-dodge.com)   
  
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Professor CRUMP  
  
South Texas College of Law

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Intro

Authorities

**Investigative Authority of Peace Officers**

* **Local Police**  EX: HPD
  + - Investigate state crime EX: Crime from any TX code
    - Felony & misdemeanor arrests w/in city limits
* **Sheriff’s Office**  EX: Harris County
  + - County jsd, informally doesn’t handle city
    - Investigate state crimes w/in their county
    - Sheriff elected in a county-wide election
    - **Constables**
      * Can do everything an HPD officer can do
      * Serve civil & criminal subpoenas
      * Elected in a county-wide election
      * County divided into precincts
* **Department of Public Safety**
  + - Speeding & DWI offenses
    - Can arrest felonies & misdemeanors, but generally consigned to hwy
    - **Texas Rangers***:* The elite

**Prosecution in each County**

* **District Attorney:** Investigator handles crime investigation
* **Attorney General**
  + - Child Support
    - Writes opinions on TX law. Not binding but often cited as precedent
    - Represents state in USSupCt when constitutionality of state law challenged
* **Administrative Departments** EX: Dept of Wildlife, HISD

**2013 Houston Leaders**

* **HPD Chief:** Charles McClellan
* **Sheriff:** Adrian Garcia
* **Harris County DA:** Mike Anderson

Duties of Attorneys & Judges

* **District Attorney 2.01**
* **Primary duty: See justice is done** (not convict)
* Represent State w/ prosecution & plea bargains in all criminal cases (felonies & misdemeanors) in DistCt & appeals
  + - **Requirements:** Habeus corpus & he’s notified, & w/in his district at the time
* **Exceptions:** Employed adversely pre-election **or** prevented by official duties
* **Requirement to Prosecute:** PC **&** evidence to meet all elements
* Can’t suppress facts or secret W’s who may establish ∆’s innocence
  + - P’s W can provide alibi → Must tell ∆
    - ∆ not req’d to give them to DA

**County District Attorney 2.02**

* Attends terms his county’s Ct below DistCt, & represents state in all criminal cases under exam or prosecution
* Represents state in appeals of cases he’s prosecuted
* DA absent → Represents state alone & aids DA in DistCt prosecution (upon request)

**Defense Attorney**

* Miranda (custody, control)
* Right to have at a *critical stage* (start of the adversarial process)
* **Attaches at:** Arraignment (told charges & plead), preliminary hearing, trial, plea negotiations
* Paid out-of-pocket or Ct-appointed paid by county
* *Public Defenders:* Only for indigent ∆’s EX: Mentally ill, intellectual disability

**Judge:** Elected, Atty may donate to their election if ethical

Jurisdiction of TX Cts

**Court of Appeals** **4.03**

* Appellate jsd coextensive w/ limits of their Dists in all criminal cases **except death penalty cases**
* Doesn’t take cases appealed from an inferior Ct to the county Ct, the county criminal Ct, or county Ct at law, where fine >$100, unless sole issue is §’s constitutionality or ordinance conviction is based.

**Court of Criminal Appeals 4.04**

* Can grant & issue writ of habeas corpus, and, in criminal law, writs of mandamus, procedendo, prohibition, & certiorari
* Other writs as necessary
* **Final** appellate & review jsd in criminal cases coextensive w/ state limits
  + - Handles all death penalty appeals **!!!**
    - Can review any CtApp criminal case decision (even if no petition)

**District Court & Criminal District Court 4.05**

* Original jsd in **all** **felony** cases, all official misconduct misdemeanors & misdemeanors trn to DC (4.17)

**When Felony includes Misdemeanor 4.06**

* Felony trial → Ct determines the case for any offense in indictment, felony or misdemeanor

**Justices of the Peace (JP)**

* Cases punishable by **max $500 fine only**
* Located all over
* Fines & admin sanction EX: DL suspension
* Doesn’t have to be a lawyer, no evidence EX: Judge Judy
* **Concurrent jsd:** w/ municipal Ct

**County Courts**  **4.07**

* **Original Jsd**  *See handout*
  + - All Class A & B misdemeanors when Justice Ct doesn’t have exclusive original jsd **&**
    - <$500 fine
* **Appellate Jsd:** Criminal cases in JP & municipal cts w/ original jsd **4.08**

**Jsd of Justice Cts 4.11**

* **Original jsd (criminal)**
  + - Fine **&** Non-jail Sanction **or**
    - Alcohol Beverage Code 106 charges w/out jail
    - Not affected by Justice Ct conviction w/ non-court agency penalty EX: Deny, suspend, or revoke drivers license
* **Concurrent jsd** w/ municipal Ct for crimes that arise in extraterritorial jsds & under their ordinances

**Jsd of Municipal Cts 4.14**

* **Exclusive Original Jsd** *see* *Handout*
  + - All criminal cases in its territory that arise under its ordinances **&**
    - Max $2,000 fine for fire safety, zoning, or public health & sanitation (includes dumping of refuse) **or**
    - Max $500 fine
* Jsd in forfeiture & final judgment of all bail & personal bonds *(is this original???)*
  + - Not affected by Municipal Ct agency conviction
    - **By agreement w/ a contiguous municipality** 
      * Original jsd **&**
      * Health & Safety Code 821.022 or Education Code 25.094
* **Concurrent jsd** w/ Justice Ct of a precinct it’s located in all state criminal cases
  + - w/in its municipality & fine only **or**
    - Alcoholic Beverage Code 106 **&** no jail
    - **By agreement w/ a contiguous municipality (or w/in ½ mile)**
      * 1.9 million+ population & a contiguous municipality may agree to it over state criminal cases:
        + Committed on **or** w/in 200 yards of their boundaries **&**
        + Fine only

**Drug Offenses**

* Governed by Health & Safety Code
* Penalty divided b/w sold or possessed

Misdemeanors

**3 Categories of Misdemeanors Penal Code 12.03**

**Class A Penal Code 12.21**

* Max $4,000 fine **or**
* Max 1 year jail **or**
* Both

**Class B Penal Code 12.22**

* Max $2,000 fine **or**
* Max 180 days jail **or**
* Both

**Class C Penal Code 12.23**

* Misdemeanor w/out punishment or category
* Doesn’t impose any legal disability or disadvantage
* Max $500 fine

Felonies

**5 Categories of Felonies (by seriousness) Penal Code 12.04**

Punishments

**Capital Felony Penal Code 12.31**

* Found guilty of capital felony & state seeks death penalty > Punish by life w/out parole or death *Must tell jury* *this*
* Found guilty of capital felony & state seeks death penalty > *Must tell jury this*
  + - Case trn under 54.02 Family Code > life **or**
    - Life w/out parole

**1st Degree Felony Punishment**  **Penal Code 12.32**

* **Punishment:** Life imprisonment **or** 5-99 years in TX Dept of Corrections
* **Optional:** Max $10,000 fine

**2nd Degree Felony Punishment Penal Code 12.33**

* **Punishment:** 2-20 years in TX Dept of Corrections
* **Optional:** Max $10,000 fine

**3rd Degree Felony Punishment Penal Code 12.34**

* **Punishment:** 2-10 years in TX Dept of Corrections
* **Optional:** Max $10,000 fine

**State Jail Felony Punishment (includes felony w/out specification) Penal Code 12.35**

* **Punishment:** 180 days - 2 years state jail
  + - **Optional:** Max $10,000 fine
* **Punish for 3rd degree felony if**
  + - Used deadly weapon when committing or fleeing **&** knew it would be used **or**
    - Previous felony conviction under 20A.03 or 21.02 or 3g(a)(1), Article 42.12 **or** affirmative finding under 3g(a)(2), 42.12

|  |  |
| --- | --- |
| * **Problem** | **Answer** |
| Danny D punched Victor victim in the mouth with his fist, bruising him. | **How do you charge?** Assault → Look to Penal Code § 22.01 for Charge  **Was it intentional?**  - “Intentionally, knowingly or recklessly”  - “Bodily injury” § 1.07  **What level of assault?** Class A misdemeanor  **So which Ct does it go to?** Cty ct |

Overview of Arrests & Warrants

**Stages of the Criminal Process**

* Usually starts w/ Arrest, reactive policing (vs proactive) EX: Crime report, further investigation
* Full custody arrest
* SITLA Bad arrest bc no PC → Exclusionary Rule

**US Constitution**

* Bill of Rights protects individual from gov’t intrusion
  + - 4th Amendment
      * *“people shall be secure in persons, houses, papers, & effects against unreasonable searches & seizures”*
        + ust have PC *“a reasonable, good faith belief that a crime has been committed & ∆ committed it”*
      * *“No warrants shall issue w/out PC supported by oath & affirmation….”*
        + Prepare, sign, & swear a complaint
        + *“…& describe w/ specificity the place to be searched and the person to be seized”*
* Illegal arrest doesn’t invalidate conviction **!!!**

**Probable Cause**  - A reasonable, good faith belief that a [crime(name it)] has been committed & [∆ (name)] committed it

**Exclusionary Rule 38.23**

* **Fed Rule:** Must exclude evidence that’s unconstitutionally obtained
  + - **Jury Instructions:** Must instruct jury that they must disregard it if they believe, or has a reasonable doubt, that evidence was unconstitutionally obtained
    - **Exception:** Evidence obtained in objective good faith reliance upon a warrant issued by a neutral magistrate based on PC
* **TX Requirement:** Warrant must be based on PC. Magistrate can’t be mistaken
* **Applies:** Problem w/ warrant EX: Not signed or dated

**Arrest Occurs When… 5.22**

* Restraint **or** custody (PC req’d) **&**
* by a PO or person executing an arrest warrant or arresting w/out a warrant
* **Restraint Factors**
  + - Handcuffs (don't indicate a terry stop)
    - Told they couldn’t leave (or asked & refused) → Definitive

**Analyzing Arrests:** Warrant & PC Req’d !!!

**Warrant Durations**

* **Search warrant:** Finite time to search
* **Arrest warrant:** No §oL

Arrests wIth an Arrest Warrant

**4th Amendment:** *“No warrant shall issue but for PC”*

**Sum:** Neither TX nor fed require an arrest warrant → Can arrest w/out a warrant a.l.a PO has PC

**General Rule (Fed):** Don’t need a warrant if there’s PC

**General Rule (TX):** Must have a warrant to make an arrest unless an exception applies (consent **or** exigent circs)

- Can’t arrest ∆ in his home w/out a warrant or exigent circs

Arrest Warrant

**Definition:** Written order that commands a PO or specific person to arrest an accused offender, to be dealt with by law **15.01**

* Public info. ∆ may request copies from the clerk immediately
* Issued by magistrate  **2.09 / 15.03**

**3 Requisites of a Warrant !!! 15.02**

* Name **or** unknown + reasonably accurate description **&**
* Name the offense **&**
* Signed by magistrate

**3 Procedural Requirements to Obtain an Arrest Warrant !!!**

* **Complaint (affidavit):** Facts must add up to PC
* **Application**
* **Warrant**

**Normal Procedure:** Arrest 1st → charges filed → Called an arrest warrant

**Not Normal Procedure:** Charges filed 1st → Arrest warrant → Called a capias

**Motion to Suppress:** Defense goes first to show it’s a bad arrest

Affidavit Req’t

**Affidavit**: A sworn statement that’s notarized

**Complaint:** Affidavit made before magistrate, Dist, or county atty **is a "complaint" if it charges an offense** **!!!** **15.04**

**Includes:** Facts PO knows or heard about (doesn’t req personal knowledge- can be hearsay)

**Drafted by:** Investigating officer

Public info. ∆ may request copies & arrest warrant from the clerk immediately after issued

Capias (Arrest After Charge’s Filed)

**Timeline**

* 1st, DA gives paperwork to Dist Clerk *Note:* No neutral mag. who looks for PC
* 2nd, Dist Clerk issues capias
* 3rd, Arrest occurs

**Definition**   **23.01**

* Writ issued by a judge (or clerk w/ judges direction) after commitment or bail & before trial **&**
* Directed *"To any peace officer of…TX"*, commanding him to arrest ∆ & bring ∆ to Ct immediately or specific date

**Requirements:** Name of person to arrest **or** description *Visor v. State*

**2 Kinds of Charging Documents in TX**

* **Indictment**  FELONIES **23.03**
  + - **Applies:** Felonies only
    - GJ determines PC
* **Information** MISDEMEANORS
  + - **Applies:** Felonies & misdemeanors
    - Support by complaint/affidavit showing PC
    - Doesn’t go to GJ
    - **Misdemeanor Case**: Sent to a randomly selected Ct. Judges determines PC & instructs clerk to draft it **23.04**

Execution of the Arrest Warrant

**Force 15.24**

* **Rule:** May use any *reasonable* means to make an arrest. Can’t use greater force than necessary
* **Knock & Announce Rule**
  + - **Rule:** PD may break down the doorif refused admittance after giving notice of his authority & purpose **15.25**
    - **Rule:** Violating it doesn’t trigger the exclusionary rule

**Authority to Arrest must be made known 15.26**

* **Requirements:** Must tell accused what authority is given to arrest. Warrant shall be executed by the arrest
* **Rule:** PO not req’d to have a warrant in his possession at the time of arrest, but must
  + - * Show ∆ asap if requested **&**
      * Tell ∆ the charge & that a warrant was issued

|  |  |
| --- | --- |
| * **Problems: Arrest Warrants** | **Answer** |
| A an arrest warrant orders the arrest of an “unknown black woman.”  **Is it a valid arrest warrant?** | No. Too general. A requisite of an arrest warrant requires that the warrant state the name of the person upon which the arrest is ordered. If they’re name is unknown, the warrant must instead 1) state that their name is unknown; and 2) give a reasonably accurate description of the person to arrest. |
| **May a police officer arrest a ∆ in Walker County on the basis of an arrest warrant that was issued in Harris County?** | Yes. Arrest warrants issued in Texas are valid throughout every part of the State and can be executed by any Texas peace officer. |
| **What are three requirements for an arrest warrant?** | An arrest warrant must contain: (1) the name of the person whose arrest is ordered, (2) the offense the person is accused of committing; (3) the signature of the magistrate. |
| **Is a PO req’d by law to obtain one warrant authorizing the search of a ∆’s house and a separate warrant authorizing ∆’s arrest?** | No. If the facts presented to the magistrate for a search warrant also establish the existence of PC that a person has committed some offense under the laws of *Texas,* the search warrant *may,* in addition, order the arrest of such person. |
| A valid arrest warrant is issued for Mr. Jones. Officers arrive at his home. They knock but Mr. Jones doesn’t answer, despite the fact that he is inside. Again the officers knock but this time they loudly announce “We’re here to arrest Mr. Jones on capital murder. An arrest warrant was issued. Open the door.” Mr. Jones refuses to open the door. **Does a police officer have the authority to break down a ∆'s door in order to enter the defendant's apartment?** | The rule is that a peace officer may use any reasonable means to make an arrest, provided that they do not use greater force than is necessary. Under the Knock & Announce Rule, the officer(s) may break down the door if an occupant refuses admittance after the officer(s) has given notice of his authority and purpose. |
| *Same as above* but the officers don’t have a copy of the arrest warrant with them. **What result?** | The rule is that an officer is not required to have an arrest warrant on hand when the arrest occurs. However they must tell the arrestee the charge and that a warrant was issued giving them authority to execute the arrest. If the arrestee asks to see the warrant, the officers must show it to him as soon as possible. |
| An officer on patrol noticed Jerry carrying a firearm in the waistband of his pants. After safely stopping the man to question him, the officer arrested Jerry for possession of unlawfully carrying a weapon, which is a Class A misdemeanor. **Was the officer req’d to obtain an arrest warrant before arresting Jerry?** | No. An officer does not need to obtain an arrest warrant to arrest Jerry because the offense was committed in the officers presence and within his view. |
| A confidential informant tells Officer Ortez that a man named Carlos drove the getaway car after a liquor store robbery the night before. The man is staying in a motel only a few blocks away. **What are the 3 reqt’s that must be met for Officer Ortez to legally make a warrantless arrest of Carlos?** | Here, it must be shown by satisfactory proof that: (1) upon the representation of a credible person (give their name) (2) a felony has been committed (name the felony), and (3) the offender is about to escape so that there is no time to procure a warrant. It is questionable whether this last req’t can be met under these circs since there is no indication Carlos is about to immediately escape, but it could be argued he was at a motel and unlikely to stay there long. The officer could have monitored the outside of the motel until an arrest warrant was secured. |

Arrest without a Warrant

**4th Amendment:** *“No warrant shall issue but for PC”*

**Sum:** Neither TX nor fed require an arrest warrant (Can arrest w/out a warrant a.l.a PO has PC)

**Fed Rule:** A warrant is not absolutely req’d if there’s PC

**TX Rule:** Must have a warrant to make an arrest unless an exception applies (consent **or** exigent circs)

**Terry Stop v. Custody Arrest**

* Custody arrest → PC req’d
* Terry Stop → Reasonable suspicion req’d

8 Exceptions: Can Arrest w/out warrant (assuming PC…) !!!

**1. On View Arrest 14.01**

* **Peace Officers**
  + - Can arrest outside his jsd for a felony **or** breach of the peace committed in his presence **!!!**
    - Must have TX P.O. license
    - **Includes:** Sheriff, constables, DEA investigators
    - **Doesn’t Apply:** Driving w/ a suspended license
    - **Exception: Marshalls:** Can arrest anything, including driving w/out a license except traffic offenses (must be in their jsd)
* **Civilian/PO outside his jsd**: Felony or breach of the public peace committed in his presence *Romo v. State, 22*
* **Breach of the Peace:** DWI

**2. Suspicious Places 14.03(a)(1)**

* Expects ∆ to be + reasonable suspicion+ fairly soon after crime **&** *Johnson; Hoag*
* Felony, public intoxication, PC they’re about to commit a crime

**3. Assault Arrests [BI + PC]** **14.03(a)(2)**

* PC assault w/ bodily injury **or** Low threshold
* PC danger of further bodily injury

**4. Violation of A Protective Order 14.03(a)(3)**

* Officer sees → Mandatory to arrest **The Only Mandatory One**
* PO doesn’t see → Discretionary

**5. Family Assault Arrests [Violence + PC] 14.03(a)(4)**

* **Applies:** Even if victim doesn’t want to press charges

**6. Voluntary Statement Arrests [Felony + Admissible Confession + PC] 14.03(a)**

* **Requirement:** Felony
* **Applies:** Man tells PO he killed someone (PO doesn’t have to see it)

**7. Felony/Exigent Circs Arrests [Offender about to Escape]** **14.04**

* **Felony offender about to escape:** No warrant req’t
* **Felony offender goes into his home:** Need warrant unless resident gives consent **or** exigent circs **14.05**

**8. Traffic & Misdemeanor Offenses Arrests**

* Traffic offense → Can arrest if objectively justified by PC → Can SITLA
  + - Motive irrelevant
    - *Pre-textual arrest:* Can justify search after arrest
    - *Belton:* Can search passenger side compartment, not trunk
* *Gant* | Traffic stop > arrest/held in handcuffs in PD car, unable to get to car > PD conducts search
  + - If reasonable suspicion or safety > Can SITLA EX: Smell marijuana or safety concern
* **Inventory Search Exception**
  + - **Fed:** ASITLA at PD station (impound must follow)
    - **TX:** Can search at scene
* **Doesn’t Apply**
  + - Once give citation > Can’t do SITLA or arrest for same offense Stuck w/ the citation
    - Open container law violation, speeding
* **Applies:** No seatbelts, illegally parked *Williams v. State*

|  |  |
| --- | --- |
| * **Problem: Exceptions to the TX Arrest Warrant Req’t** | **Answer** |
| Tom & Alice slash tires & throw eggs / cops called / T&A confess to PO. **Can he arrest w/out a warrant? What exception?** | **Suspicious Places?** No. Must be a felony  **Voluntary Confession?** No. Must be a felony  **Answer:** No exception applies. Must get a warrant |
| Domestic dispute & shows protective order. They’re there & violated it. **Should PD arrest w/out a warrant?** | PD must arrest them |
| A maintenance man arrives at a murder scene. He asks the officers what happened and if they know who did it. The officers become suspicious when the man says that he works in the building and knows the victim, in fact, the man claims that he stopped by to pick up a set of keys that he left earlier when working on the victims’ apartment. The officers notice that the man has droplets of blood on the cuffs of his trousers. They then realize that the description of the keys the man gave, matches a set of keys that were found near the bodies of the victims. **Can the officers arrest the man w/out a warrant? What exception?** | Yes, under the suspicious places exception. The officers would have a reasonable suspicion that the maintenance man committed the murders. Their suspicious would be reasonable because: the maintenance man arrived at a crime scene, shortly after a crime occurred, to claim keys that were found at the scene of the crime. The officers might expect the killer to return to the scene if he left a piece of incriminating evidence that might cause law enforcement to believe he was a suspect (the keys).  *See the Hoag case.* |
| Donny the drunk collided into a tree at a high rate of speed after he caused an accident in Downtown Houston while driving under the influence. Donny fleed the scene. Due to the high rate of speed from his collision with the tree, it was likely that that Donny was badly injured. Minutes later, Donny arrives at a hospital just a few blocks away from the scene, leaving his wrecked car in the parking lot. He claims that he fell off the back of a friends 4 wheeler while they were doing wheelies at his ranch about 30 miles away. | Yes, under the suspicious places exception. The officers would have a reasonable suspicion that Donny may have caused the accident because he was badly injured in such a manner that he would foreseeably need to go to a nearby ER, and he arrived at an ER just blocks away from the scene. Donny’s clearly damaged car was left in the hospital parking lot, he smelled of alcohol, and there were no ranches in the area. In addition, he meets the requirements of suspicious places because he committed a crime in a public place (downtown streets) while intoxicated. |

Confidential Informants

**Judging PC in a Search Warrant**

* **Federal**
  + - **Modern: *Gates* Totality of the Circs Test** *Illinois v. Gates*
    - **History: *Aguilar-Spinelli* 2-Prong Test**
      * **Reliable Informant?** EX: Employed, no criminal history
      * **Reliable Basis of Information?** EX: Saw marijuana
      * Must have a reliable informant. Not reliable, but very reliable basis of info → Not enough
* **TX: Motion to Suppress**
  + - **General Rule:** All searches must be supported by warrants unless there’s an exception
    - **To challenge PC, ∆ must show:**
      * **1. Standing:** Must have 4th amendment right to bring the motion + REP
      * **2. State Action\***  **TX & Feds differ !!!**
        + **Fed:** State actor req’d EX: HPD, FBI
        + **TX:** State actor NOT req’d EX: Nosy neighbor ok (suppress if REP)
      * **3. Proper Search & Seizure (w/ PC)**  **38.23(a)**

Searches with Warrants

**Definition:** Written order written by a magistrate, directed to PO, that demands the PO to search that person & commands PO to bring it before a magistrate  **18.01(a)**

**Requirements**

* Sufficient facts of PC presented to magistrate
* Sworn affidavit w/ facts of PC

**Applies:** Can get a search warrant to search abused children for marks

Targets of a Search Warrant

Things you can search for

**Federal: 3 things you can search for** *(Gould)*

* Instrumentalities EX: Gun used to commit the crime
* Fruits of a crime EX: Stolen property
* Contraband (made illegal by penal code) EX: Illegal drugs, paraphranelia
* Mere evidence\* **\***Added by *Warren* in 1967

**TX: 12 Things you can search for** **18.02**

* 1. Stolen property Fruits
* 2. Property designed, made, or adapted for or commonly used in crime Instru or contra
* 3. Arms and munitions kept for riot Instru or conta
* 4. Prohibited weapons Contraband
* 5. Gambling devices, equipment, or paraphernalia Contraband
* 6. Obscene material for commercial distribution or exhibition Contraband
* 7. Illegal drug, controlled substance or paraphernalia Contraband
* 8. Illegally possessed property Contraband
* 9. Instrumentalities used in the crime Instrumentalities
* 10. Property or items tending to show a particular person committed an offense (except ∆’s personal prop)
* 11. Persons
* 12. Contraband (Chap 59)

Evidentiary Search Warrants

Mere Evidence Warrant

**Rule:**  Mere evidence must be specifically named in the warrant. Add’l mere evidence must be supported by PC

***Wood Test:*** Was it a reasonable way to get the evidence named in the warrant?

**1st mere evidence warrant:** Any judge can issue (except JP)

**2nd mere evidence warrant:** Must be issued by someone higher (DC Judge)

**Purpose:** Allow seizures for otherwise uncategorized evidence

**Applies:** Clothing, bags, hair, cigarette butts, ligature marks, knife for fingerprints *State v. Wood, 81*

**Doesn’t Apply**

* **The Press:** Can’t seize article or a news station/radio station/newspaper **18.01(e)**
* **Policy:** No const right to protect their source, so don’t interfere

Sufficiency of Affidavit & Warrant

**Rule:** Must describe the items in the warrant, w/out opinion, & connect it to the crime *Cassias v. State, 56*

**Purpose**: Enables PD to locate & distinguish ∆’s property from other property *Lippert v. State*

**Applies:** PD follows directions in affidavit & finds a transposition error (inaccurate description)

* Typo in affidavit
* Further info allows PD to distinguish point from any other in the area > OK
* No further info → 4th Amendment issue bc defective affidavit

**Test:** Look to description

**Look for:** *“In my experience as a narcotics officer, I know that drugs….my confidential informant, who’s provided me reliable info in the past, is employed, and has no criminal record, observed a package matching this description, that was filed with…”*

|  |  |
| --- | --- |
| * **Examples** |  |
| * EX: Not just plastic tubing → Show connection to drugs * EX: Not just “I know it’s marijuana” * EX: Not just it was a box → when, where |  |

Typos & Administrative Mistakes

**Rule:** Generally don’t void the search w/out showing prejudicial harm *Green v. State, 66*

**Rule:** No pre-signed warrant. Must file affidavit before magistrate signs warrant

**Exception:** Clerical error

Execution, Return, & Inventory

**Execution of Warrants 18.06**

* PO must execute search warrant w/out delay (>3 days or less if ordered) & return to judge
* PO must present a copy to O (if present) or a person in possession (if not present)
* Written inventory req’d before taking items. Must include PO’s name & copy to O
* **Days allowed for warrant to run** **18.07(a)**
  + - 15 days if for specific DNA **or**
    - 3 days for any other purpose
    - **Don’t count day of the signing and don't count date of the execution**
      * *Signing 1day 2days 3days Execution [It’s really 5 days]*
      * *3/20 3/21 3/22 3/23 3/24 3/25*

**Evidence not to be used [Exclusionary Rule] 38.23**

* No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of TX or US shall be admitted in evidence against ∆ **!!!**
* **Exception:** Evidence obtained by a PO acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on **PC [diff than federal] !!!**
* If facts must be excluded → Test is whether there’s PC w/out those facts *Dancy v. State, 61*

**Returning Search Warrant Seizures**  **18.10**

* PD should attach inventory & location of seizur
* PD holds property until judge orders EX: In PD storage
* Can’t move property from county warrant was issued w/out an order
* Can forward elsewhere for lab analysis

**Removal of Evidence from a County w/out Ct Order**

* **Ministerial violations:** Not subject to exclusionary rule *Martinez v. State*
* **How to show prejudice**
  + - **Applies:** ∆ can’t get copy of warrant **&** PO didn’t show copy to O
    - **Ask for:** Continuance once obtain bc might be exculpatory. Can request info from DA (they can’t retain exculpatory evidence *Brady*). Also, encourages plea bargaining

Searches w/out Warrants

Plain View Searches

**Rule:** No 4th Amendment issue when PD are in a place where they 1) **have a right to be**  **&** 2) **see contraband**

**Requirements**

* Initial intrusion must be legal **[legal + immediately apparent]** Where they have a right to be
* Immediately Apparent

**Effect:** No warrant req’d

**Applies:** All sensory perceptions EX: Plain Smell Doctrine, Plain Feel Doctrine, etc

**Requirements:** PC **+**Warrant **or** Exception to the warrant req’t

|  |  |
| --- | --- |
| * **Examples** | **Result?** |
| * Cocaine bag looks like sugar | Exclude bag. Not immediately apparent. |
| * Search warrant for drugs, finds incriminating letter in envelope | Exclude letter. Drugs not immediately apparent. *Joseph v. State* |
| * Search warrant for drugs & PD finds negatives w/ child porn | Exclude negatives. Not w/in scope |
| * PD hears incriminating message on answering machine | Exclude message. Not a crime. |

Searches Incident to Arrest

***Belton***

* **Arrest then Search -→ OK**
* Stop / no citation being written / Smelled marijuana & then saw envelope labeled “Supergold” / Arrest / Search
* Gave rise to searches incident to arrest. *AZ v. Gant* followed

***Linett [TX]***

* **Rule:** If you can arrest & haven’t cited → Can search
* Writing citation / search / arrest
* **Search then arrest → NOT OK** (bc gave citation, so couldn’t then arrest for traffic violation)

***Williams, p 42 (1986) [TX]***

* No citation / searched truck / Arrest → OK (bc could still arrest for traffic violation)
* ∆ wasn’t in his car

***AZ v. Gant (2009)***

* ∆’s under arrest / Put in back of PD car → 1) No *Belton* bc no danger for PD 2) Destruction of evidence bc PD wasn’t looking for evidence of a crime → Overturn conviction

**If arrest occurs in ∆’s home**

* **Allowed:** Protective sweep
* **Not Allowed:** Can’t search drawers (violates plain view doctrine)
* **Consider:** Whether it violates the plain view doctrine

Vehicle Inventory

**Rule:** PD may conduct an inventory search on an impounded vehicle

**Doesn’t Apply:** 4th Amendment

**Governed by:** Administrative needs of PD

**Common:** PD arrests driver → Can tow & impound at PD → Then can do inventory search

**Purpose**

* Protect PD from false claims of theft
* Protect O’s property
* Protect PD & public from danger

**Further Support**

* Lesser expectation of privacy in car
* Cars hard to search bc mobile

**Requirements for Lawful Impound:** Nexus b/w crime & taking of the car *Benavides v. State, 88*

**Unlawful Impound:** Another licensed adult driver available

|  |  |
| --- | --- |
| * **Examples: Vehicle Inventory** | **Result?** |
| Car in garage & victim died of carbon monoxide poisoning | Reasonable nexus |
| Murder-suicide & car parked 2 blocks away | Not a reasonable nexus |
| Passenger 15 & no license | Not a reasonable alternative. Impound |
| Passenger 21, licensed, & sober | Reasonable alternative. Don’t impound |
| * **Examples: Compared w/ SITLA** | **Result?** |
| Arrest DUI driver, take keys, open trunk & perform inventory search at scene on Hwy | Ok |
| Arrest DUI driver, take keys, open trunk & perform SITLA of trunk at scene on Hwy | Not Ok **!!!** |
| PC to arrests ∆ on outstanding warrant / inventory trunk /find open bag w/ drugs in plain view | Ok , *Stephen v. State, 91* |
| PD forces their way into the trunk | Probably not allowed EX: *Gill,* remove back seat |

Community Caretaking Function Searches

**Test:** Whether a reasonable officer would believe they needed assistance *Wright v. State, 102*

**Factors**

* Nature & level of distress
* Location of the individual
* Alone or had access to other help **&**
* Danger to themselves or others

**Doesn’t Apply:** Laypersons don’t have a community caretaking function

**Community Caretaking & Private Residences**

* Must believe entry is necessary to protect & preserve life (higher standard)
* EX: Victim hanging out of window with someone strangling her
* EX: Victim inside & house on fire

**Community Caretaking & Vehicles**

* Passenger throwing up out of car, PD stops to make sure he wasn’t being hurt or needed an ER --> Ok

Checkpoints & Administrative Searches

**Border Checkpoints** *Martinez-Fuente* (Fed)

* Federal gov’t has jsd to have fixed border checkpoints
* 4th Amendment seizure occurs when a vehicle is stopped at a roadside checkpoint. OK if reasonable
* **Factors**
  + - Reasonableness of procedures
    - Minimal intrusion
    - Public interest (need for enforcement)

**DL & Registration Checkpoints** *Prouse* (Fed)

* Used *Martinez-Fuerte* factors

**DUI Roadblocks** *Webb v. State, 107*

* **Balance:** Public safety vs. privacy
* **Factors**
  + - Standard procedure, PO has less discretion **!!! Main !!!**
    - Location
    - Time & Duration
    - Advance notice to public
    - Advance warning to approaching motorists
    - Safety conditions
    - Degree of fear/anxiety
    - Length of time detained
    - Physical factors surrounding location & method
    - Less intrusive method available
    - Effectiveness
    - Other relevant circs
* **Rule:** DWI checkpoints unconstitutional until legislature authorizes statewide procedure
* **Vs Dana’s outline:** Ok to have a properly conducted DUI checkpoint
* **Rule to draw blood:** PC + Warrant (don’t need in hand) **&** Constitutional under 4th Amendment

Residential Searches

**Requirements:** Consent **or** Exigent circs

**Test:** Did they have PC + warrant **or** exigent circs?

**Primary justification to enter a home w/out a warrant:** Exigency

**Policy:** Home is greatest sanctuary

**Rule:** It’s a constitutional plain view search if PD had right to be in the house to see it *Parker v. State, 115*

|  |  |
| --- | --- |
| * **Examples: Residential Searches** | **Result?** |
| Credible citizen tips PD + odor of pot → Odor=PC // Pot could be removed | Exigent circs |
| Odor only & multiple people inside | PC not specific enough to the person to arrest |

Private Party Searches

**Private citizen can arrest an offender any time a PO can if:**  *Miles v. State, 119*

* Felony or a misdemeanor against the public peace **&**
* Occurred w/in the view of the arresting citizen
* *Against the public peace:* Conduct that proposes …or harm against the public
* *EX:* Tow truck driver chases & stops DUI driver → Ok if doesn’t endanger public

Statements by the Accused

**2 Req’s for Confession (Federal)**

* Voluntary
* Miranda Warning

**Oral Confessions**

* **Rule:** Confession given while ∆ is in PD custody & he’s being interrogated → Must give Miranda rights
* **Exception:** Res Gestae statements

"Res Gestae Statements"

**Definition:** A pre-interrogation statement surrounding the crime of the arrest *Galloway v. State, 164*

EX: Suspect blurts it out, not the result of custodial interrogation

Non-Custodial Interrogation Statements

**2 Tests** *Shiflet v. State, 158*

* **Focus Test**
  + - **Test:** Did PO focus on who committed the crime? Did he think the suspect committed it? PD’s intent?
    - Subjective, less common *Escabido*
* **Custody Test**
  + - **Test:** What would a reasonable suspect think?
    - **Consider:** Did he think he was being held in custody?
    - **Key:** Would it change whether or not he was in custody?

Voluntariness

**Rule:** ∆’s statement may be used against him if it appears freely & voluntarily made **38.21**

**Voluntary:** Drunk, high, mentally ill (sometimes, defend w expert W)

**Not Voluntary**

* Voluntary statement not preceded by a Miranda warning →
* Voluntary confession but no Miranda warning → Can’t use to show guilt. But can use to impeach ∆ if he testifies. ∆ must open the door. Like a prior inconsistent statement.
* No 5th amendment protection for physical exemplars EX: Can’t say “you can’t take a hair sample”

**Trickery or Deception**

* **Rule:** Can lie to get confession
* **Test:** Was ∆’s will overborn
* EX: We’ll give best deal to who confesses first → Ok even if Co-∆ not in custody

Promises

**Requirements for a promise to render a confession invalid**

* Positive **&**
* Made or sanctioned by someone in authority **&**
* So influential it causes ∆ to be untruthful

**Warnings must be given before statement is admissible**

* Right to remain silent
* Any statement he makes may be used against him at trial
* Right to a lawyer present prior to question
* If unable to afford a lawyer, he has the right to have a lawyer appointed to him
* Right to terminate the interview at any time
* If this is a written statement, ∆ must be shown to have knowingly, willingly, & intelligently given
  + - *(basically Miranda warnings must be on the written confession)*
    - *Intelligently:* Low standard. Aware of accusation & possible charge

**For or Against Warnings**

* **Rule:** Can’t add *“for or”* to the warning that any statement he makes may be used against him at trial
* **Effect:** Always renders confession involuntary
* **Policy:** Confessions unlikely to be used for ∆. Might induce ∆ to confess (even untruthfully)

**Promises from persons in Authority, Doesn’t Apply to:** Employers **&** Defense Attorney

**Motion to Suppress *Jackson v. Denno* Hearing:** Hearing to determine the voluntariness of a confession

Written Statements

**Requirements (handwritten or typed)**

* **Look for:** *“This waiver of my rights is completely voluntary on my part.”*
* Otherwise confession might be deemed involuntary

**When Written Statements of an accused may be used** **38.22 (1)**

* Statement signed by ∆ **or**
* Made by ∆ in his own handwriting **or**
* Bearing his mark (if unable to write. Non-PO must witness)

**Handwritten Confessions:** Allowed. Better for ∆ to handwrite, ensures it’s not unfavorable to ∆

**Typed Confession:** PO can type after ∆ confesses. May be unfavorable to ∆, not in their words

**Warnings the Statement must show on its face to be admissible**  **38.22(2)**

* **1. Must give Miranda Warnings prior to the statement &**
  + - Right to remain silent & not make any statement at all & any statement may be used against him at his trial
    - Any statement he makes may be used as evidence against him in court
    - Right to have a lawyer present to advise him prior to and during any questioning
    - If unable to employ a lawyer, has the right to have a lawyer appointed to advise him prior to & during any questioning
    - Right to terminate the interview at any time
* **2. ∆ knowingly, intelligently, and voluntarily waived those rights !!!**

**PD must stop questioning when:**

* **Rule:** PD must stop questioning when suspect invokes his rights
* **Look for:** *“I will not talk to you until I have a lawyer.”*
* **Doesn’t Apply:** *“I think I need a lawyer…”*

Oral Confessions

**Federal:** Oral confessions are admissible **!!!**

**TX:** Oral confessions are generally inadmissible **!!!**

**Exceptions: 2 Circs where Oral Confessions Admissible (TX) !!!**

* E-recorded **or**
* Assertion of fact that tends to establish the guilt of the accused

Exception: Electronic Recordings

**Requirements 38.22 (3)**

* Warnings must be on the tape/video **&**
* Accurate (must authenticate) **&**
* A knowing, voluntary, & intelligent confession on the tape **&** *see 2 Sec. 2 reqt’s above*
* All voices identified **&**
* Must preserve until conviction & all appeals are exhausted

Exception: Assertions of Fact that tend to establish the guilt of the accused

**TX Rule:** Oral confession admissible if ∆ makes an assertion of fact that's found to be true, that conduces to establish his guilt

* EX: I got drunk cause my gf broke up w/ me

**Inevitable Discovery** *Nicks v. Williams* (Good Christian Burial Case)

* **Rule:** Improper confession admissible if PD would have inevitably discovered the evidence
  + - EX: Confess to cop in car that body’s in the cornfield. PD was already searching cornfield → Confession admissible
* **Includes:** Circumstantial Evidence

Must disregard error to a constitutional nature, unless has a **substantial & injurious** **effect or influence** *Woods v. State***,** 152

**Requirements for Oral or Sign Language Statement from custodial interrogation to be admissible 38.22 (3)**

* **Requirements**
  + - E-recorded EX: Video
    - Before statement but during recording ∆’s given the warnings above **&** knowingly, intelligently, and voluntarily waives any rights in the warning;
    - Accurate
    - All voices identified **&**
    - ∆’s atty received a true, complete, and accurate copy 20+ days before the proceeding
    - **Not admissible unless all req’ts are met, except:**
      * Only voices that are material are identified **&**
      * ∆ was given the warnings above
* Must preserve until ∆'s conviction for any related offense is final, direct appeals are exhausted, or prosecution barred by law
* **Doesn’t Apply**: Any statement which contains **assertions of facts or circs that are found true** & **conduce to establish the guilt of the accused**
  + - EX: Find secreted or stolen property or instrument of the offense
* Deaf → Must provide interpreter

|  |  |
| --- | --- |
| * **Examples: Statements by the Accused** | **Is it a valid confession?** |
| Employer promises to get ∆ off, but ∆ was later convicted. | Valid Confession, Employer is not a person in authority for purposes of rendering a confession invalid |
| Defense atty says if you confess you’ll be released on bond, but you confessed & no bond was allowed | Valid Confession. Defense atty is not a person in authority for purposes of rendering a confession invalid |
| PO says confession could be used *for or* against ∆ → | Invalid confession. Adding *“for or”* to the Miranda warnings renders a confession involuntary. |

VENUE

**Purpose:** Where trial can be held. +1 venue can have jsd

**Requirements to Establish Venue**

* Allegations must be in charging document **&**
* Says ∆ committed crime in that county **&**
* Prove w/ a preponderance

**Offense Committed Outside TX 13.01**

* If committed wholly or in part in TX --> Can prosecute in *any* TX county **where ∆ is found or**
* Where any element of the crime is found EX: Mailing illegal drugs
* EX: Family travels through TX / Beats child / Child dies in unidentified TX county > Venue in county they’re found

**Criminal Homicide** **13.05**

* EX: Max (Terrent County) calls Mary (Harris County) about killing victim killed in Harris County → Both counties ok
* EX: Carl kills victim in Terrent County, dumps body in Harris County → Can try in either county
* EX: Child kidnapped in Travis County, travels through Harris county, & ends up in Galveston County → All have venue

**2 possible venues:** Goes to whichever files first. Usually PD cooperates so county w/ the most evidence tries it

**Other Offenses :** Venue not specifically stated → Venue is where crime committed **13.18**

**Offense in state & unsure of venue where crime occurred:** Venue where ∆ resides, apprehended, or extradited **13.19**

**Dismissed bc fail to prove venue:** Must re-file in another county w/ venue. Beware §oL’s

**Unauthorized Use of a Vehicle *(Joyriding §)*** Anywhere you get or take it  **13.23**

**False Imprisonment, Kidnapping, & Human Smuggling**  **13.12**

* Where committed **or**
* County victim taken through, into, or out of

**3 Venues for Computer Crimes 13.25**

* County of *principal place of business* of the computer, computer network, or system O **or**
* Where ∆ had control or possession of:
  + - Crime proceeds **or**
    - Books, records, documents, property, instruments, programs, or other material used
* **\*Main\*** any county from which, to which, or through which access to a computer, network, program, or system was made
  + - **Applies:** By wire, electromagnetic waves, microwaves, other
      * EX: NY ∆ sends $ through Dallas switching station to Harris County -→ NY, Dallas, Harris County

**Proof of Venue 13.17**

* Indictment or info, or any pleading may allege the offense was committed in the prosecuting county
* Only req’d to prove by a preponderance that the prosecuting county has venue

**Presumption of venue unless TX Rules of AppPro 44.2(c) (pg 1339)**

* ∆ objects in TrCt **or**
* Trial record shows venue in another county

Change of Venue

**When:** Must file w/in 7 days before the hearing (like any other pre-trial motion)

**New venue:** Usually it’s moved to an adjoining county

**Court Motion for Change of Venue 31.01**

* **Applies:** Judge believes ∆ can’t have a fair & impartial trial
* **Requirements**
  + - Notify all parties & hear evidence
    - Notice to ∆ & State
    - Then can order a change of venue to any county in Dist of that county or an adjoining district, stating grounds for change
    - **Requirement for Change of Venue beyond Adjoining Dist:** 10 days notice + grounds for reversal if ∆’s timely contest shows Dist not subject to same conditions which req’d transfer.

**State Motion for Change of Venue 31.02**

* **Applies:** Felony or misdemeanor + jail
* **Motion must be given by:** Dist or County atty
* **Nutshell:** Can do it in writing
* **Requirements**
  + - Influence in favor of ∆ **or**
    - County is too lawless (can’t have a speedy, fair & impartial trial) **or**
    - W’s life in danger there

**∆’s Motion for Change of Venue 31.03**

* **Requirements**
  + - ∆’s affidavit **&**
    - Affidavit of 2+ credible residents of prosecuting county for either:
      * 1. Not a fair & impartial trial **&**
      * 2. Dangerous combination against him instigated by influential persons (can’t expect a fair trial)
* Change of venue is grounds for reversal
  + - ∆ timely contests & any county in his Dist and adjoining Dist not subject to same conditions which req’d transfer
* **Purpose:** Convenience of parties/W’s **&** in the interest of justice
* May transfer to another district when ∆ agrees to plead guilty (req’s ∆’s motion & prosecutors consent)

**Motion may be controverted 31.04**

* Credible person can use affidavit to attack credibility of persons making affidavit for change of venue, or knowledge

**Req’ts to change venue bc media coverage:** Pervasive, prejudicial **&** inflammatory

THE CHARGING PROCESS

**3 Documents to know in the charging process !!!**

* Indictment *replaces information for felonies, rarely misdemeanors*
* Information  *for most misdemeanors*
* Compliant *for most class c misdemeanors*

Joinder of Offenses

**Rule:** Charging document can have only 1 criminal episode

**Rule:** All crimes committed arising out of the same “criminal episode” **21.24**

**Criminal Episode:** 2+ transactions connected by a single plan can be joined as diff counts  **3.01**

* Punishment for multiple counts in the same indictment is stacked EX: 10 + 5 + 5 → Serves 10 years
* EX: Steal car to rob liquor store
* EX: Serial rapist always acts on full moon

**Rule:** Each paragraph can only charge 1 offense, but there’s only 1 verdict

**Rule:** Count, indictment, information, or complaint sufficient only if 1+ of its paragraphs is sufficient

* EX: Murder can be committed a) intentionally or knowingly **or** b) Intent to cause SBI & do an act that is clearly dangerous to human life → Can charge on both. Jury told they can convict ∆ if they believe he did either

Prosecution reads charging document to the jury

Misdemeanor Charging Process

Complaint

**Look for:** *“***Caption** *In the name & by the authority of the state of TX…***Commencement** *charges \_\_\_ w/ \_\_\_ in the name of the state…***Offense** *on or about \_\_\_ did then commit a [count]”*

**3 Types of Complaints !!!**

* Charging document for Class C misdemeanors **&**
* Affidavit for an arrest warrant **&**
* Supporting affidavit that supports the information

**Definition:** Affidavit made before magistrate or district or county atty that charges the offense  **15.04**

**Requirements** **!!!** **15.05**

* ∆’s name **or** reasonably definite description **&**
* Show ∆ committed a crime directly or good reason to believe, & does believe, ∆ committed it **&**
* Time & place of crime as best as possible **&**
* Signed by PO

**Who can draft it:** Anyone w/ good faith belief that the facts are true **(except prosecutor** **!!!)** *Morey v. State*

**General:** Personal knowledge not req’d

**Purpose:** Notice

Information

**Definition 21.20**

* Written statement filed by the state that charges ∆ w/ a prosecutable offense
* Charging document for most misdemeanors **27.01**
* Charging document for felonies → Goes to GJ indictment

**Requirements** **!!!**  **21.21**

* 1. Commences *"In the name & by authority of The State of TX"***&**
* 2. Venue **&**
* 3. By the proper officer **&**
* 4. ∆’s name **or** unknown + reasonably accurate description **&**
* 5. Location of offense w/in Cts jsd where information filed **&**
* 6. Crime occurred before information filed & not barred by §oLs **&**
* 7. Offense in plain and intelligible words **&**
* 8. Concludes *"Against the peace and dignity of the State"* **&**
* 9. Officially signed by DA or county atty

**Information based on Complaint 21.22**

* Can’t present information until affidavit made (charging ∆). Must file affidavit w/ information. Sworn under oath

**Use:** All cases (felonies, class a & b misdemeanors) start w/ an information. Information may turn into an indictment (felonies only)

Felony Charging Process

Indictment

**Definition**

* Written statement by a GJ accusing a person of an act/omission that’s an offense
* Charging document for felonies (replaces information)(very rarely misdemeanors)

**Purpose of Indictment:** Notice to ∆ **&** Vest jsd in the trial county **!!!**

**Requirements !!! 21.02**

* 1. Commences *"In the name & by authority of The State of TX"***&**
* 2. Venue **&**
* 3. Act of a GJ of the proper county
* 4. ∆’s name **or** unknown + reasonably accurate description **&**
* 5. Location of offense w/in Cts jsd where indictment presented **&**
* 6. Crime occurred before indictment filed & not barred by §oLs **&**
* 7. Offense in plain and intelligible words **&**
* 8. Concludes *"Against the peace and dignity of the State"* **&**
* 9. Officially signed by GJ foreman

**Must include:** Everything should be stated in an indictment which is necessary to be proved (might be outdated) **21.03**

**Waiver:** Can waive an indictment (unless capital murder-may only waive the right to a trial by jury). Must have lawyer, in writing, & in open Ct

Grand Jury (GJ)

**General**

* TX, federal, &1/3 of states use GJ to indict for felonies
* Right to a GJ stems from US Constitution, but not binding on states
* Investigates crime, hears W’s
* Defense sits outside, doesn’t participate

**Purpose:** Determine PC

**Criticism:** Some believe they’ll indict anyone they’re told to indict

**3 Results after Deliberation**

* Can issue a **true bill** that they’re going to indict **or**
* A **no bill** that they’re not going to indict **or**
* Continue w/ investigation to determine PC

Selecting the GJ

**2 Ways to select a GJ in TX** **19.01**

* **Key Man System (comm’r system)**
  + - Dist Judge selects 3-5 commissioners (key men) who call buddies & request them to serve on GJ
    - Harris County follows. Meets 2x/week for the term.
    - Usually retired persons
* **Petite System**
  + - Judges select from a list compiled from voter registration/drivers license
    - More neutral method

**Goal:** Broad representation of community (county citizens) Consider race, age, & gender.

**Rule:** Constitutional as long as neutral selection process *Ex Parte Becker***,** 212

* **BOP:** Must show a protected class wasn’t included
* **Criticism:** Voters registration list could cause GJ to be discriminatory (b/c class)

Commissioners select 15-40 citizens to be GJ’s for \ next term. Commissioners exempt from serving during their term **19.06**

- **Cerada v. State\*** (p. 215)

Duties of Grand Jury

**Duties 20.09**

* Inquire into all offenses that any member may have knowledge
* GJ member can begin investigation

**Who may be present in GJ room [prosecutors, stenographers] 20.011**

* Grand jurors
* Bailiffs
* Prosecutor
* W’s while being examined **or**   
  who assist prosecutor in examining other W’s or presenting evidence (if necessary)
* Interpreters (if necessary)
* Stenographer, e-recording, or e-video operator **&**

**Who may be present during deliberation:** Only GJ’s are allowed in the GJ room while they deliberate

**Secrecy**  **20.02**

* **Rule:** GJ proceedings are secret. Can’t disclose anything transpiring before the GJ in their official duties, regardless of whether its recorded
* **Doesn’t apply:** W’s ???
* **Punishment for Contempt:** Max $500 fine **&/or** max 30 days jail
* **Exception:** Prosecutor may disclose (if necessary) a record/transcript, or other prohibited disclosure to a GJ, PD, or a prosecutor. Must warn them it’s secret (punishment applies) *Stern v. State, 198*

**5th Amendment Violations**

How Suspects Are Questioned by the Grand Jury

**Questioning Suspect/∆ 20.17**

* GJ shall first state the offense, county allegedly committed, & estimated **TIME,** **DATE**, & direct the examination
* **Before Questioning:** Must give ∆ a written copy of warnings *(below)* & chance to retain/apply counsel & consult w/ them
* **Must give these warnings (Mine says oral, dana’s outline says written ??? )**
  + - Under oath
    - Lie about material question → aggravated perjury
    - 5th Amendment right to refuse to answer any incriminating question (only on a question-by-question basis)
    - **Right to have a lawyer outside the chamber** to advise you before answering questions that might incriminate you
      * *Suspect can pause the GJ during questioning & go talk to atty outside*
    - Your testimony may be used against you at any subsequent proceeding
    - If unable to employ a lawyer…right to have one appointed…before answering possibly incriminating questions

How Witnesses Are Questioned by the Grand Jury

**Applies:** Felony in county w/in GJ’s jsd, **&** offender’s name is known/unknown **or** uncertain when/how committed **20.18**

**Procedure:** GJ 1st tells W about the investigation. Then, GJ questions W to determine if he knows about the crime & who did it

**Effect:** W can’t plead the 5th. Must answer

**When Witnesses Refuse to Testify Before GJ 20.15**

* Notify prosecutor **&**
* Ct can compel W to answer by imposing a max $500 fine **&** **jail until he testifies**

**2 Types of Immunity**

* **Use Immunity:** Can’t use it against the testifier
* **Transactional Immunity:** Immune from prosecution for that case

Grand Jury Action; No Bill or Indictment

**Post-testimony Vote by GJ’s: If 9 members concur**, foreman gives a memo documenting it to the prosecutor **20.19**

**Timeline: Indictment Prepared 20.20**

* Prosecutor prepares all indictments, w/ as little delay possible
* Foreman signs
* Atty endorses W names whose testimony it was found
* GJ foreman delivers to judge. **9+ GJ’s must be present**  **20.21**

Defects and Challenges to the Charging Instrument

**History:** Could only object to facial defects at trial. Substantive defects ok on 1st appeal

**Modern:** Both facial & substance defects ok

**Waiver of Rights 1.14**

* **Rule:** ∆ in a criminal prosecution for any offense may waive any of his rights
* **Exception:** Capital felony → May only waive right to trial by jury **!!!** **1.13(b)**

**Objections**

* ∆ must object to a defect, error, or irregularity of form or substance in an indictment or information **before trial**
  + - TrCt can require it be made earlier **28.01**
    - Doesn’t object → Waives right to object

Defensive Challenges to the Charging Instrument

**Written Pleadings:** Motions to set aside an indictment or information, special pleas & exceptions must be **in writing 27.10**

Facial Defects

**Rule:** ∆ must object to the indictment error *before* *trial* *begins* (form or substance irrelevant)

**Only exceptions to substance of indictment 27.08**

* Doesn’t appear ∆ committed a crime **or**
* Barred by §oL **or**   
  offense committed after the indictment
* Contains a legal defense or bar to prosecution **&**
* No jsd on its face

**Only Exceptions to form of Indictment 27.09**

* Wrong venue **or**
* 21.02 and 21.21 req’ts not met **or**
* Not returned by a lawfully chosen or empaneled GJ

**Must allege recklessness or criminal negligence 21.15**

* **Applies:** Recklessness or criminal negligence is an **element** of the offense **or** a **charge**
* **Requirement**: Charging document must allege it w/ reasonable certainty
* Mere allegations insufficient

**Notice:** Sufficient if it alleges elements or the crime name (even if they’re not described) *Duron v. State*, 260

**Rule:** Must state **name & offense**. w/out them ∆ can object on appeal. An objection’s req’d for everything else *before trial Cook*

|  |  |
| --- | --- |
| * **Examples: Facial Defects** | **Is it a valid?** |
| Indictment w/ **name** & **offense** → valid | Valid |
| Indictment fails to state ∆’s name | Invalid |
| Indictment fails to state ∆’s offense | Invalid |
| Indictment fails to state ∆ knowingly & intentionally committed it | Valid |
| Charging instrument dismissed | Can appeal to reinstate or amend |

Charging Instrument Amendments

**Amendment of Indictment or Information**  **28.10**

* **Pre-trial Amendments**
  + - Must give ∆ notice to amend form or substance in an indictment or information. 10 days to respond (less if ∆ requests)
* **Post-trial Amendments:** Allowed if ∆ doesn’t object
  + - **Rule:** To add another offense →must get new indictment from GJ (unless ∆ doesn’t object-unlikely) **!!!**
    - EX: Indictment charges ∆ w/ possession of meth → Can’t add possession of *cocaine*
* **Can’t amend when**
  + - ∆ objects to form or substance if the amendment charges ∆ w/ an add’l or different offense **or**
    - Prejudices ∆’s substantive rights

**Requirements**

* w/in §oL’s **&**
* Made w/ leave of Ct **& 28.11**
* Changed physical words to amend EX: Name changed → Must reflect new name

**Can change w/out leave of Ct**

* Add’l ways to commit the offense
* Change name of W, weapons, remove surplus info
* Change name of victim EX: Another way to commit felony murder

∆'S APPEARANCE BEFORE A MAGISTRATE

**Must take Offender before Magistrate 14.06**

* **Rule:** PO must take ∆ immediately or w/out unnecessary delay (w/in 48 hours) to a magistrate who may have ordered the arrest **or** a county magistrate where arrest made w/out an order **or** any other TX county.
  + - Magistrate must immediately perform 15.17 duties
* **Exception-Alternatives**
  + - **Class C Misdemeanor Citations [for residents & non-residents]**
      * PD may issue a citation to a person (or child) for a Class C misdemeanor
      * **Requirements:** Written notice of the time & place to appear, name & address, offense, & this admonishment, in bold, underlined or capital letters:
        + *"If you’re convicted of a misdemeanor involving violence where you are or were a spouse, intimate partner, parent, or guardian of the victim or are or were involved in a similar relationship with the victim, it may be unlawful for you to possess or purchase a firearm....  If you have any questions …you should consult an attorney."*
      * **Doesn’t Apply:** 49.02 Penal Code offense
    - **Class A & B Misdemeanor Citations [only for county residents]**
      * **Requirements:***Same as above*
      * **Applies only to these offenses**
        + 481.121, Health and Safety Code, if punishable under Subsection (b)(1) or (2)
        + 481.1161, Health and Safety Code, if the offense is punishable under Subsection (b)(1) or (2)
        + 28.03, Penal Code, punishable under (b)(2)
        + 28.08, Penal Code, punishable under (b)(1)
        + 31.03, Penal Code, punishable under (e)(2)(A)
        + 31.04, Penal Code, punishable under (e)(2)
        + 38.114, Penal Code, punishable as a Class B misdemeanor **or**
        + 521.457, Transportation Code

Preliminary Initial Appearance (PIA)

**Definition:** Hearing for an arrested person. Beginning of the prosecution.

**Not an arraignment !!!** Arraignment is where ∆ has been formally charged

**Not really an adversarial proceeding**

**Duties of Arresting Officer & Magistrate 15.17(a)**

* ∆ arrested, w/ or w/out a warrant or before charges are filed (capias)
* W/in 48 hours (no unnecessary delay), ∆’s taken to a magistrate where he was arrested (or in state if speedier)
  + - It’s a preliminary hearing (not an arraignment.) We call them PIA’s (preliminary initial appearances)
    - May also be conducted via e-broadcast
* Magistrate tells them the accusation
* **Magistrate must give ∆ these warnings 15.17**
  + - Right to remain silent **Miranda**
    - Right to an atty & time to consult w/ them **Miranda**
    - Right to have one appointed **Miranda**
    - Right to an examining trial OR goes to GJ for indictment (must show PC) **Miranda**
    - **Right to terminate** **+ Add’l TX Requirement**
* **Examining Trial**
  + - A small hearing w/ a judge before felony indictment to determine PC
    - It has W’s, a record, a “little” trial
    - Preferred by ∆ bc free discovery for defense & get to cross-ex W’s
    - Prosecution must show PC that ∆ committed the crime
    - Allowed any time before GJ indicts
* Determines if bail is allowed
* Then, either:
  + - Arrest w/out warrant → *nin v. Pugh* Hearing*,* SupCt said a neutral magistrate must determine PC for an arrest
      * Must have this at the PIA → Must show PC to hold ∆
    - Arrested w/ a warrant → No *Gerstein v. Pugh Hearing* bc PC already determined by a magistrate

It’s recorded & kept until the earlier of

* Date pretrial hearing ends **or**
* 91st day after recording for misdemeanors or 120th day for felonies.  ∆’s counsel can pay for a copy

**6th Amendment Right to Counsel**

* *Stage 1:* Right to counsel “attaches”. No appt for indigents
* *Stage 2:* Critical Stage (post-attachment). Must appoint bc adversarial

Bail

**Bail 17.01**

* Security given by∆ they’ll appear & answer the accusation in Ct
* **Includes**: Bail bond **or** Personal bond
* All arrested ∆’s are entitled to have bail (except capital offenders) **!!!**
* If he skips town, Dog the Bounty Hunter can help (get a writ of attachment & go get ‘em)

**Bail Bond 17.02**

* **Definition:** A written undertaking by ∆ & ∆’s sureties they’ll appear before a Ct or magistrate to answer an accusation
* Officer must give receipt
* **Must give refund, upon a Ct order, after ∆ complies to:** ∆ or depositor or ∆ if no one else has a receipt
* If bail bond allowed --> ∆ can deposit it w/out his surities signing

3 Types of Bonds

**Surety Bond 17.08**

* Most common. A1 bonds, pay a 10% premium fee
* Bonding co pays on a promise to return
* **Must set bond w/in 24 hours and max $5,000 if no *Gersten v. Pugh* hearing (???)**
  + - **Felony → w/in 72 hours**
* Felony offense & another charge --> no bond *see handout*
* No cash discount
* ∆’s atty should be on good terms w/ bond co
* Atty can act as bondsman for client (bad idea). Anyone else must have bondsman license

**Cash Bonds**

* Can’t use credit cards
* Commonly drug dealers post them
* Appears or case disposed → Gets cash back
* No cash discount

**Personal Bond**

Amount of Bail

* 5K bail, bond is usually 10%. Bond isn’t returned (goes to bonding co)

Must have same bond in the amount whether cash or surety *Bondsmen v. Carey, 292*

* Can’t make a distinction bw amount (once it’s set). But can set a higher bond, generally

**Rules for Fixing Amount of Bail !!!**  **17.15**

* 1. Bail shall be sufficiently high to give reasonable assurance ∆ will comply
* 2. Can’t use as an instrument of oppression
* 3. Nature & of offense and circs committed
* 4. Ability to make bail
  + - ∆’s burden to show him & his family don’t have sufficient resources to make bail
    - **Consider:** Job, bank account, etc
* 5. Future safety of victim & community **!!!** EX: Serial rapist → high or no bond

**Determining Flight Risk:** Flight risk rated from +4 (good) to -4 (bad)

Challenging the Amount of Bail

*Milner v. State, 294*

Indictment can have enhancement counts → Increases punishment EX: Prior felony

* Prior convictions ups the punishment

**2 Ways to Challenge Bail as Excessive**

* **Motion to Reduce Bail:** Don’t do it bc carried w/ the case. Won review TrCt decision until case is over.
* **Habeus Corpus:** Main. Collateral attack. Can be reviewed after TrCts bail decision. AppCt usually returns w/in 1 month

Personal Bond and Conditions of Release

**Personal Bond 17.03**

* **Rule:** Magistrate may release ∆ on personal bond w/out sureties or security Rare
  + - EX: Maybe if 17 yr old has sex w/ 13 yr old gf (aggravated sexual assault)
* **Exceptions:** Only TrCt may release on personal bond a ∆ who’s charged w/
  + - * Capital Murder
      * Aggravated Kidnapping
      * Aggravated Sexual Assault
      * Deadly Assault on PO, parole board member, or Ct Participant
      * Injury to a Child, Elderly Individual, or Disabled Individual
      * Aggravated Robbery
      * Burglary
      * Engaging in Organized Criminal Activity
      * Continuous Sexual Abuse of Young Child or Children **or**
      * Continuous Trafficking of Persons
    - Charged w/ a felony under 481 or 485.033, Health and Safety Code w/ jail or a max fine that’s more than a minimum term or max fine for a 1st degree felony **or**
    - Refuses a drug test **or** tests positive
* **Conditions allowed**
  + - Reasonable belief ∆’s on drugs or drugs/alcohol involved → Can require an alcohol or drug test & treatment program (if reasonably assures ∆ will appear at trial)
    - Can’t use these test results at trial
    - Ct costs may include drug/alcohol tests or ∆ to pay as a condition of bond
    - Ct may order a personal bond fee (17.42) be:
      * Paid before ∆ released
      * Paid as a condition of bond
      * Paid as Ct costs
      * Reduced by statute **or**
      * Waived

When No Bond is Required

15.17(b)

**Applies:** Death penalty case

**Requirements:** Must give substantial showing that…. Is likely

Denial of Bail in Capital Cases

1.07

Espinoza v. State, 302

Ex Parte Woodward, 303

Denial of Bail in Non-Capital Cases

Denial of Bail, 305

Taylor v. State, 306

∆'S FIRST Trial CT APPEARANCE

Right to Counsel

Day after ∆’s arrest – brought to court in orange jumpsuit

If bonded out – then he can show up in civilian clothes

TrCt has the pre-trial release, which was done at the magistrate PIA hearing

Has been evaluated for indigency

Required to have an attorney that has the potential punishment of imprisonment

**How soon must appointment of an attorney happen 1.051(c)**

* In smaller counties – no later than the end of the third working day after the court has received a request for attorney
* Larger county – no later than the next business day after the date the court receives the request

If ∆ doesn’t want counsel, can waive his right to counsel, but the trial judge has to explain that he has a right to an attorney, if he represents himself he is held to the same standards as a lawyer, do you speak English? Do you need an interpreter? If he changes his mind in the middle of trial, a lawyer can be appointed

TX Fair Defense Act

TX doesn’t have a central public defender database (some larger counties have it)

* COUNTIES have 3 choices (Texas Defense Act)

**3 systems**

* **Ad hoc appointment system** 
  + - Designed to ensure the allocation of appointments around qualified attorneys in a fair and nondiscriminatory matter
    - Added qualifications and CLE
* **Public Defender System** 
  + - Gov’t or nonprofit corporation
* **Alternative program** 
  + - Harris county has this
    - Can use a combination of methods to appoint counsel
    - Rotating system
    - Need qualification and CLE’s and pass tests
    - Each attorney must be approved by each judge

Public Defenders

Entitled to reimbursement for reasonable expenses

Vouches can be cut and not approved – court discretion to cut the cost

Pleading a case

Keep from getting a worse verdict from the jury

Speeds things a long – efficiency

GUILTY AND NO CONTEST PLEAS

Nature of Plea Bargaining

**General**

* It’s a K
* Governed by K law bw prosecutor & ∆
* Binding once approved by the judge – trial judge must accept the plea
* Mandamus – appellate procedure to force TrCt to do what it’s supposed to do
* Unclean hands
* D has to be voluntary and mentally competent (knowingly)
  + - Has to know of the direct consequences of the guilty plea
    - Voluntary – need substantial compliance
* Questioning ∆
  + - **Admonishments Judge must give ∆ 26.13(a)** 
      * Tell ∆ the range of punishments for his plea
      * Prosecutors recommendation isn’t binding on the Ct – if agreement (plea bargain) has to tell ∆ if it will accept the plea – D can withdraw the plea if judge will not accept it (felony)
      * If ∆’s not a citizen, immigration could be involved
      * ∆ meet registration req’ts of chapter 62 (registered sex offender)

**Constitutional Requirements of the Plea**

* Voluntariness – waived all of his constitutional rights
* If not standing up there making inappropriate comments are acting dumb – presume competence

**Taking of the plea**

* Admonishment
* ∆ must to waive constitutional rights
* P has to provide substantive evidence of guilt (in felony case)

**Admonishments**

* Incomplete admonishments are subject to harmless error
* ∆ must show harm

Voluntariness Req’t

Plea Mechanics

**Introducing Substance Evidence- Guilty Plea in a Felony Case**

* If ∆ consents in writing in open Ct → Prosecution can present testimonial evidence **1.15**
  + - **Includes:** Affidavits, documentary evidence, etc
* Oral or written stipulation of evidence **1.15**
  + - **Requirements:** Must be a stipulation of the charge
* ∆ can enter a sworn statement of guilt **or case law**
* ∆ can testify under oath, at the plea hearing, & admit that the allegations in the indictment (or information) are true **easiest**
* **Other Requirements**
  + - ∆ must give consent to his appearance, confrontation, & cross-ex of W’s
* Normally both state & ∆ have a right to a trial by jury. Usually can waive (unless capital case + death penalty)
  + - **Requirements:** Must be open Ct in writing w/ approval of both the state & the Ct
    - State must give consent bc you must have a plea
    - Prosecutions discretion to allow ∆ to waive a jury trial

**Entry of Guilty Pleas in Misdemeanor Cases**

Admonishments

**Guilty Plea in a Felony Case 26.13**

* Prior to accepting a plea, Ct must tell ∆
  + - Range of punishment
    - Prosecutors punishment recommendation isn’t binding on the Ct
    - Must inquire if there was a plea bargain agreement. If so, must inform ∆ if it accepts it in open court & before any finding .  If Ct rejects it, ∆ can withdraw the plea (felony only)
    - If punishment doesn’t exceed the agreement, TrCt must give permission to ∆ before ∆ may prosecute an appeal on any matter in the case except for those matters raised by written motions filed prior to trial;
    - If ∆’s not a US citizen, their plea may result in deportation, exclused from visiting US, or deny naturalization **&**
    - ∆’s req’d register if convicted of or placed on deferred adjudication for registerable offense
* Substantial Ct compliance is sufficient, unless ∆ shows he wasn’t aware of the consequences & misled or harmed by it
* Can be oral or written
  + - If in writing, ∆ & his atty must sign a statement that he understands it & is aware of the consequences. If ∆ is unable or refuses to sign it, Ct can tell him orally
* Ct should also:
  + - Inquire if a victim impact statement has been returned to the state atty & ask for a copy **&**
    - Inquire if state atty gave notice of any plea bargain *to the victim, their guardian, or close relative of a deceased victim*

Introducing Substantive Evidence

Introduction, 396

**Menefoe v. State,** 396

Waiver of Jury Trial

Intro, 395

**Shaffer v. State\*,** 396

Note 3, 397

Guilty Pleas in Misdemeanor Cases

Introduction, 401

**McGuire v. State,** 401

26.13(a)(2)

**Guilty Plea 26.13(a)(2)(above)**

* Before accepting a plea:
  + - Ct must tell ∆ that the prosecutors punishment recommendation isn’t binding on the Ct *(Same as felony)*
    - Ct must inquire if a plea bargain agreement exists. If so, must inform ∆ if it accepts it in open court & before any finding.  If Ct rejects it, ∆ can withdraw the plea

**Plea of guilty or nolo contendere in a misdemeanor 27.14**

* ∆ or his atty may make in open Ct. May waive a jury, & may punish w/ or w/out evidence
* **If fine only**
  + - May mail or deliver a plea of "guilty" or "nolo contendere" & a waiver of jury trial.  ∆ may also request in writing that the Ct notify him of the amount of an appeal bond allowed.
    - **Not req’d to appear if:** Plea & waiver received *before or after* ∆’s Ct date but 5+ days before trial
    - Ct notifies ∆ in person or by certified mail of any fine & about the appeal bond if it was requested. Fine or bond is due w/in 31 days.
* **Misdemeanor w/ fine only:** Paying it constitutes a guilty finding as if entered *nolo contendere* & constitutes a written waiver of a jury trial
* **Written notice for fine-only offense or a parking fine**, and filed with the Ct and a copy given to ∆, the notice serves as a complaint to which ∆ may plead "guilty," "not guilty," or "nolo contendere."  If ∆ pleads "not guilty" or fails to appear, a complaint shall be filed that conforms to the Chap. 45 req’ts & it serves as an original complaint.  ∆ may waive the filing of a sworn complaint & elect the prosecution proceed on the written notice of the offense if ∆ agrees in writing w/ the prosecution, signs the agreement, and files it
* Before accepting a plea for family violence, Ct must tell ∆: *"If you’re convicted of a misdemeanor involving violence where you are or were a spouse, intimate partner, parent, or guardian of the victim or are or were involved in a similar relationship with the victim, it may be unlawful for you to possess or purchase a firearm....  If you have any questions …you should consult an attorney."*
  + - Can be oral or written, except if ∆ charged w/ a misdemeanor w/ fine only

PRETRIAL MOTIONS AND HEARINGS

Pretrial Hearing

**Rule:** Ct may set any criminal case for a pre-trial hearing, & direct ∆ & state to appear for a conference & hearing **28.01**

**Requirement:** ∆ must be present

**Determines**

* Arraignment of ∆ & appoint counsel
* ∆’s Pleadings
* Special pleas
* Exceptions to form or substance of indictment or information
* Motions for continuance
* Motions to suppress evidence
* Motions for change of venue
* Discovery
* Entrapment **&**
* Motion for appointment of interpreter.

**Time Limit:** Must file 7 days before the hearing

**Time Limit once hearing set:** State must give ∆ 10 days notice. Has 7 days to file it

* **Notice=**
* Announced by Ct w/ ∆ or his atty present **or**
* personally served **or**
* Mailed

Arraignment

**Requirement:** ∆ must be present

**Purpose:** Fix ∆’s Identity & Taking ∆’s Plea

Fixing ∆’s Identity

**Name as stated in Indictment 26.07**

It’s called at arraignment. Believed to be his name unless he says otherwise. Can’t later deny it was incorrect in defense.

* **Purpose:** Allows judge to amend ∆’s name on the indictment

**∆ suggests different name:** Note in Ct minutes, correct indictment, & proceed like there wasn’t a mistake **26.08**

**∆ refuses to give his real name:** Use indictment name as true. ∆ can’t later contradict it in defense. Name irrelevant.  **26.09**

**∆’s name unknown:** ∆ can ask that indictment be corrected w/ his true name  **26.10**

Taking ∆'s Plea

**Indictment Read:** If ∆ doesn’t object to his name, then Ct reads the indictment & asks ∆ to plea **26.11**

**Pleas allowed:** Guilty, Not guilty, Nolo Contendere

**∆ pleas not guilty:** Added to Ct minutes

**∆ refuses to plea:** Ct records as not guilty  **27.02(3)-(5)**

Motions to Suppress Evidence

*See Exclusionary Rule (above)*

**Issues of Conditional Relevance:** Admissibility issue that depends on facts → Jury decides those facts

A simple “your honor I object” is insufficient to preserve your motion to suppress

Motions for Continuance

**Ways to get a continuance**

* Informal Reset before trial
  + - Ct coordinator
    - In charge of schedule Judge’s docket as an administrative matter
    - Signed form goes to clerk
* Consent of the parties
  + - A written agreement to dismiss the case if ∆ fulfills a number of conditions EX: Drug Rehab
      * No plea, no conviction, no deferred adjudication

**If Juror observes a Religious Holy Day 29.012**

* **Definition:** Religious org (tax code 11.20) prohibits members from participating in secular activities, such as Ct
* **Duration:** Recess until next day Ct’s in session
* **Requirements:** Juror must file an affidavit before the final jury selection:
  + - Grounds for the recess **&**
    - Jurors religious beliefs prohibit him from taking part in a Ct proceeding that day
    - *\* This affidavit is proof of the facts & don’t need to corroborate*

**By Agreement of both Parties:** Must show good cause in open Ct. May only be for as long as is necessary  **29.02**

**By ∆, For Sufficient Cause Shown:** May only be for as long as is necessary  **29.03**

**By ∆, if ∆ can’t find a W:** Doesn’t have to show in its motions for continuances unless state does **29.04-06**

**State’s 1st Motion for Continuance 29.04**

* W’s name & residence, if known, or that’s is unknown **&**
* Efforts to make W attend. Supeona or application for one insufficient when the law authorized an attachment **&**
* W’s testimony that’s believed to be material

**State’s 2nd+ Motion by State for Continuance, W unable to attend**

* **Material facts** he expects W to establish **&**
* Expects W to attend at next Ct term **&**
* Can’t get testimony from any other source that term

**∆ ‘s 1st Motion for Continuance, W unable to attend 29.06**

* W’s name & residence (or it’s unknown) **&**
* Diligence used to procure his attendance; & it shall not be considered sufficient diligence to have caused to be issued, or to have applied for, a subpoena, in cases where the law authorized an attachment to issue. **&**
* Facts W’s expected to provide (must be **material facts**) **&**
* W’s not absent by ∆’s procurement or consent **&**
* Motion isn’t made for delay **&**
* No reasonable expectation W can attend during the present term. Ct’s discretion, not a right
* **If overruled & ∆ convicted & material W, & motions facts appear true:** Grant new trial & postpone

**∆’s 2nd+ Motion by State for Continuance 29.07**

* Testimony can’t be procured from any other known source **&**
* Reasonable expectation of procuring W at next term
* *\*also must include 29.06 req’ts*

**Motion Sworn To:** Motions for continuance must be sworn to by a person w/ personal knowledge of the facts **29.08**

**Continuance after trial begins 29.13**

Allowed an unexpected occurrence since trial began **&** couldn’t reasonably anticipate **&** makes trial unfair

Motions for Community Supervision

Allowed if ∆ files a **pre-trial** written sworn motion that he’s never been convicted of a felony & jury finds it’s true **42.12 (4)(e)**

Examining Trial Alternative

**State v. Honorable Lupe Salinas\*** (p. 218)

**Examining Trial 16.01**

Must give ∆ time to find an atty. Ct may may appoint one to represent them in an examining trial only. Felony accused has right to an examining trial before indictment in county w/ jsd, whether he’s in custody or on bail (judge determines amount, if allowed).

If accused transferred for criminal prosecution after a hearing under 54.02, Family Code, Cts discretion to do examining trial.

**Warning to Accused 16.02**

Before examining W’s, judge should tell ∆:

* Has the right to make a statement about it &
* it may be used in evidence against him &
* he can’t be forced to make a statement

**Voluntary Statement 16.04**

* ∆ may make voluntary statement before W’s examined (not after)
* It shall be reduced to writing by or under the direction of the magistrate, or by ∆ or his counsel, & signed by∆ (but not sworn). Magistrate shall attest by his own certificate & signature to the execution and signing of the statement.

**Counsel may examine W 16.06**

* State & ∆ or his counsel may question W’s on direct or cross ex. Judge may examine W’s if no state counsel present

**Use Same Rules of Evidence as Final Trial 16.07**

**Presence of ∆:** Examination of each W shall be in ∆’s the presence **16.08**

**Testimony reduced to Writing 16.09**

* W’s testimony is reduced to writing if judge orders & read or given to W to review. W can notify for correction. W signs. Must be certified by judge **or**
* A statement of facts authenticated by State & ∆’s atty & approved by judge may be used to preserve W’s testimony

JURY SELECTION

**Jury**

* Defense wants people who can’t say no
* J**ury comes from:** Voter registration lists **or** Drivers license lists
* There are exemptions jurors can claim….Have custody of a child under care and no childcare,
* How many jurors are called by a court
  + - Felony → Need more jurors, usually 12 Verdict must be unanimous
    - Misdemeanor → Need only 6
* First 32 jurors are actually on the panel
* Jurors 33-37 are alternates
* If juror #23 is struck for cause, then that brings it down to 31 jurors, so bring in alternate

**Motion to Shuffle 35.11**

* Another way to move around jurors → Make a motion to shuffle
  + - Either side can make it
    - Causes jurors to be randomly selected from the panel (by computer, etc)
    - **Effect:** Re-arranges the order of jurors
    - Alternates can be drawn in, so they may end up on the juror
    - **Limit:** Can only shuffle once
    - EX: First jurors are all police officers and last part of them is all parents of criminals
* Can waive right to shuffle
* **Do you have to show harm to get your case reversed as a ∆ bc you were not allotted your right to shuffle?**
  + - Harm no longer presumed. Hard to measure. Must show the panel was subverted to achieve a non-random sorting of juror (ie first ½ white, second ½ black)
* Must file prior to voir dire

Jury Size

**Felony**

* DistCt get 5 preemptory challenges
* County Ct - 6 person jury and you get 3 preemptory strikes

Voir Dire

**Purpose**

* Get the best jury for your side **\*MAIN**
* Educate the jury as to the law and see if they can follow it
* Check the qualifications of jurors
  + - Judge makes preliminary cut

**3 things basic to serving (can’t waive these)**

* Must be a qualified voter in TX and the county (but doesn’t have to be a *registered* voter)
* No prior convictions **OR**
* Pending charges for theft or any felony

Make sure you understand what they’re saying, so ask them to repeat

Figure out who you want to strike EX: Good to know if they’ve been a W in a criminal case

Can tell them if its sensitive they can go explain just with the judge

**TX** allows individual voir dire, where each is questioned separately

Challenges for Cause

**Unfit to Serve**

* the 3 things basic to serving (above)
* Insane juror
* Defect in organs of feeling, (blind, touch etc), mental defect of disease
* Jurors a W in the case
* Juror served on ∆’s GJ
* Served on prior trial in the same case
* Bias or prejudice
* Can’t read or write

Peremptory Challenges

**Preemptory Challenges:** Don’t want them to serve

Trial

∆'s Presence at Trial

- TCCP Arts. 33.03-33.04

Witnesses Subpoenas

Subpoena all W’s or trial will proceed w/out them (even victim)

If the don’t show after subpoena → Can *get writ of attachment* to get sheriff to get them

Trial subpoenas have statewide jsd

Ct clerk issues subpoena

Can issue a subpoena Duces Tecum

**Subpoena and Application 24.03**

Must file application in writing stating W’s name, address, vocation **&** testimony material to case

Application must be available to opposing party

W req’d to come to Ct *but doesn’t have to talk* **!!!**

If W lives out of county → Must have issued from county of their residence ???

If subpoena denied → Thinks rude → Get a *writ of attachment* to have sheriff get them

* Entitled to have it issued if proper subpoena Lives out of county → have their county issue it

"The Rule"

- TRE 614; TCCP Art. 36.06

Motion in Limine

One or both sides request it to not ask questions, give statements about a particular matter the movant thinks is… prejudicial.

Happens before voir dire EX: Exclude confession

Doesn’t preserve error. It’s a placeholder to keep the opposition away from those matters until a ruling can be made on them.

Not a ruling on the evidence. Must object if they let evidence in (to preserve on appeal)

Might depend on other evidence

Trial "Discovery"

**Overview**

* Very little in criminal trials
* Discovery is left to TrCt discretion. They usually don't exercise it. Judges discretion

**Rules 39.14**

* Upon **∆’s motion** showing **good cause** (**high standard)** & notice to the other parties, except as provided by 39.15, the court before **(or during trial)** shall order the State to produce & permit the inspection & copying or photographing by or on behalf of ∆ of any designated documents, papers, written statement of the ∆, (except written statements of W’s& work product of counsel & their investigators **-- can’t get written statements of anyone else**), books, accounts, letters, photographs, objects or tangible things not privileged, which constitute or contain evidence material to any matter involved in the action and which are in the possession, custody or control of the State or any of its agencies.
* Must specify time, place & manner of inspection, copies & photos of those documents or tangible evidence; provided, however, it doesn’t extend to written communications b/w the State, its agents, representatives or employees.
* Can’t remove evidence from the states possession of the State
* State representative must be present for inspection
* **Except work product. Once atty can’t say to the other to send all the notes he took in the library.**
  + - **Extends to investigators**
    - **But can get books, letters, etc. Tangible, things that are material**
* Either party can motion, w/ notice for the Ct to order 1< parties to disclose the name & address of each person they may call at trial to present evidence. Must be w/in 20 days before trial

**Must turn over Potentially exculpatory evidence (that shows ∆ is not guilty) over to ∆**

* **Includes** substantive and impeachment evidence of prosecutions W’s (bc due process) *Brady*
* ***Brady* Requirements: 3 things Defense Must Show (same as Fed)**
  + - Prosecution suppressed the evidence
    - Evidence was favorable to ∆ (can be exculpatory or impeachment evidence)
    - Evidence was material (reasonable probability it would have resulted in a different verdict)
* **General**
  + - Doesn’t require SCIENTER (negligence, etc)
    - There’s a Duty to all investigative state agencies associated w/ the case

PreTrial Discovery Options

* **2 Factors TrCt considers** *King v. State, 314*
  + - Prosecutions bad faith
    - Evidence was favorable to defense

Discovering Witnesses (finding who they are before trial)

* Can look at clerks records, W lists, indictment records **39.14 (b)**
* Usually prosecution turns them over
  + - When either party makes a motion + notice → Must disclose name & address of any expert W’s they plan to call
    - So can request a list of expert W’s before trial
    - Prevents continuances bc can then get your own expert W’s to rebut
    - Pretty much the only thing the prosecution can do before trial

**Using Public Records**

* Voter registration lists
* Tax records
* Private Investigator
* Sex Offender Database
* Don’t depend on the Texas Open Records Act. It only gives you info once the case is closed & all appeals are exhausted
* Written statements of W’s (Sometimes can copy from prosecutions file)

THE COURT'S CHARGE

**Charge of Ct 36.14**

* Subject 36.07 in each felony & misdemeanor case tried in a Ct, the judge shall, before the argument, deliver to the jury, except in pleas of guilty, where a jury waived, a written charge setting forth the law, w/out opinion, w/out summing up the testimony, discussing the facts or using any argument to arouse their sympathy. Before that, ∆ must have a reasonable time to examine it & object in writing
  + - **Includes:** Errors claimed to have been committed in the charge, as well as errors claimed to have been committed by omissions therefrom or in failing to charge upon issues arising from the facts, and in no event shall it be necessary for the ∆ or his counsel to present special requested charges to preserve or maintain any error
* Requirement that the objections to the court's charge be in writing ok if objections dictated to the court reporter & state's counsel, before reading the charge to the jury.
* This is all that’s necessary to preserve, for review, the exceptions, objections, or modifications

Elements of the Charge

- Elements of the Offense (p. 416)

- Johnson v. State (p. 416)

Defining Legal and Statutory Terms

- Hogan v. State (p. 422)

"Abstraction" Requirement

-Williams v. State\* (p. 425)

Lesser Included Offenses

- Charge on Lesser Included Offenses (p. 440)

- Westbrook v. State (p. 441)

Preserving Error

**Review of Charge on Appeal 36.19**

* If CtApp finds 36.14-18 req’ts were disregarded, don’t reverse unless it injured ∆’s rights **or** ∆ hasn’t had a fair & impartial trial. Must have objected at trial.

Continuances once Trial Begins

Generally must have something unexpected happen

Hard to get

EX: Material W in hospital

Motions for Continuing Supervision

Spend sentence in free world rather than prison EX: Probation, Deferred Adjudication

**42.12(4)(e)**

∆ eligible for probation or deferred adjudication

If file a motion for probation before trial & are eligible (must not be convicted of a felony anywhere in the US)

**Examining Trial Alternative (Best for Defense) (see page 217)**

* Another possible pretrial hearing
* Absolute right to it any time before an indictment is handed down 16.01???
* Prosecution hates em
* Free discovery for the defense → Defense gets to listen & examine prosecution W’s
* **Primary Purpose:** To protect an innocent ∆ (not indict an innocent person)
* Prosecutor can’t go into GJ deliberations, but can present evidence at any time
* You do have a constitutional right to a finding of PC. Examining trial or GJ can make that determination. The first to review it gets to make that determination
* **Purposes**
  + - **Have a magistrate determine if there’s PC in a felony to continue the case**
      * What other body determines PC in a felony? Grand Jury
      * If GJ already determined
      * Something about examining trial
    - **Set Bail**
    - **Record W’s Testimony**
      * BC actually a hearing w/ testimony
      * To determine whether there’s PC
      * Direct ex, cross-ex, like a trial except its just a hearing
      * Defense attys love it
      * Ws testimony at the examining trial can be used at trial if W unavailable
      * Defense can use it to impeach the W if they testify

**Motions to have the Jury Assess Punishment:** *Defense* must file *before the trial….before the jury walks in the door* **!!! 27.02(7)**

**Motions Reporting Criminal History of Testifying W’s**

* Character evidence 404(b)
* Motives, intent, knowledge, identity

**37.03(3)(g)**

* Defense should file a motion ***before trial*** whether prosecution intends to offer evidence…prosecution must respond.
* **A defense motion**
* On ∆’s timely request, must give 404(b) TX Rules of Evidence for notice of intent to introduce evidence
  + - If DA intends to introduce an extraneous crime or bad act w/out a final conviction or a probated or suspended sentence, notice is reasonable only if it includes the date & county it occurred & victim’s name or bad act.

**37.073a1**

* All relevant evidence is admissible
* If defense wants to know → must file pre-trial to request they receive reasonable notice
* Character evidence generally doesn’t come in during assessing guilt innocence **but it does in assessing punishment**

Jury Deliberations & the Verdict

Deliberation

Rules of Deliberation (p. 452)

**Conversing w/ Jury 36.22**

No one allowed w/ jury while it’s deliberating. No one can converse w/ a juror about the case on trial except in the presence & w/ Cts permission

**Jury may communicate w/ Ct 36.27**

When jury wishes to communicate with the Ct, it shall notify the sheriff who informs Ct.

Any communication must be written, prepared by foreman & submitted by bailiff

Ct answers in writing & must use reasonable diligence to secure ∆’s & his atty, and shall first submit the question and also submit his answer to the same to ∆ or his counsel or objections and exceptions, in the same manner as any other written instructions are submitted, before answer given to jury

* Unable to get them → use proper judgment

Cts answer read in open Ct unless ∆ waives

Felony → Recorded by Ct reporter in record

**Jury may have W’s re-examined or testimony read** **36.28**

In criminal trial, if the jury disagrees about a W statement they may, upon applying to the Ct, the Ct reporter's notes tread to them hat part of such W testimony or the particular point in dispute, and no other; but if there be no such reporter, or if his notes can’t be read, the Ct may ask W to repeat their testimony about the disputed point only, as nearly to the language he used in trial

**Sum:** Jury can have testimony/part of it read again in open Ct

**3 Special issues in a Capital Murder Case**

* Future dangerousness to the community?
* Offense committed alone or with others? Knew/should have known killing was going to take place?
  + - → If these 2 are yes by 12/12 jurors…then consider 3rd question:
* Any mitigating evidence that would preclude jury from assessing death?

**To be successful on appeal where judge improperly denies a defense challenge for cause → Defense atty must:**

* Ask for the challenge for cause be denied **&** denial improper
* Later forced to accept a questionable juror bc wrongfully denied a preemptory challenge
* **Or**
* D must show on appeal that….

Discrimination

**Race & Gender in Preemptory Challenges**

Neither the prosecution nor defense can use a racially prejudiced reason to use a preemptory strike

EX: Can’t say, he’s black, I strike him

Can’t use a preemptory strike on basis of gender or race *Batson*

**To challenge a discriminatory preemptory strike**

Ask judge for a *Batson hearing***&**

Show they were struck on the basis of gender

Only 3 women & all were struck → Likely successful, *prima facia* presumption it was discriminatory. BOP shifts to prosecution to show a legit reason to strike

**Guilt-Innocence**

* Reads charging document
* Opening Statements
* Prosecutions case-in-chief
  + - Cross, prosecution may redirect, then ∆ may re-cross
* Prosecution rests
* ∆ makes motion for judgment of acquittal (usually denied)
* Must show insufficient evidence to prove every element of the charged crime beyond a reasonable doubt
* Defense case-in-chief
  + - Cross, defense may redirect, then ∆ may re-cross
* Defense rests
* Can have:
  + - Rebuttal by prosecution, then D sur-rebuttals
      * Prosecution can’t repeat their case-in-chief, just must rebut
* Then prosecution prepares *charge of the Ct*, which tells jury how to view the evidence, what they can/can’t do, & the law
* State case → Judge reads charge to jury
  + - As a defense atty, say “They just read the charge. I know you can’t possibly remember it, you will be given a copy. What I’m going to do is explain what it means….”
* Closing arguments (prosecution, then defense, then prosecution)
* Jury retires & deliberates
  + - If guilty → Go back for punishment hearing **or** can have judge do sentencing, who may do a presentence investigation.
* ∆ must be present at the trial except class C misdemeanors where no incarceration **33.03**
* ∆ voluntarily absent after pleading → Can proceed if *voluntary* (waives 6th amendment right to confront W’s)

Rule 414

* At parties request, Ct shall order W excluded so they can’t hear other W’s testimony
* **Purpose:** Prevent perjury EX: They might tailor their testimony to what other W’s said
* **Doesn’t Allow**
  + - A party who’s not a natural person (doesn’t shave armpits?) no. Can’t have a corp
    - Experts
    - Victim if…
* If sitting outside, can’t talk to anyone about the case (maybe bailiff)
* **36.06:** When W’s are sworn & placed under the rule. Judge tells them not to talk w/ anyone or read/see things about cas
  + - EX: Newspaper

**Rule615, TX Rules of Evidence** *Jordan v. State*

* **Background:** Work-product protected EX: Another lawyer can’t demand to see your file
* **Applies:** After direct-ex, opponent asks non-moving party produce a W’s written statement , except ∆
* **Can be a tape recording**
* **Doesn’t Apply:** W is a ∆ → Can’t get written statement of testimony from defense
* If doesn’t give → Might strike W or mistrial if not just a *harmless error*

**Use before the Jury Rule** *Franklin v. State*

* **Requirements**
  + - Only a ∆
    - Can make a specific & timely request to inspect a document the W used before the jury **&**
    - Contents were an issue
* **If Use before the Jury violation** → automatic reversal. Not req’d to show harm

**Jury Charge**

* Law of the case
* Verdict
* Signed by residing juror (jury foreman)
* Before given to jury, usually after ∆ closes → Counsel should have a reasonable time to inspect it & request changes
  + - Otherwise reversible error
* Can dictate objection to Ct reporter
* Jury can take it to the jury room
* Usually can’t take demonstrative evidence to jury room

**To determine whether the charge is proper**

* Compare it w/ penal code
* Don't compare it to the indictment or information (bc all you need in that is ∆’s name + crime)
* Must say *“beyond a reasonable doubt”*
  + - EX: If charge is burglary & doesn’t charge to find ∆’s guilty beyond a reasonable doubt of all the elements
* Jury charges are a very common error in appeals

**Lessor included offenses**

* Must be in charge
* EX: Aggravated robbery is part assault, part theft. ∆ says no gun used, prosecution says there was one. If w/out a deadly weapon, it’s just robbery. So you could include assault and theft as lessor included offense
* Judge can’t comment in charge about Ws credibility Can’t say “If you are dumb enough to believe him”
* All communications bw judge & jury must be in writing (bailiff takes it)
* If jury want’s to communicate
  + - Presiding juror will write a note / get defense counsel / judge sends answer in writing
    - Must be given in open Ct (on record)
* **TX:** Jury can’t take notes
* Ct can give an **Allen Charge (dynamite charge):** tells jury to make a decision
* **37.07(1)(a)**
  + - Occasionally there are special pleas that are part of the indictment
    - EX: crowded jail, serve ½ sentence

**Polling the Jury:** See if they agreed on a verdict. If not → go back & deliberate

**Assessing Punishment**

* **Majority:** Judge assesses punishment in non-capital cases
* **TX:** Allows jury-assessed punishment in non-capital cases

**All Relevant Evidence:** Allows all prior convictions, arrests, charges, etc **!!!**

General Verdicts

**Community Supervision**

* **Probation Req’ts**
  + - Never convicted of a felony
    - K w/ Ct
    - Ct imposes conditions
    - **Only a jury can give probation for 3G offenses:** Murder, capital murder, indecency w/ a child, aggravated sexual assault, aggravated robbery, injury to a child or disabled individual… **ON EXAM !!!**
* **Deferred Adjudication Requirements**
  + - 2 ways it’s diff than probation:
      * You plead guilty but the finding of guilt is deferred for a max 10 years
      * If probation isn’t revoked, then there’s no conviction
      * **Disadvantage:** *But* if probation is revoked → ∆ is eligible for full range of punishment
        + They’ll charge 6 years, but 2-20 is allowed
* **Article 4… Victim Impact Statement**
  + - * …Announced in ∆’s presence → Victim shall have relative/close person appear in Ct about the ∆ & the effect of the offense on the victim
      * Must be made after punishment assessed & Ct decides whether to allow community supervision in the case

Special Verdicts

-37.071, Sec. 2, 3

Polling the Jury

|  |  |  |  |
| --- | --- | --- | --- |
| **Request** | **Favorable (Step 1: The disclosure trigger)  ∆ must prove this #2 Requirement** | **Material  (Step 2: The remedy trigger) ∆ must prove this #2 Requirement** | **Motive** |
| THE 1st CASE  Request 🡪 *Brady* | Is it something ∆ would want to have?  *Favorable*: Tends to exculpate or reduce culpability | ~~Non-disclosed evidence would have created a reasonable~~ **~~possibility~~** ~~of a different outcome~~ | Irrelevant |
| THE 2nd CASE  (No Request) *Agurs* | w/out a discovery request, the evidence not disclosed must have been clearly exculpatory.  **Reason:** Prosecutor would have explicit notice that ∆’s entitled to it  **EX: Doesn’t Apply:** Gov’t fails to disclose impeachment evidence 🡪 No obligation to disclose (bc not favorable)  **EX Applies:** Learns ∆’s innocent but doesn’t give evidence 🡪 Clearly exculpatory | ~~Reasonable~~ **~~probability~~** ~~of a different outcome~~ | Irrelevant |
| THE 3rd CASE  Request *Bagley* | Test for favorable doesn’t change (w/ request 🡪 favor)(w/out request🡪 clearly exculpatory) **!!!** | Whether there’s a request or no request, the non-disclosure **must create a reasonable probability** of a different outcome to = material. **!!!** | Irrelevant |

EXAM tips

* **Classroom:** Room 706, 713-646-1874. Email is best, [scrump@stcl.edu](mailto:scrump@stcl.edu), Tuesday 1-3 or appt
* **Attendance:** Can miss 2 classes, dropped on 3
* **Credit Hours:** 2
* **Exam Date:** May 9, 2013
* **About the Exam**
* Short fill in the blank. Exactly like the bar question. Know the answers to the ones we did
* Very few of them need analysis b/c know or don't
* 42-43 questions
* Little less than 3 mins a question
* Closed Book
* Limited to 5 lines. Every question is answerable in 5 lines.
* Highest exam is often a writer, not a typer
* Focus a lot on the TX Code of CrimPro articles, especially the reqts - what are the 3 req’ts for an attachment
* Don’t need to know section #’s
* Pretty evenly distributed over the class topics
* Follows the order that we covered each topic in class
* Fair apportionment of the time we spent on each topic. More arrest questions than motion for continuance questions