A PRIMER ON PUNISHMENT AND ITS USE IN DEFENSE OF THE CITIZEN ACCUSED

More often than not, the punishment phase of a trial is treated like the "stepchild" by criminal defense lawyers and prosecutors in all but capital cases. It is a portion of the trial that takes a back seat to the "guilt/innocence" phase of the trial. However, with the attitude of today's appellate courts, specifically the make-up of the Court of Criminal Appeals, and the public's call for law and order that we face daily, the punishment phase of a trial can be more important than the "guilt/innocence" phase.

How often have you had a case, where the facts were such that you had little, if no defense to the charge at all? Or, how often has your client, by the time you are appointed or hired, done everything in his power to assist the government in proving its case? Often, we as defense attorneys are asked to do the impossible. Many times, all we can do is damage control in attempting to keep the punishment to a term that our client can accept or to minimize the number of years that he can be assessed.

Unfortunately, in recent years, I have found that we often measure success by beating the number of years that are actually assessed as opposed to what the prosecution has offered in the form of a plea bargain. But, if you are willing to put forth the effort, the punishment phase of the trial can actually be more important and more beneficial than the case in chief in a large number of cases.

Most attorneys spend all their time and effort on the guilt/innocence portion of the trial, and do not devote adequate time to the punishment phase. In many cases this may be an absolute mistake. In this regard, I have found that you can often lose the battle, but win the war during this second portion of the trial.

CONSIDERATIONS

A. WHAT COURSE OF ACTION IS AVAILABLE TO YOU? (This is very basic, but included for reference)

- ❑ Plea of not guilty to the jury, with the jury to set punishment.
- ❑ Plea of guilty to the jury, with the jury to set punishment.
- ❑ Plea of not guilty to the judge, with the judge to set punishment.

- ❑ Plea of guilty to the judge, with judge to set punishment.
- ❑ Plea bargain agreed to by the parties.

B. FACTORS TO CONSIDER IN EACH CASE!(You must look at all these factors in each and every case to decide what action you are going to take)

- ❑ **Deferred Adjudication**
- ❑ **Probation**
- ❑ **Jail Time**
- ❑ **Penitentiary Time**
- ❑ **Community Service**
- ❑ **Restitution**
- ❑ **Good of the Community**
- ❑ **Level of sophistication of the community where the trial is being held**
- ❑ **Judicial attitude toward your client or the offense**
- ❑ **Your client's criminal history**
- ❑ **Your client's attitude**
- ❑ **Your client's demeanor**
- ❑ **Your client's personal history**
- ❑ **Your client's family**
- ❑ **Friends of your client**
- ❑ **Relatives of your client**
- ❑ **Availability of witnesses**

C. HOW DO I DECIDE WHICH PROCEDURE IS BEST?

You have to make the determination on a case by case basis on how to approach the punishment phase of the trial. I recommend that if the facts are such that the government has a "lay-down" case, that you consider selecting the punishment phase as the place to make your stand.

There are basically two ways to approach this tactic. One is that you can let the court and the government know what your are going to do. The other is not to reveal your course of action, and let the government think you are going to fight them on the guilt/innocence portion of the trial; then at the time of trial, you enter your guilty plea and you are ready to proceed with the trial you have prepared for. This method circumvents the prosecution from preparing for the punishment phase of the trial. The prosecution will still be required to prove up its case, but the majority of the time, their proof is minimal and often some of the more damning details are skimmed over. And, the amount of "smoke" you have thrown up prior to trial may lead the prosecutor to spend all his or her time attempting to offset the defenses you have been touting. Most prosecutors will not devote the time to the punishment phase of the trial and rely on victims' families, police, law enforcement, probation, and/or parole officers to testify as to the bad reputation of your client. Many times the prosecution has little or no evidence to put on against your client in punishment. You on the other hand, will have witnesses that you have prepared ready, willing and able to take the stand and tell the court or the jury what a great person you client is, or about the change in his life this situation has brought about and why he should not be incarcerated. Bottom-line is that not revealing your strategy, will oftentimes give you an advantage over the government. But, you need to make an

assessment of your particular case and use the tactic that will be to your best advantage.

When trying to decide whether to go before judge or jury, you absolutely have to know your judge, your community and your client's background. For instance, I know a judge that is fairly light on drug users, but will absolutely "hammer" a child molester. Or another judge I know is often swayed by crying children begging not to send their daddy to jail. If you are handling a case in a foreign jurisdiction, there is a publication that I have found useful as well. It is called Texas Judge Reviews, by Jane M. Corley. The book was published by James Publishing. This book listed each year every District Judge in the State of Texas. It gives each judge's biographical information, attorneys' impressions of the judge, discusses each judge's temperament, demeanor, legal acumen, preparedness, trial style, attitudes on continuances and gives you suggestions concerning his "leanings" in criminal and civil cases. I have found the book very helpful, but not the final word. It is out of print now, but you can usually find a copy among your fellow defense attorneys. Therefore, if the book is not available to you, I would suggest that you talk with attorneys that practice before the judge on a regular basis to make sure as to your assessment of the judge and his attitude toward not only the offense but his "sentencing attitude" as well.

As for your community, you have to know what the level of sophistication may be. For instance, in a rural county, where the people think that marijuana is next to the "ultimate sin", or that lawyers from Dallas are "flatland foreigners", you may not want to use a jury. How do you find out? You talk to lawyers where the case is pending. You find out what the judge's position might be in a particular case. If you are a "foreigner," consider associating a local "well thought of" attorney to assist you in at least picking the jury. If he does nothing but take notes for you during voir dire, have him at the counsel table to show that a "native" is on your client's side. You talk to people from the area and try to get an idea of the sophistication and level of acceptance in a particular area. I have found that if I can find a TCDLA member who is familiar with the community, I can generally get a valid read on jury philosophy in a community. For instance, there is a county in West Texas that has not had an acquittal by a jury since 1968. Most lawyers who are not from that general area, would not be aware of that fact. You may or may not be aware of that fact, without talking to local lawyers.

D. HOW DO I DETERMINE WHETHER TO USE THE PUNISHMENT DEFENSE?

Below I have listed the considerations that I look at to see whether this is a viable way to approach the case. I am quite sure there are more, but these are factors that have worked for me. They are not in any particular order of importance, but each must be looked at by you as the attorney, as a way of possibly assisting your client.

- ❑ Evidence by the State
- ❑ Past criminal history
- ❑ Reputation of client in community where case is pending
- ❑ Reputation of client in his home community
- ❑ Family of client
- ❑ Work history of client
- ❑ Religion of client
- ❑ Type of offense
- ❑ Civic involvement
- ❑ Psychiatrics of client
- ❑ Children

- ❑ Availability of witnesses
- ❑ Victim of crime
- ❑ Length of incarceration
- ❑ Intelligence level of client
- ❑ Judge
- ❑ Extraneous offenses
- ❑ Health of client
- ❑ Level of sophistication of community where case is pending

Depending on the case, I try to start work on the punishment phase of the trial from the date I am hired or appointed. In other words, I start trying to build the character for my client immediately. And what is even better, you can actually control, if your client will follow your advice, what your evidence is going to be at the punishment phase.

I divide the clients into two types:

<u>FOR THE CLIENT THAT IS OUT ON BOND</u>:

1. Tell him to get a job, or keep his, and to get as close to his boss or supervisor as he can. This way his boss can testify as to what a great employee your client has made.

2. Tell him to get involved in church. Not just go, but be active. Usher, attend during each service, teach Sunday School, serve at Wednesday night suppers, etc. All the while he should be developing people that are in the church as possible character witnesses.

3. If young and living with parents, develop a course of living to bring the parents into play as witnesses who have noticed a change in their child.

4. If living with wife or girlfriend, what better witness to a change in lifestyle by your client.

5. Get your client involved in volunteer work, YMCA, boy scouts, "meals on wheels" anything dealing with helping out in the community and develop fellow workers, supervisors, coordinators as possible character witnesses.

6. If drugs or alcohol played any part in the alleged crime, get your client into rehab and/or counseling. Counselors make great witnesses.

7. Try to get your client into counseling. Counselors make great witnesses and are on your side, trying to make your client a contributor to society and can be "hired guns" to assist you in trying to keep your client out of the penitentiary.

8. Education is something that is oftentimes overlooked. Get your client into GED program, adult education, junior college courses, etc. or any type of educational program that will help to make him a contributor to general society.

9. New job training is another area that can be used to show that all important change in your client, preparing for the future.

FOR THE CLIENT NOT OUT ON BOND:

1. Get client involved in religious services at jail. More than just attending. The jail church people are always sincere and convincing witnesses and generally very forgiving and willing to help.

2. Education, most jails have "in facility" education or correspondence courses that can be signed up for and taken by your client while awaiting trial.

3. Letters to relatives setting out remorse for the alleged crime (without confessing) and statements about setting his life straight and making a better citizen. DO NOT HAVE YOUR CLIENT WRITE LETTERS TO THE VICTIM OR THE VICTIM'S FAMILY.(Can now be a criminal offense to write the victim or victim's family)

4. Communication with friends by letter, telephone or jail visit discussing remorse, change of attitude, etc.

5. If drugs are involved, get counseling for your client. Petition the court for help in drug rehabilitation through counseling within the jail.

6. Have your client prepare a "plan" and assist him in preparation of a plan, once he is released. Include in the plan living conditions, job, church, community involvement, etc.

7. Have client's family arrange employment if he is released.

8. Take advantage of any medical condition your client may have.

9. Have client volunteer for any program in the jail, work crew, trustee, etc. Once again to show the change in your client

The main concept is to develop a "plan of action" as to all phases of your client's life if he is not sent to the penitentiary and to have all the bases covered to give the court or the jury something to get the judge or the jury to sink their teeth into. CAVEAT: IT HAS TO BE VIABLE AND SELLABLE.

For instance, your plan should contain a job for your client upon release, a place to live, people to assist him, remorse for the offense, involvement in the community, involvement in a church, involvement with his family, counseling, etc. All of these items and any more that you can come up with to show the judge or jury that your client will be a useful, contributing member of his community.

E. WITNESSES

In the punishment phase of the trial, you have a unique position, as you can actually select whatever witnesses you want to prove whatever you want. In no other type of proceeding before a court do I know of an opportunity that you have like this. I divide the witnesses into two categories:

Witnesses for the Defense and Witnesses for the State.

I have used almost any type of person you can possibly imagine as a punishment phase witness. Here are some of the types of witnesses I have used:

WITNESSES FOR THE DEFENSE

- ❑ Expert witnesses
- ❑ Employer
- ❑ Fellow employee
- ❑ Relative
- ❑ Children
- ❑ Family
- ❑ Church people
- ❑ Concerned citizens
- ❑ Volunteer coordinators
- ❑ Counselors
- ❑ Civic leaders
- ❑ Jail employees
- ❑ Deputies
- ❑ the Defendant
- ❑ Fellow volunteers
- ❑ Friends

Each one of these witnesses are important, and the more that you can weave into your case to prove up your plan, the better off you will be. Remember, you can get these witnesses with little or no trouble, and they will almost always be friendly, supportive, and against sending your client to jail. Any evidence you can bring forward concerning the history of your client as compared with your plan will help show a change for the better.

If you have evidence of your client as a child, the hardships he endured, the level of training or education by parents or lack thereof, the educational level of your client, his peers, etc. These are all matters which if handled properly can contribute to your plan and either reduce the possibility of a lengthy sentence or even grant probation.

STATE'S WITNESSES

Most of the time, the State's punishment phase witnesses are divided into two categories:

- ❑ Law enforcement officers
- ❑ Victims or families of victims

Law enforcement officers are the easiest to attack. They generally will not know where the client lives, his or her spouse's name, what church he or she attends, where he or she works, how many children he or she has, whether or not he or she is involved in any volunteer work. Their testimony generally goes like this:

PROSECUTOR: "Officer Jones, are you acquainted with _____?"
OFFICER: "Yes sir."
PROSECUTOR: "Officer Jones, are you acquainted with the reputation of _____,
for being a peaceable and law abiding citizen in the community in which he lives?"
OFFICER: "Yes, sir."
PROSECUTOR: "How would you classify that reputation, good or bad?"
OFFICER: "Bad"
PROSECUTOR: "Pass the witness"

It is at this juncture where you can really go on the attack. Start off low key and get more and more surprised, disgusted, frustrated as you cross-examine the officer. You can question the officer as follows:

LAWYER: "Officer Jones, do you know where _____ lives?"
OFFICER: "No sir."
LAWYER: "Officer Jones, do you know where _____ works?"
OFFICER: "No sir."
LAWYER: "Officer Jones, what is _____'s spouse's name?
OFFICER: "I don't know."
LAWYER: "Officer Jones, what is the name of _____'s oldest child?"
OFFICER: "I don't know."
LAWYER: "Officer Jones, what is the name of _____'s youngest child?"
OFFICER: "I don't know."
LAWYER: "Officer Jones, do you know the name of the church that _____ attends?"
OFFICER: "No sir."
LAWYER: "Officer Jones, do you know what volunteer programs _____ participates in?"
OFFICER: "No sir."
LAWYER: "Officer Jones, do you the name of _____'s best friend?"
OFFICER: "No sir."
LAWYER: "Officer Jones, do you know whether or not _____, has completed high school?"
OFFICER: "No sir."
LAWYER: "Officer Jones, do you know the names of the parents of _____?"
OFFICER: "No sir."
LAWYER: "Officer Jones, do you know the occupation of _____'s father?"
OFFICER: "No sir."
LAWYER: "Officer Jones, do you know the occupation of _____'s spouse?"
OFFICER : "No sir."
LAWYER: "Officer Jones, do you know the occupation of _____, prior to his arrest on this charge?"
OFFICER: "No sir."
LAWYER: "Officer Jones, do you know whether or not _____ has ever been

treated for mental illness or an emotional disorder?"

OFFICER: "No sir."

LAWYER: "Officer Jones, do you know what religion _____ follows?"

OFFICER: "No sir."

LAWYER: "Officer Jones, do you know whether or not _____ has special training as a _____?"

OFFICER: "No sir."

LAWYER: "Officer Jones, do you know the name of _____'s boss?"

OFFICER: "No sir."

LAWYER: "Officer Jones, do you know how long has _____ been held in custody for this case?"

OFFICER: "No sir."

LAWYER: With disgust------"I have no further questions of this witness!"

In the proper case you can ask other questions, like:

LAWYER: "Officer Jones, do you know whether or not _____ was sexually abused as a child?"

OFFICER: "No sir."

LAWYER: "Officer Jones, do you know whether or not _____ was physically abused as a child?"

OFFICER: "No sir."

LAWYER: "Officer Jones, do you know who is _____'s family doctor?"

OFFICER: "No sir."

Use anything that can show that the officer really has no knowledge about your client. But make sure that you know that the officer does not know the answers to your questions. You have to make your cross-examination fit your case, and the facts, but you can see how you have set up your final argument. The theme of your argument would be "the only witnesses brought by the government were witnesses that it pays who actually know little or nothing about your client. Weigh the credibility of a witness who doesn't even know where my client lives, works, worships, etc. It can make a really great argument if you have put on your witnesses to show all of these items which I have listed previously, put on my witnesses to prove up and cross-examined the government's witnesses. Be creative, be cautious, but try to build your case from a character standpoint that will appeal to the judge or the jury. There is not a real "burden of proof" here, so more is always better. I have literally filed witnesses from all walks of life in and out of the courtroom in a particular case for hours and hours, and all the government had was some policemen, undercover agents, and deputies who had little actual knowledge of any of the facts concerning my client or his reputation.

A MAJOR CAVEAT HERE: NEVER, NEVER, NEVER, NEVER ASK A LAW ENFORCEMENT OFFICER *UPON WHAT HE BASES HIS OPINION*. FURTHERMORE, DO NOT GET EVEN CLOSE TO THAT QUESTION. IF YOU DO, EVERYTHING THAT HAS EVER BEEN SAID ABOUT YOUR CLIENT WILL LIKELY COME OUT AND YOU CANNOT STOP IT.

F. HOW DO I PREPARE WITNESSES FOR THE DEFENSE?

This is the easy part, in that you are not dealing with any facts that are in issue. You literally have the "sky" open to you to discuss about your client.

Make sure that you prepare your witnesses for the following:

1. "Have you heard" questions.
2. Extraneous offense attempts by the Government
3. Badgering by the Government

You can actually prepare your witnesses and with your most trusted ones, set traps for the prosecution to step right in the middle of.

You want to use your witnesses to make the jury or the judge a part of the family. Let them in on what is going to happen. You want tears, crying, weeping, begging for forgiveness, unbridled remorse all coming out. Emotion can be a deadly weapon against the government. The prosecutor is not going to badger or jump all over an emotional witness begging for forgiveness, begging for mercy, pledging his or her loyalty to your client, for fear of alienating the jury. You want to make sure that you have every facet of the life of your client impregnated with assistance from family, clergy , friends, community services, employer, etc.

Finally, the most time in preparation of witnesses should be spent with your client, if you are going to put him or her on. My tips on preparing your client are very simple:

1. Develop our plan, know it backward and forward;
2. An unrelenting pledge to make a positive contribution;
3. Begging for mercy;
2. Begging for a second chance;
3. Unbridled remorse;
4. Emotions running rampant;
5. Fear of confinement;
6. Fear for his or her family;

CONCLUSION

I hope that you can use some of the suggestions I made. My experience has been that you can often turn a "sow's ear" into a "purse", it may not be "silk", but it oftentimes will be acceptable. If you are successful you can cut your client's exposure and time, and once in a while walk out of the courthouse with him on probation or a deferred.

NOTE: I have included an excellent paper written by Keith Hampton, which I could not improve on and should be a useful tool for you in punishment matters. It contains, numerous case cites, references to statutes and rules of procedure. I am very grateful for Keith's permission to use said paper in this presentation. I believe that it covers most everything necessary in the punishment phase of the trial.

Punishment Hearings

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Basic Concepts: "Conviction," "Final Conviction" and "Probation"

"Conviction." A "conviction" means a judgment of guilt and the assessment of punishment. *See Ex parte Evans*, 964 S.W.2d 643 (Tex.Crim.App. 1998). One is "convicted of a felony" if a court "enters an adjudication of guilt, ... regardless of whether ... the sentence is subsequently probated." Tex. Gov't. Code Ann.§415.058(b)(1).

"Probation." Probation means suspension of the imposition of a sentence. Tex. Code Crim. Proc. art. 42.12 §3(a). Probation is punishment. *See Angelle v. State*, 571 S.W.2d 301, 303 (Tex.Crim.App. 1978)("Probation, as well as incarceration, is a form of punishment."). Probation is a power expressly created in Article IV, §11a of the Texas Constitution. Probationary terms and conditions constitute a contract between the trial court and the defendant. *See Nealy v. State*, 500 S.W.2d 122 (Tex.Crim.App. 1973).

"Final Conviction." "Whatever else the term 'final conviction' may have meant at various times in the history of this State's criminal jurisprudence, it has always included convictions which are not appealable, have never been appealed, and cannot be appealed at any time in the future." *Ex parte Renier*, 734 S.W.2d 349, 360 (Tex.Crim.App. 1987)(Teague, J., dissenting). "[I]t is well-settled that a probated sentence is not a final conviction for enhancement purposes unless it is revoked." *Ex Parte Langley*, 833 S.W.2d 141, 143 (Tex.Crim.App. 1992).

The "Unconvicted"

This Court has often said that an unrevoked probated sentence does not amount to a final conviction. At best such talk is peculiar. The evident purpose of the adult probation law in this State, unembellished with the plethora of special procedures which now adorn Art. 42.12, V.A.C.C.P., is to provide an alternative to incarceration. It is not an alternative to conviction.

In the ordinary case, when a person has been convicted of a criminal offense, either by judge or jury, upon a plea of guilty, not guilty, or nolo contendere, and he is not ineligible for probation, the trial judge may, and in some cases must, suspend the imposition of sentence upon the condition that such person successfully complete a term of scrutiny by the court, during which he is held to a standard of conduct more rigorous than that to which other citizens are subject. Successful completion of this regimen necessarily means that he will never be obliged to serve a period of incarceration for his offense. It does not necessarily mean anything else.

Therefore, in the ordinary case, a discharge from probation, without more, does not mean that the probationer has been unconvicted. It only means that he has successfully avoided incarceration, which would otherwise have been the necessary consequence of his conviction.

The word "conviction" is not defined in our penal laws, and considerable force can be put behind the proposition that it means different things in different statutes. . . .[T]his Court has construed the term "conviction" to mean a judgment of guilt and the assessment of punishment. In addition, we have sometimes also construed it to mean "final conviction," a term full of problems in its own right. Texas criminal jurisprudence would stand to considerable benefit from careful legislative attention to this problem.

Ex parte Renier, 734 S.W.2d 349, 365 (Tex.Crim. App. 1987)(Teague,J.dissenting).

"[W]here a habeas corpus petitioner has been granted probation and it has not been revoked, the defendant is not confined and the conviction is not final for purposes of Article

11.07, [Tex. Code Crim. Proc. Ann.]." *Rodriguez v. Court of Appeals*, 769 S.W.2d 554, 557 (Tex.Crim.App. 1989).

Consequences of "Conviction." Those convicted of felonies (or thefts) can't serve on a jury. *See* Tex. Code Crim.Pro. art. 35.19; 35.16. *See also* Tex. Const. art. XVI §§ 2 and 19; art. I, §15.

Consequences of "Final" Conviction. Those finally convicted of a felony can't vote. *See* Tex.Const. art. VI, §1; Tex. Election Code §13.001.

Discharge from Probation. While the defendant is on probation, he is not ***finally*** convicted. *See Payne v. State*, 618 S.W.2d 380 (Tex.Crim.App. 1981). Once the probation is successfully completed, all "penalties and disabilities" are removed and the defendant can serve as a juror and vote. *See Payton v. State*, 572 S.W.2d 677 (Tex.Crim.App. 1978)(on rehearing).

"Judicial Clemency" — Early Discharge from Probation. A judge may discharge a person early from community supervision if he has "satisfactorily completed one-third of the original community supervision period or two years of community supervision, whichever is less." Tex. Code Crim. Proc. art. 42.12, §20(a). This discharge is not a right but rather is a matter of "judicial clemency." *Wolfe v. State*, 917 S.W.2d 270 (Tex.Crim.App. 1996).

"[W]hen a trial judge believes that a person on community supervision is completely rehabilitated and is ready to re-take his place as a law-abiding member of society, the trial judge may "set aside the verdict or permit the defendant to withdraw his plea, and shall dismiss the accusation, complaint, information or indictment against the defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted or to which he has pleaded guilty. ... If a judge chooses to exercise this judicial clemency provision, the conviction is wiped away, the indictment dismissed, and the person is free to walk away from the courtroom 'released from all penalties and disabilities' resulting from the conviction." *Cuellar v. State*, 70 S.W.3d 815, 818 (Tex.Crim.App. 2002); Tex. Code Crim. Proc. art. 42.12, § 20(a).

Early Discharge not Available to Intoxication offenses, sex offenses and State Jail Felonies. Early discharge is not available to defendants convicted of DWI/BWI/FWI, intoxication assault or intoxication manslaughter, or for any offense for which on conviction registration as a sex offender is required, or those convicted of an offense punishable as a state jail felony.

Community Supervision is not a "Sentence." The Code of Criminal Procedure defines community supervision as involving a suspension of the sentence. In other words, community supervision is an arrangement in lieu of the sentence, not as part of the sentence. Tex. Code Crim. Proc. art. 42.12 §3(a)(providing that a judge, after conviction or plea "may suspend the imposition of the sentence and place the defendant on community supervision").

Deferred Adjudication Community Supervision

- Deferred adjudication is available only when the plea is guilty or no contest. *See Reed v. State*, 644 S.W.2d 479 (Tex.Crim.App. 1983). A jury is not authorized to defer adjudication. Hence, waiving jury and pleading guilty/nolo contendere gives the trial court the authority to give deferred adjudication.

- A judge may grant deferred adjudication ***except for*** offenses under chapter 49 of the Texas Penal Code (driving/flying/boating while intoxicated; intoxication assault; intoxication manslaughter), repeat drug offenders under Texas Health & Safety Code, §481.134(c)-(f) who sell in drug free zones; and repeat sex offenders who had a previous probation or deferred adjudication. *See* Tex. Code Crim. Proc. art. 42.12 §5(d).

- A judge can grant deferred adjudication even when the minimum punishment exceeds 10 years, unlike "regular" probation. *See Cabazas v. State*, 848 S.W.2d 693 (Tex.Crim.App. 1993).

- Upon revocation, the trial court can sentence a defendant up to the maximum punishment available for the offense. But the defendant has a right to a punishment hearing. *See Issa v. State*, 826 S.W.2d 159 (Tex.Crim.App. 1992). The punishment hearing is a separate hearing from the hearing on whether to proceed to adjudication.

- A person on deferred adjudication *has no right to appeal* the trial court's decision to proceed with adjudication and find the defendant guilty. *See Phynes v. State*, 828 S.W.2d 1 (Tex.Crim.App. 1991); *Daniels v. State*, 615 S.W.2d 771 (Tex.Crim.App.1981). However, a person ***does*** have the right to appeal ***once convicted and sentenced.*** *See Dillehey v. State*, 815 S.W.2d 623 (Tex.Crim.App. 1991). Notice for these appeals is governed by Rule 25.2 of the Texas Rules of Appellate Procedure. *See Watson v. State*, 924 S.W.2d 711(Tex.Crim.App. 1996)(interpreting former Rule 40(b)(1)).

- After placing the defendant on community supervision under this section, the judge shall inform the defendant orally or in writing of the possible consequences of a violation of

community supervision. If the information is provided orally, the judge must record and maintain the judge's statement to the defendant. The defendant must show that he was harmed by the failure of the judge to inform him of the consequences of a violation of his deferred adjudication probation in order to obtain a reversal. *See* Tex. Code Crim. Proc. art. 42.12 §5(d).

Judge or Jury?

"3g," "Drug-free" zones, and Deadly Weapons. ***Only a jury*** can recommend probation to those found guilty of offenses where the offense was a "3g" offense, i.e., an offense listed in article 42.12, §3g. Those offenses are: capital murder, murder, aggravated robbery (§29.03); aggravated kidnapping (§20.04), and all sex offenses.

Also listed under the "3g" section are those found guilty of an offense under chapter 481 of the Health and Safety Code (the "Controlled Substances Act") "where the punishment is increased under Section 481.134(c), (d), (e), or (f), Health and Safety Code, if it is shownn that the defendant has been previously convicted of an offense for which punishment was increased under any of those subsections." Translated, this simply means that only a jury can give probation to a person once previously convicted of a drug offense in a "drug-free zone."

The same prohibition against judge-granted probation is true for those found guilty of offenses where a deadly weapon (defined in Tex. Penal Code, §1.07) was "used or exhibited during commission of a felony offense or during immediate flight therefrom, and that the defendant used or exhibited the deadly weapon or was a party to the offense and knew that a deadly weapon would be used or exhibited."

"Convicted of a Felony": A defendant with a prior felony conviction can only get probation from a judge because a jury cannot recommend probation unless if first finds that the defendant has never before been convicted of a felony. *See* Tex.Code. Crim.Proc. art. 42.12, §4. The phrase "convicted of a felony" means a ***final*** conviction. A conviction on appeal is not a final conviction that makes a defendant ineligible for probation. *Baker v. State*, 520 S.W.2d 782 (Tex.Crim.App. 1975). On the other hand, pardons for previous felony convictions which do not exonerate the defendant do not make him eligible for probation. *Taylor v. State*, 612 S.W.2d 566 (Tex.Crim.App. 1981); *Watkins v. State*, 572 S.W.2d 339 (Tex.Crim.App. 1978).

If the defendant is charged with one of the offenses listed in article 42.12, §3g, and

he has a prior felony conviction, then he is not eligible for probation at all from either judge or jury.

Elections and Probation Eligibility

● **When?** If the defendant wishes a jury to determine his punishment, he must make an election. Otherwise, the judge will make that determination. *See Tinney v. State*, 578 S.W.2d 137 (Tex.Crim.App. 1979). In order to avoid defaulting punishment to the court, the defense must either file a sworn motion for probation "prior to trial" or make a written election for the jury to assess punishment "before voir dire begins." However, a defendant who failed to make an election, but a jury assesses his punishment anyway without objection, has nothing to complain about. *See Fontentot v. State*, 500 S.W.2d 843 (Tex.Crim.App. 1973).

● The defendant can change his election any time before trial, but after a finding of guilt, he can change only with the State's consent.

● If a pretrial hearing is scheduled *per* Tex. Code Crim. Proc. art. 28.01, the election must be made at that time or be lost. *See Postell v. State*, 693 S.W.2d 462 (Tex.Crim.App. 1985).

● **How?** A motion for probation must be sworn to. A client should be admonished about swearing to something that isn't true, and admonished a bit more about the consequences of filing a false document. The attorney himself might want to review Article 1.052 of the Code of Criminal Procedure when doubts about a defendant's truthfulness arise.

Defendant must Prove Probation Eligibility: The defendant must prove his eligibility for probation. *See, e.g., Baker v. State*, 519 S.W.2d 437 (Tex.Crim.App. 1975). This means that in a jury trial, the defendant must have first filed a written, sworn motion prior to trial stating that he has not previously been ***finally*** convicted of a felony in Texas or any other state. Failure to do so constitutes ineffective assistance of counsel. *See Ex parte Welch*, 981 S.W.2d 183 (Tex.Crim.App. 1998).

Defense lawyers sometimes forget that they must put on evidence in support of the affidavit by the defendant that he has never been convicted of a felony. Worse, defense lawyers sometimes assume that it is the defendant who must testify. Both errors can and should be avoided.

A parent or spouse can confirm the affidavit. The defense lawyer can also ask the State to stipulate to the fact that he has not been convicted of a felony anywhere, or that a check through the TCIC and NCIC systems revealed no prior felony convictions.

Then he must put on evidence to prove his motion, which means that counsel should have witnesses or some other evidence prepared for the penalty phase of trial.

Boot Camp Probation & Shock Probation

Boot Camp and Shock Probation Eligibility Requirements

State "Boot Camp" Probation (42.12, §8): The defendant must be otherwise eligible for probation, between 17 and 26 years old, and physically/mentally capable of participating in a program that requires "strenuous physical activity." However, he is not eligible if convicted of a state jail felony.

"Shock" Probation (42.12, §6): The defendant must be otherwise eligible for probation and have never been previously incarcerated in a prison. A person who has been on probation before, but was never confined in a prison is still eligible. *See Houlihan v. State*, 579 S.W.2d 213 (Tex.Crim.App. 1979).

A person given "shock" probation when he was not eligible is not entitled to credit for time served on his illegal probation. *See Tamez v. State*, 620 S.W.2d 586 (Tex.Crim.App. 1981). If shock probation was part of a plea agreement with a defendant not eligible for it, then the defendant is entitled to a new trial. *See Ex parte Austin*, 746 S.W.2d 226 (Tex.Crim.App. 1988).

Boot Camp and Shock Probation Jurisdictional Pitfalls

State Boot Camp: After 180 days, the trial court loses jurisdiction to order a defendant into the state boot camp. If defendant pled on representation that he would get boot camp but didn't because the trial court lost jurisdiction, then the plea was involuntary and the case must be reversed. *See Ex parte Bittikoffer*, 802 S.W.2d 701 (Tex.Crim.App. 1991)(before September 1, 2003, trial courts lost jurisdiction after 90 days).

"Shock Probation:" After 180 days of the date of the execution of a prison sentence, the trial court loses jurisdiction to order "shock" probation. *See Bryan v. McDonald*, 642 S.W.2d 492 (Tex.Crim.App. 1982).

"Shock" probation may not be granted to state jail felons until the defendant has served at least 75 days in a state jail facility.

Time is calculated from the date execution of the sentence actually begins. *See* Tex.Code.

Crim.Pro. art. 42.12, §§6 & 7, that is, he goes into custody.

Mistrials, Reversals, Motions for New Trial, and Reformations

Punishment mistrials result in a new trial altogether. *See Bulard v. State*, 548 S.W.2d 13 (Tex.Crim.App. 1977). However, a reversal for punishment error results in only a new ***punishment*** trial. *See* Tex.Code Crim.Proc. art. 44.29(b). Trial courts cannot grant a new trial as to punishment only. *See State v. Hight*, 907 S.W.2d 845 (Tex.Crim.App. 1995).

Greater punishment on retrial is constitutionally permissible so long as the sentencer is not imposing a harsher sentence because of vindictiveness, i.e.., penalizing the defendant for successfully appealing his case. *See Wilitz v. State*, 863 S.W.2d 463 (Tex.Crim.App. 1993)(discussing *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); *United States v. Goodwin*, 457 U.S. 368, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982)).

Appellate courts (though not the Court of Criminal Appeals) may reform judgments. *See Bigley v. State*, 865 S.W.2d 26 (Tex.Crim.App. 1993); *French v. State*, 830 S.W.2d 607 (Tex.Crim.App. 1992).

Multiple Prosecutions

"Criminal Episode." Chapter 3 of the Texas Penal Code deals with the prosecution of multiple offenses for what is deemed the same "criminal episode." "Criminal episode" is a term of art, defined as the commission of multiple offenses "pursuant to the same transaction or pursuant to two or more transactions that are connected or constitute a common scheme or plan." "Criminal episode" is also defined as "the repeated commission of the same or similar offenses."

Concurrent Sentences in Most Cases. A defendant may be prosecuted in a single criminal action for all offenses arising out of the same criminal episode. Unless he is accused of a sex offense against a child or intoxication manslaughter, discussed below, the sentences must run concurrent. However, he may, under Section 3.03 of the Penal Code, move to sever the offenses. If he does move to sever, he risks cumulative sentences, i.e, having one sentence "stacked" upon the other.

Improperly "Stacked" Sentences. Other than sex offenses against children or intoxication manslaughter, the trial court cannot stack sentences in a single trial of consolidated offenses.

See LaPorte v. State, 832 S.W.2d 597 (Tex.Crim.App. 1992). It does not matter whether the State followed the rules of consolidation. *But see Alvarado v. State*, 840 S.W.2d 442 (Tex.Crim.App. 1992); *State v. Fernandez*, 832 S.W.2d 600 (Tex.Crim.App. 1992).

This rule applies even if the parties agree. The State and the defense cannot agree to violate the statutory provision mandating that sentences from a single criminal episode run concurrent when prosecuted in a single criminal action. *See Ex parte Sims*, 868 S.W.2d 803 (Tex.Crim.App. 1993).

Where More Than One Offense is Alleged in Same Indictment/Information. Under current law, the State may, in one indictment, allege alternative legal theories for one offense. *Hathorn v. State*, 848 S.W.2d 101 (Tex.Crim.App. 1992). If this is done, the State may obtain only one conviction based on that indictment.

The State can also join separate offenses in one indictment, as long as the offenses arise out of the same criminal episode, as defined in Chapter 3 of the Penal Code. *See* Tex.Code Crim. Proc., art. 21.24. In the context of a charge which may encompass separate and different assaults within the same transaction, an indictment containing alternative legal theories may present some question as to whether it charges separate offenses or merely alternative legal theories. Article 21.24 requires separate counts for separate offenses, which should be one method of delineating separate offenses from alternative legal theories. One transaction of aggravated sexual assault can result in the commission of separate statutory offenses.

When the State alleges more than one separate offense (not within the same criminal episode) in a single charging instrument, misjoinder occurs. Counsel may file a motion to quash. *See Sifford v. State*, 741 S.W.2d 440, 441 (Tex.Crim.App. 1987). Alternatively, counsel may do nothing until the jury instructions are prepared, then object to permitting the State to obtain more than one conviction from a single indictment alleging multiple offenses. *See Ex parte Pena*, 820 S.W.2d 806 (Tex.Crim.App. 1991). There is an exception to this latter procedure: for properly-joined **property crimes**, the court does not have to compel the State to elect. *See Coleman v. State*, 788 S.W.2d 369 (Tex.Crim.App. 1990).

Potential "Stacked" Sentences for Intoxication Manslaughter and Sex Offenses Against Children: Despite the fact that the accused was prosecuted in a single criminal action for offenses within the same criminal episode, the sentences may run consecutively if each sentence is for a conviction for intoxication manslaughter (Section 49.08 of the Penal Code), whether the conviction is the result of a contested trial or a plea bargained sentence.

The same is true for those convicted in a single criminal action for sex offenses "committed against a victim younger than 17 years of age at the time of the commission of the offense." The designated sex offenses are **indecency with a child** (Section 21.11), **sexual assault** (Section 22.011), **aggravated sexual assault** (22.021), **prohibited sexual conduct** (25.02), and **sexual performance of a child** (Section 43.25).

Severance. Whenever two or more offenses have been consolidated or joined for trial under Section 3.02, the defendant shall have a right to a severance of the offenses. Because the statute is mandatory, refusal of a proper request for severance is automatic reversal. *See Warmowski v. State,* 853 S.W.2d 575 (Tex.Crim.App. 1993).

The defense does not have the absolute right to sever alleged properly joined offenses regarding intoxication manslaughter or sex offenses against children. Defense would have to prove to the court that joinder of offenses would "unfairly" prejudice the defendant, and even then, severance is discretionary with the court.

Consolidation and Joinder. Previously, a defendant has never had any statutory right to joinder of offenses. *See Nelson v. State*, 864 S.W.2d 496 (Tex.Crim.App. 1990). However, Tex. Penal Code, §3.04(c) provides that a defendant's otherwise absolute right to severance does not apply to sex offenses against children or intoxication manslaughter unless the court determines joinder would be unfairly prejudicial **"or may order other relief as justice requires."** This is the only statutory provision which actually forbids joinder under those specified sections. Both the Penal Code and the Code of Criminal Procedure are otherwise silent.

If these provisions fail to constitute a rule of procedure in this particular state of case which has arisen, then "the rules of the common law shall be applied and govern." Tex.Code Crim. Pro. art. 1.27. "It is the public policy of this state to avoid a multiplicity of suits. The prevention of a multiplicity of suits is a ground for equity jurisdiction. Both equity and [the courts] abhor a multiplicity of suits. And a court of equity will go far to prevent a multiplicity of suits or actions, or to avoid circuitous remedies." Tex.Jur.3d *Equity* §9 (West 1990). Thus, there may well be a right to consolidation under the common law. If the cases are consolidated or "joined," then the general policy of concurrent sentences should prevail.

Time Credits

Art. 42.03, §3. If a defendant appeals his conviction, is not released on bail, and is retained in a jail as provided in Section 7, Article 42.09, pending his appeal, the judge of the court in which the defendant was convicted shall give the defendant credit on his sentence for the time that the defendant has spent in jail pending disposition of his appeal. The court shall endorse on both the commitment and the mandate from the appellate court all credit given the defendant under this section, and the institutional division of the Texas Department of Criminal Justice shall grant the credit in computing the defendant's eligibility for parole and discharge.

■Judge must credit time spent in state jail facility after revocation of a state jail probation.

■"Back time" for a defendant consumed prior to sentence is guaranteed as matter of law. *See* art. 42.03, §2. *But see* art. 42.12, §15(h).

■Post-revocation credit for time spent in a Community Correctional Facility prohibited ☹ as matter of law. *See art.* 42.12, §18. *See Trigg v. State*, 801 S.W.2d 958 (Tex.App. — Dallas 1990, *no pet*.).

■No credit for jail prior to going to prison for "shock" probation time. Of course, if the defendant is subsequently revoked, he is given credit for that back time in jail. *See Adams v. State*, 610 S.W.2d 780 (Tex.Crim.App. 1980).

■ Credit is given for all time spent in jail awaiting revocation. *See Guerra v. State*, 518 S.W.2d 815 (Tex.Crim.App. 1975).

■ No "good conduct" credit for time spent under house arrest or electronic monitoring. *See* Tex. Code Crim. Proc. art. 42.03.

■ No "good conduct" credit for time spent on an illegal "shock" probation. *See Tamez v. State*, 620 S.W.2d 586 (Tex.Crim.App. 1981).

■ A judge may credit any time spent in county jail awaiting trial against SJF confinement.

■ A fugitive is given flat time credit during the time he spent in another state awaiting transfer to Texas. *See Ex parte Kuban*, 763 S.W.2d 426 (Tex.Crim.App. 1989).

■ The local sheriff is given wide latitude in giving credit for conduct. *See* Tex. Code Crim. Proc. art. 42.032, §§2 & 3. However, good time can be forfeited by the sheriff "for a sustained charge of misconduct in violation of any rule known to the defendant" if the sheriff "has complied with discipline proceedings as approved by the Commission on Jail Standards."

■ Except for credit earned by a defendant under Article 43.10 [manual labor], no other time allowance or credits in addition to the commutation of time under this article may be deducted from the term or terms of sentences.

■ ***In addition to any other credits allowed by law***, a defendant is **entitled to have one day** deducted from each sentence he is serving while performing **manual labor**, but it cannot exceed _ of the sentence.

■ Time is calculated from the date execution of the sentence actually begins. *See* Tex.

Code Crim. Proc. art. 42.12, §§6 & 7. Presume that "execution" begins when the defendant is placed in custody.

■ A judge cannot order a probationer to serve both a term in a community corrections facility and a subsequent term in a community corrections facility or jail when added together would exceed 36 months. *See* Tex. Code Crim. Proc. art. 42.12, §18(h).

Fines & Court Costs

The primary pitfalls where money is concerned arise in those cases where the defendant is unable unwilling to pay an assessed fine or court costs. Punishment for the former is constitutionally forbidden, while punishment for the latter is constitutionally permitted. "[I]t is a denial of equal protection to convert a fine to imprisonment for those who are unable to pay a fine." *Ex parte Sanchez*, 489 S.W.2d 295, 297-298 (Tex.Crim.App. 1972).

In *Williams v. Illinois*, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970), the Court held that a State cannot confine an inmate beyond the maximum period of confinement authorized by statute on the basis that he is unable to pay his fine. In *Tate v. Short*, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971), the Court held that a State cannot imprison a person for failing to pay a fine imposed for violating a nonjailable offense because he is indigent. Both of these punishments violated the Equal Protection Clause because the defendants were confined only because they were too poor to pay. This analysis includes repayment of court-appointed legal services. *See Ex parte Gonzales*, 945 S.W.2d 830 (Tex.Crim.App. 1997).

A court can order the defendant to pay the entire fine and costs "at some later date,"or pay a specified portion of the fine and costs at designated intervals.

Moreover, Article 42.12 §11(b) provides:

> A judge may not order a defendant to make any payments as a term or condition of community supervision, except for fines, court costs, restitution to the victim, and other conditions related personally to the rehabilitation of the defendant or otherwise expressly authorized by law. ***The court shall consider the ability of the defendant to make payments in ordering the defendant to make payments under this article.***

Revocation Hearings

Probation revocation proceedings fall within the protections guaranteed by the Due

Process Clause of the Fourteenth Amendment of the federal constitution. *See Gagnon v. Scarpelli*, 411 U.S. 778, 782, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). A probationer is entitled to due process protections, which include written notice of the claimed violations of probation, disclosure to the probationer of the evidence against him, the opportunity to be heard in person and to present witnesses, the right to confront and cross-examine expert witnesses, a "neutral and detached" hearing body, and a written statement by the fact finders as to the evidence relied on and the reasons for revoking probation. *Ruedas v. State*, 586 S.W.2d 520, 523 (Tex.Crim.App. 1979). "The written statement required by [*Gagnon v. Scarpelli*] and *[Morrissey v. Brewer]* helps to insure accurate factfinding with respect to any alleged violation and provides an adequate basis for review to determine if the decision rests on permissible grounds supported by the evidence." *Black v. Romano*, 471 U.S. 606, 613-614, 105 S.Ct. 2254, 85 L.Ed.2d 636 (1985). Revocation unsupported by sufficient proof violates due process. *See Douglas v. Buder*, 412 U.S. 430, 93 S.Ct. 2199, 37 L.Ed.2d 52 (1973).

The guiding principle for punishment of errant probationers is the nature and extent of their violations of the conditions of their community supervision. *See Kelly v. State*, 483 S.W.2d 467, 469 (Tex.Crim.App. 1972)("The question at a revocation hearing is whether the appellant broke the contract he made with the court[.]"). The greater the violation, the greater the punishment. The principle is in part one of proportionality. *See generally Black v. Romano, supra* at 620-625 (Marshall, J., concurring).

"[T]he decision to revoke probation typically involves two distinct components: (1) a retrospective factual question whether the probationer has violated a condition of probation; and (2) a discretionary determination by the sentencing authority whether violation of a condition warrants revocation of probation." *Black v. Romano, supra* at 611.

Affirmative Defense for Indigents: Inability to pay costs, fees, or fines is an affirmative defense to revocation based on failure to pay. A defendant must raise such defense and prove it by a preponderance of the evidence. *See* Tex. Code Crim. Proc., art. 42.12, §21(c); *Hill v. State*, 719 S.W.2d 199, 201 (Tex.Crim.App. 1986). The State then has the burden of proving an alleged failure to pay fees, costs, and the like was intentional. *Stanfield v. State*, 718 S.W.2d 734, 738 (Tex. Crim. App. 1986). However, the State has this burden even if the probationer fails to raise the issue of inability to pay as an affirmative defense. *Ortega v. State*, 860 S.W.2d 561, 567 (Tex. App. — Austin 1993, *no pet.*).

> "We hold, therefore, that in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternative measures of punishment other than imprisonment. Only if alternative measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment." *Bearden v. Georgia*, 461 U.S. 660, 672, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983).

Facts and circumstances attending a given act or omission may reveal intent. *Stanfield*, 718 S.W.2d at 738. One who has the ability to pay that which he is required to pay but does not, without more, leaves a factfinder with a strong inference that his failure to pay is intentional. *Hill*, 719 S.W.2d at 201. When the trial court finds that a defendant had the ability to pay and his failure was intentional, the reviewing court must view the evidence in the light most favorable to the ruling. *Jones v. State*, 589 S.W.2d 419, 421 (Tex.Crim.App. 1979).

Jurisdictional Defense. A court retains jurisdiction to hold a revocation hearing and to revoke, continue, or modify community supervision, regardless of whether the period of community supervision imposed on the defendant has expired, if **before the expiration** the attorney representing the state files a motion to revoke, continue, or modify community supervision and a capias is issued for the arrest of the defendant. Tex. Crim. Proc. art. 42.12, §21(e).

Due Diligence Defense. It is an affirmative defense to revocation or proceed to

adjudicaiton for an alleged failure to report to a supervision officer as directed or to remain within a specified place that a supervision officer, peace officer, or other officer with the power of arrest under a warrant issued by a judge for that alleged violation failed to contact or attempt to contact the defendant in person at the defendant's last known residence address or last known employment address, as reflected in the files of the department serving the county in which the order of community supervision was entered. Tex. Crim. Proc. art. 42.12, §24

Sufficiency of Evidence to Support the State's Allegations. The standard of proof in probation revocation hearings is a preponderance of the evidence. *See e.g., Kulhanek v. State*, 587 S.W.2d 424 (Tex.Crim.App. 1979). The State must prove by a preponderance of the evidence that the terms of community supervision were violated. *See Cobb v. State*, 851 S.W.2d 871, 874 (Tex.Crim.App. 1993); *Cardona v. State*, 665 S.W.2d 492, 494-95 (Tex.Crim.App. 1984). Preponderance of the evidence means "when the greater weight of the credible evidence before the court creates a reasonable belief that a condition of probation has been violated as alleged." *Scamardo v. State*, 517 S.W.2d 293, 297 (Tex.Crim.App. 1974). Proof that a violation could have occurred amounts to no evidence. *See Jeffley v. State*, 938 S.W.2d 514 (Tex.App. — Texarkana 1997)(applying standard to insanity defense). Where there is insufficient evidence supporting the allegations in a motion to revoke probation, it is an abuse of discretion to order revocation. *See Reza v. State*, 608 S.W.2d 688 (Tex.Crim.App. 1980).

Change of Residence Violation. Mere fact that probation officer's letters were returned held insufficient to support allegation that he changed residence without permission. *See Perry v. State*, 459 S.W.2d 865 (Tex.Crim.App. 1970).

Failure to Pay Fine/Costs or Make Restitution. "[I]f the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available." *Bearden v. Georgia*, 461 U.S. 670, 669-670. "[A] probationer who has made sufficient bona fide efforts to pay his fine and restitution, and who has complied with the other conditions of probation, has demonstrated a willingness to pay his debt to society and an ability to conform his conduct to social norms." *Id*.

1000 feet "child- zone" Violation. A sex offender probationer cannot go within 1000 feet of various "child zones" unless he is in or going immediately to or from his probation office, a program required as a condition of community supervision, or a private residence or residential facility he was required to reside in as a condition of community supervision.

Failure to Report as Directed. The "as directed" language violates due process notice requirements becuase it is too vague and leaves boundless discretion to the probation officer. *Cardona v. State*, 665 S.W.2d 492 (Tex.Crim.App. 1984).

"Association with Disreputable Folks" Violation. If the defendant doesn't know that the person has a record or is an escaped felon, then he cannot be said to violate this standard condition. *Steed v. State*, 467 S.W.2d 460 (Tex.Crim.App. 1971); *Gill v. State*, 556 S.W.2d 354 (Tex.Crim.App. 1977).

Working Faithfully at Suitable Employment. Getting fired for failure to show up (if he didn't know the work hours) is insufficient to prove a violation of this work condition. *Waff v. State*, 571 S.W.2d 915 (Tex.Crim.App. 1978); *Gormany v. State*, 486 S.W.2d 324 (Tex.Crim.App. 1972); *Butler v. State*, 486 S.W.2d 331 (Tex.Crim.App. 1972); *Rehwalt v. State*, 489 S.W.2d 884 (Tex.Crim.App. 1973); *Kubat v. State*, 503 S.W.2d 258 (Tex.Crim.App. 1974).

Restitution: *Article 42.037 Hearings*

• The sentencing court may order the defendant to make restitution to "any victim of the offense." In cases of loss/destruction of property, the court can order the defendant to return the property or "if return of the property is impossible or impractical or is an inadequate remedy, to pay an amount equal to the greater of" the value on the date of loss/destruction or the value on the date of sentencing.

• Restitution is limited to the victim of the offense for which the defendant has been charged and convicted. *See Martin v. State*, 874 S.W.2d 674 (Tex.Crim.App. 1994); *Ex parte Lewis*, 892 S.W.2d 4 (Tex.Crim.App. 1994).

• In cases of bodily injury to a victim, the court require the defendant to pay for "necessary medical and related professional

■ The court shall resolve any dispute relating to the proper amount or type of restitution. The standard of proof is a preponderance of the evidence.

■The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense is on the prosecuting attorney.

■The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant and the defendant's dependents is on the defendant.

■ The burden of demonstrating other matters as the court deems appropriate is on the party designated by the court as justice requires.

services and devices relating to physical, psychiatric, and psychological care," as well as "necessary physical and occupational therapy and rehabilitation." The defendant can also be ordered to reimburse the victim for lost income.
• In cases of the victim's death, the court can require the defendant to pay for "necessary funeral and related services."
• "The court shall impose an order of restitution that is as fair as possible to the victim. The imposition of the order may not unduly complicate or prolong the sentencing process."
• Conviction of a defendant for an offense involving the act giving rise to restitution under this article estops the defendant from denying the essential allegations of that offense in any subsequent federal civil proceeding or state civil proceeding brought by the victim, to the extent consistent with state law.

• The court may require a probationer to reimburse the crime victims compensation fund (in chapter 56 of the Code of Criminal Procedure) for any amounts paid from that fund to a victim of the probationer's offense.
• ***The court may <u>not</u> order restitution for a loss for which the victim*** has received or ***will receive compensation.***
• The court may require a defendant to make restitution under this article within a specified period or in specified installments.
• When the probation department prepares a report, the court shall permit the defendant to read it. See art. 42.037(j).
• The trial court can assess both a fine and restitution.

Writs for Probationers. Article 11.072. Those on community supervision may file writ applications to challenge the legal validity of (1) **the conviction** or order in which community supervision was imposed (after seeking relief through motion to amend); or (2) **the conditions of community supervision on constitutional grounds.** The trial court must issue the writ and enter an order granting or denying the relief sought in the application. If the application is denied in whole or part, the applicant may appeal under Tex. Code Crim. Proc. art. 44.02 and Tex. R. App. Pro. Rule 31.

PUNISHMENT TRIALS: *WHAT IS YOUR THEORY OF MITIGATION?*

Whether judge or jury, the defense attorney has a duty to present a case for a mitigated punishment. Mitigation can mean anything from the defendant's role in the offense, residual doubt, and/or an imperfect defense, to a mental disorder, intoxication, and/or poor upbringing. It is, in a phrase, any reason to mitigate the penalty. For purposes of this paper, assume that there is little to nothing in the facts of the offense which makes a case for mitigation. The proof was overwhelming and the defendant committed the crime. What is your role in the punishment trial?

> *Ex Parte Duffy*, 607 S.W.2d 507, 514-15 (Tex.Crim.App. 1980) *overruled on other grounds*, *Hernandez v. State*, 988 S.W.2d 770 (Tex.Crim.App. 1999)(quoting the ABA Project on Defense Counsel Standards).

There are two essential moral inquiries for just criminal punishment: what the person did and who he is. The former has already been answered. Your job for the punishment trial is to tell the judge or jury all about your client in a way that humanizes him and perhaps explains why he committed the offense in the first place. To do this well, you need a mitigation specialist.

A mitigation specialist is a social worker. They have skills and training that neither lawyers nor investigators have. Their expertise is getting the skeletons out of your client's closet. He won't (or can't) tell you — but he (and his family) will tell a social worker. This specialist's greatest skill is the art of listening and like sponge, they collect a vast array of useful information. They also can spot subtleties that regularly escape lawyers. When preparing for a punishment trial, this person is your first partner in the defense team. Their job is not to testify, but to collect all the records (school, medical, psychological, etc.), and locate and develop a dialogue with everyone in your client's life who can offer insight (and testimony) into who this person is.

Among the topics counsel must investigate and consider presenting are:

★ Medical history
★ Educational history
★ Employment and training history
★ Family and social history
★ Prior adult and juvenile correctional experience
★ Religious and cultural influences

Once you've collected this information, you can then begin preparing your mitigation case. You should interview all the witnesses identified by your specialist. You may also

want to get an expert. Mitigation specialists will demonstrate their usefulness once again in assisting counsel to decide what sort of expert is needed and what narrow issue that an expert can bring to bear in the case.

Armed with this information, you can then show the jury who he is and the forces in his life that made him this way. Perhaps the defendant was sexually abused as a child. Perhaps he has a brain injury. Perhaps he grew up very poor. In this way, you vastly increase the likelihood of mitigating the defendant's punishment. One juror may connect with the defendant's bad childhood. Another may be unmoved by the evidence of his childhood, but be affected by proof of a medical injury. The greater number of such factors, the greater the likelihood of mercy.

CONSTITUTIONALLY REASONABLE INVESTIGATIONS

Follow the ABA Guidelines

"Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable." *Strickland v. Washington*, 466 U.S., at 688-689 (1984).

"The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. . . . Investigation is essential to fulfillment of these functions." *Wiggins v. Smith*, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)(quoting 1 ABA Standards for Criminal Justice 4-4.1).

An attorney has a duty to investigate his client's life history. *Ex parte Duffy*, 607 S.W.2d at 517 ('Defense counsel has the responsibility to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty.')(internal citations omitted).

Failure to uncover and present mitigating evidence at sentencing cannot be justified as a tactical decision to focus on other evidence where counsel has not "'fulfilled their obligation to conduct a thorough investigation of the defendant's background.'" *Williams v. Taylor*, 529 U.S. 362, 396 (2000)(citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p 4-55 (2d ed. 1980)). Especially (but not exclusively) in a capital sentencing hearing,

> counsel must not be allowed to shirk her responsibility. Thus, while we defer to legitimate, strategic decision-making, from the perspective of strategic competence, we hold that defense counsel must make a significant effort, based on reasonable investigation and logical argument, to ably present the

> defendant's fate to the jury and to focus the attention of the jury on any mitigating factors.

Hall v. Washington, 106 F.3d 742 (7th Cir. 1997)(citation omitted).

The duty to investigate derives from an attorney's basic function, which is "to make the adversarial testing process work in the particular case." *Strickland*, 466 U.S. at 690. "Because that testing process generally will not function properly unless defense counsel has done some investigation into the prosecution's case and into various defense strategies, 'counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986) (quoting *Strickland*, 466 U.S. at 691). **This means investigations of mitigation.** *See Wiggins v. Smith*, 123 S.Ct. at 2536-37 (scope of investigation into defendant's "misery as a youth" fell short of the professional standards then prevailing because counsel knew of defendant's "unfortunate childhood"); *Williams v. Taylor*, 529 U.S. at 398-99 (holding that failure to investigate defendant's horrible background constituted ineffective assistance).

In *Wiggins v. Smith*, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), the United States Supreme Court has emphasized the essentiality of counsel fulfilling his obligation. The Court stressed the ABA guidelines in determining whether a mitigation investigation was constitutionally reasonable. Defense counsel had a PSI and some remarks from the defendant which suggested that he had a bad childhood. However, counsel — for claimed strategic reasons — never looked further and did not offer any mitigating evidence at the punishment trial. The Court held that counsel's failure to conduct a further investigation constituted ineffective assistance. *Wiggins v. Smith, supra* ("Counsel's decision not to expand their investigation beyond the PSI and [other] records fell short of the professional standards ... .").

It may be necessary when making an ex parte application for a mitigation specialist that you attach a copy of *Wiggins*. They need to know that the case runs the risk of a reversal on a writ where a habeas attorney discovers a wealth of mitigating evidence never investigated because the court denied funds for such an investigation. But you might also explain that mitigation specialists are cheaper than psychiatrists or psychologists, whose testimony may be unnecessary depending upon what the mitigation specialist discovers. In time, judges will see that they get a bigger bang for the buck for these experts than for others.

Punishment Evidence

Rule of Admissibility in Texas Punishment Trials: *what is helpful to the jury in determining the appropriate sentence for a particular defendant in a particular case.*

"Relevancy" at Punishment: Rules of Evidence 404 and 405 do not apply to punishment trials. However, Rule 403 — the legal relevance rule — has not been statutorily excluded, so it continues to apply. *See, e.g., Jones v. State*, 963 S.W.2d 177 (Tex.App. — Fort Worth 1998); *Brooks v. State*, 961 S.W.2d 396 (Tex.App. — Houston [1st] 1997). The question, then, is the meaning of relevance at a punishment trial. In *Murphy v. State*, 777 S.W.2d 44 (Tex.Crim.App. 1988)(plurality), the Court observed that "admissibility of evidence at the punishment phase of a non-capital felony offense is a function of policy rather than relevancy. This is so because by and large there are no discreet factual issues at the punishment stage. There are simply no distinct 'facts ... of consequence' that proffered evidence can be said to make more or less likely to exist. Rule 401, supra. Rather, 'deciding what punishment to assess is a normative process, not intrinsically factbound.'" *Id*. at 63.

If relevance is a matter of policy, then what exactly is the policy of this state? Unfortunately, Article 37.07 offers little help; it merely informs what is not excluded. In *Miller El v. State*, 782 S.W.2d 892, 896-897 (Tex.Crim.App. 1990), the Court declared that because the Legislature has yet to set any "coherent policy to guide courts in discerning what evidence is appropriate to the punishment deliberation," the judiciary has "fill[ed] the policy void" by deciding evidence of "'the circumstances of the offense itself or . . . the defendant himself' will be admissible at the punishment phase."

"[T]he test for relevancy of the evidence is much broader at the punishment stage, the purpose being to allow the factfinder as much useful information as possible in deciding the appropriate punishment for the individual defendant." *Bowser v. State*, 816 S.W.2d 518, 521 (Tex. App. — Corpus Christi 1991, *no pet*.)(reversing punishment for the failure of the court to issue a writ of attachment for a defense witness). *See also Kanouse v. State*, 958 S.W.2d 509 (Tex.App. — Beaumont 1998); *Haney v. State*, 951 S.W.2d

551 (Tex.App. — Waco 1997).

This sentiment has been embraced by the Court of Criminal Appeals in *Rogers v. State*, 991 S.W.2d 262 (Tex.Crim.App.1999). The Court conclude in *Rogers* that a determination of what is relevant at punishment **"should be a question of what is helpful to the jury in determining the appropriate sentence for a particular defendant in a particular case."** Significantly, the Court looked to the listed objectives in Section 1.02 of the Texas Penal Code **and held that "sentences assessed for prior convictions are relevant in the context of the jury's decision on punishment.**"

Art.37.07 §3(h). Evidence of an adjudication for conduct that is a violation of a penal law of the grade of misdemeanor punishable by confinement in jail is admissible only if the conduct upon which the adjudication is based occurred on or after January 1, 1996.

general reputation, his character, an opinion regarding his character, the circumstances of the offense for which he is being tried, and, notwithstanding Rules 404 and 405, Texas Rules of Criminal Evidence, ***any other evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible,*** regardless of whether he has previously been charged with or finally convicted of the crime or act. A court may consider as a factor in mitigating punishment the conduct of a defendant while participating in a program under Chapter 17 as a condition of release on bail. Additionally, notwithstanding Rule 609(d), Texas Rules of Criminal Evidence, and subject to Subsection (h), evidence may be offered by the state and the defendant of an adjudication of delinquency based on a violation by the defendant of a penal law of the grade of: (1) a felony; or (2) a misdemeanor punishable by confinement in jail.

As this is the new Texas policy for punishment trials, then the courts will need to rethink some of the prior cases holding that certain types of evidence is inadmissible. For example, evidence regarding **how probation operates**, including the various conditions which might be available for a probationer makes probation more or less likely than without such evidence. *See Brown v. State*, 741 S.W.2d 453 (Tex.Crim.App. 1987)(holding under previous 37.07 such evidence inadmissible). Such evidence is certainly helpful to jurors and hence admissible under Section 1.02, Article 37.07 and *Rogers*. Likewise, the prohibition against evidence of the **conditions of confinement** to which a defendant will be subjected will also need revisiting by the courts. *See Stiehl v. State*, 585 S.W.2d 716 (Tex.Crim.App. 1979). *See Sunbury v. State*, 88 S.W.3d 229 (Tex.Crim.App. 2002).

Victim Impact Evidence

■ "[V]ictim impact evidence may be admissible as a circumstance of the offense . . . so long as that evidence has some bearing on the defendant's 'personal responsibility and moral guilt.'"*Stavinoha v. State*, 808 S.W.2d 76 (Tex.Crim.App. 1991)(quoting *Miller El*).

■ **Heightened Judicial Supervision Required.** “[T]here is no legal ‘bright and easy line’ for deciding precisely what evidence is and is not admissible as either victim character or victim impact evidence. The inability to craft a bright-line rule, therefore, requires heightened judicial supervision and careful selection of such evidence to maximize probative value and minimize the risk of unfair prejudice. Courts must guard against the potential prejudice of ‘sheer volume,’ barely relevant evidence, and overly emotional evidence. A ‘glimpse’ into the victim’s life and background is not an invitation to an instant replay.” *Salazar v. State*, 90 S.W.2d 330, 336 (Tex.Crim.App. 2002).

■ **Admissible victim impact** includes testimony or evidence of degree of physical injury (past, present or future), *Miller El, supra*, including psychological trauma, *Brown v. State*, 875 S.W.2d 38 (Tex.App. — Austin 1994); *Peoples v. State*, 874 S.W.2d 804 (Tex.App. — Fort Worth 1994); *Murry v. State*, 804 S.W.2d 279 (Tex.App. — Fort Worth 1991); and physical/emotional impact of victim’s death on a relative, *Brooks v. State*, 961 S.W.2d 396 (Tex.App. — Houston [1st] 1997)(relevance of victim-impact testimony in non-capital case requires that such evidence have a “close, direct link to the circumstances of the case”).

Defendants are not nameless, faceless ciphers in the courtroom. They are physically present and able to offer their human face and evidence of their humanity. But both defendants and juries must also know that the homicide victim is not a faceless, fungible stranger. Every homicide victim is an individual, whose uniqueness the defendant would or should have considered, regardless of whether the murderer actually knew any specific details of the victim's life or characteristics.

On the other hand, the punishment phase of a criminal trial is not a memorial service for the victim. What may be entirely appropriate eulogies to celebrate the life and accomplishments of a unique individual are not necessarily admissible in a criminal trial. *Salazar v. State*, 90 S.W.3d 330, 335 (Tex.Crim.App. 2002).

■ Under *Booth v. Maryland*, 482 U.S. 496 (1987), evidence which “creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner” is inadmissible under the Eighth and Fourteenth Amendments. Such evidence was testimony about the victim’s family members opinions and views regarding “the crime, the defendant and the appropriate sentence.”

When considering the admissibility of victim impact or victim character evidence, courts must carefully consider the following factors:

■ **Inadmissible evidence** at punishment includes proof by the State that a slain victim was peaceable and inoffensive, *Armstrong v. State*, 718 S.W.2d 686 (Tex.Crim.App. 1985); proof by the State that the complainant had been a hardworking teacher, artistic and musically inclined, with students who loved her, well-educated and an animal lover were irrelevant to the special issues in capital case, *Smith v. State*, 919 S.W.2d 96 (Tex.Crim.App. 1996)(plurality).

(1) how probative is the evidence;

(2) the potential of the evidence to impress the jury in some irrational, but nevertheless indelible way;

(3) the time the proponent needs to develop the evidence; and

(4) the proponent's need for the evidence.

Salazar v. State, 90 S.W.3d 330, 336 (Tex.Crim.App. 2002).

■ **Inadmissible evidence** at punishment includes proof by the defense of **"reciprocal victim impact,"** namely that the victim was a homosexual. *See Goff v. State*, 931 S.W.2d 537 (Tex.Crim.App. 1985).

■ In general, a witness may not **recommend** to the trier of fact **a particular punishment**. *See Sattiewhite v. State*, 786 S.W.2d 271, 290 (Tex.Crim.App. 1989); *Wright v. State*, 962 S.W.2d 661, 663 (Tex. App. — Fort Worth 1998, *no pet.*).

"Circumstances of the Defendant Himself"

■ **"Opening the Door:"** A defendant opens the door by putting his ***suitability*** for probation in issue, but not by putting his ***eligibility*** for probation in issue. *See Murphy v. State*, 777 S.W.2d 44 (Tex.Crim.App. 1988); *Anderson v. State*, 896 S.W.2d 578 (Tex.App. — Fort Worth 1995).

■ **Gang Affiliation:** The Court of Criminal Appeals has held that gang affiliation is not only admissible in punishment as it relates to character, but the jury must also know "the types of activities the gang generally engages in so that they can determine if his gang membership is a positive or negative aspect of his character, and subsequently his character as a whole." *Anderson v. State*, 901 S.W.2d 946 (Tex.Crim.App. 1995). Yet, it is not necessary for the State to directly link the defendant to any of the gang's misdeeds so long as it proves that the defendant is a member! *See Beasley v. State*, 902 S.W.2d 452 (Tex.Crim.App. 1995). *See also Howard v. State*, 962 S.W.2d 119, 124 (Tex.App. — Houston [1st] 1997, *pet.*

ref'd).

■ Evidence held to be **admissible at punishment** includes defendant's impressive academic record (*Logan v. State*, 445 S.W.2d 267 (Tex.Crim.App. 1970), military honors and awards (*Brazile v. State*, 497 S.W.2d 302 (Tex.Crim.App. 1973), church affiliation (*Miller v. State*, 442 S.W.2d 340 (Tex.Crim.App. 1969).

Legislative Policy of Relevance and Admissibility

Although the Legislature has not set out discreet factual issues, it has set out some parameters scattered in the Code of Criminal Procedure and the Penal Code.

■ Texas Penal Code, §1.02 is one of the clearest policy statements for the "issues" at stake at a punishment trial:

> The general purposes of this code are to establish a system of prohibitions, penalties, and correctional measures to deal with conduct that unjustifiably and inexcusably causes or threatens harm to those individual or public interests for which state protection is appropriate. To this end, the provisions of this code are intended, and shall be construed, to achieve the following objectives:
>
> (1) to insure the public safety through:
>
> (A) the deterrent influence of the penalties hereinafter provided;
>
> (B) the rehabilitation of those convicted of violations of this code; and
>
> (C) such punishment as may be necessary to prevent likely recurrence of criminal behavior;
>
> (2) by definition and grading of offenses to give fair warning of what is prohibited and of the consequences of violation;
>
> (3) to prescribe penalties that are proportionate to the seriousness of offenses and that permit recognition of differences in rehabilitation possibilities among individual offenders;
>
> (4) to safeguard conduct that is without guilt from condemnation as criminal;

> (5) to guide and limit the exercise of official discretion in law enforcement to prevent arbitrary or oppressive treatment of persons suspected, accused, or convicted of offenses; and
>
> (6) to define the scope of state interest in law enforcement against specific offenses and to systematize the exercise of state criminal jurisdiction.

This statutory provision is precisely what the Court of Criminal Appeals looked to in its seminal (and unanimous) *Rogers* opinion, cited *supra*.

■ **Murder Punishment Trials — Article 38.36(a):**

> In ***all*** prosecutions for murder, the state or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense.

Sudden Passion is **a punishment issue.** *See* Tex. Penal Code, §19.02(d).

■ "In cases in which the matter of punishment is referred to a jury, either party may offer into evidence the **availability of community corrections facilities** serving the jurisdiction in which the offense was committed." *See* Tex. Code Crim.Proc., art. 37.07, §3(f).

Ake v. Oklahoma: Partisan Defense Experts for Indigent Defendants

An indigent defendant is entitled to the assistance of a psychiatrist if he made an ex parte threshold showing to the trial judge that his sanity or future dangerousness is likely to be a significant factor at his trial. *See Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). A trial judge is not required to permit the defendant "to choose a psychiatrist of his personal liking" or giving him funds to hire one. However, "the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense."

> This Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to

> assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake. ***
>
> Meaningful access to justice has been the consistent theme of these cases. We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense. Thus, while the Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy, see *Ross v. Moffitt*, 417 U.S. 600 (1974), it has often reaffirmed that fundamental fairness entitles indigent defendants to "an adequate opportunity to present their claims fairly within the adversary system," *id.*, at 612. To implement this principle, we have focused on identifying the "basic tools of an adequate defense or appeal," *Britt v. North Carolina*, 404 U.S. 226, 227 (1971), and we have required that such tools be provided to those defendants who cannot afford to pay for them.

Ake, 470 U.S. at 76-77, 105 S.Ct. at 1092-1093.

> We hold that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one.

Ake, 470 U.S. at 73-74, 105 S.Ct. at 1091-1092. *See also Tuggle v. Netherland*, 516 U.S. 10, 116 S.Ct. 283, 284, 133 L.Ed.2d 251 (1995)("We held in *Ake* . . . that when the prosecutor presents psychiatric evidence of an indigent defendant's future dangerousness in a capital sentencing proceeding, due process requires that the State provide the defendant with the assistance of an independent psychiatrist."); *Simmons v. South Carolina*, 512 U.S. 154, 164, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) ("Where the State presents psychiatric evidence of a defendant's future dangerousness at a capital sentencing proceeding, due process entitles an indigent defendant to the assistance of a psychiatrist for the development of his defense[.]").

The Court of Criminal Appeals has stressed the necessity of the adversary process.

See Williams v. State, 958 S.W.2d 186 (Tex.Crim.App. 1997)(Ake "premised upon the notion that an indigent is entitled to 'meaningful access to justice' which means that he should have "access to the raw materials integral to the building of an effective defense" thus ensuring "a proper functioning of the adversary process.").

Ake is not limited to psychiatrists or only to the trial at guilt/innocence. *See Rey v. State*, 897 S.W.2d 333, 337-39 (Tex.Crim.App. 1995)(applies to any expert). It also applies to punishment issues. *See Smith v. McCormick*, 914 F.2d 1153, 1158-59 (9th Cir. 1990). *See also Caldwell v. Mississippi*, 472 U.S. 320, 323-24, 105 S.Ct. 2633, 86 L.Ed.2d 231, n.1 (1985) (ballistics & fingerprint experts)(denial of court-appointed ballistics expert did not deprive the defendant of due process where he offered little more than undeveloped assertions that the requested assistance would be beneficial); *Yohey v. Collins*, 985 F.2d 222, 227 (5th Cir. 1993) (ballistics expert); *Little v. Armontraut*, 835 F.2d 702, 711 (8th Cir. 1987)(hypnotist); *State v. Moore*, 321 N.C. 327, 364 S.E.2d 648 (1988)(fingerprint expert); State v. Penley, 318 N.C. 30, 347 S.E.2d 783 (1986)(pathologist); *State v. Johnson*, 317 N.C. 193, 344S.E.2d 775 (1986)(medical expert).

The defendant is entitled to a partisan defense expert who functions under counsel's direction "to provide technical assistance to the accused, to help evaluate the strength of his defense, to offer his own expert diagnosis at trial if it is favorable to that defense, and identify weaknesses in the State's case, if any, by testifying himself and/or preparing counsel to cross-examine opposing experts." *DeFreece v. State*, 848 S.W.2d 150, 159 (Tex.Crim.App. 1993), *cert. denied*, 114 S.Ct. 284 (1993). *See also Smith v. McCormick*, 914 F.2d 1153 (9th Cir. 1990).

In *McBride v. State*, 838 S.W.2d 248, 250-252 (Tex.Crim.App. 1992), the Court of Criminal Appeals construed Article 39.14 of the Code of Criminal Procedure, which upon a good cause showing, authorizes the court to order the State to permit defense inspection of any tangible "material" evidence in its possession. Because the prosecution must always prove that the substance at issue in a drug case is a controlled substance, the drug's character and identity is always material to the defense. This reality in drug cases, the Court decided, entitled the defense to the assistance of a chemist under *Ake* because the defense could not otherwise challenge this central part of the prosecution's case. However, the defense has a right to have its own expert test fingerprints, bullets, guns, books or records only when the evidence is legally "indispensable" to the prosecution's case, *See Quinones v. State*, 592 S.W.2d 933, 942-43 (Tex.Crim.App. 1980).

Demonstrating Your Need for an Expert *Ex parte*

The threshold showing required for expert assistance is on an *ex parte* basis. *See Ake v. Oklahoma*, 470 U.S. at 82 ("ex parte threshold showing"). "We hold that an indigent defendant is entitled, upon proper request, to make his *Ake* motion ex parte." *Williams v. State*, 958 S.W.2d 186 (Tex.Crim.App. 1997). Failure of the trial court to permit an ex parte showing of need for expert is error "constitutional in nature." *Williams v. State*, *supra* at n. 8 (reversing because State failed to prove that error was harmless beyond a reasonable doubt).

Article 26.052(f) of the Code of Criminal Procedure also allows counsel to make an *ex parte* application for "advance payment to investigate potential defenses" by making a particularized showing of need. If the application is denied, the court must state the reasons in writing and seal all of the records pertaining to it for appellate review.

Requirements and Procedures for Getting a Defensive Expert

A defendant must not only file an *ex parte* motion for a defense expert. He must also explain *ex parte* to the trial court why expert assistance is likely to be a significant factor at trial, either with the court reporter in chambers with the trial judge, or in an affidavit. *See Rey v. State*, 897 S.W.2d 333, 341 (Tex.Crim.App. 1995); *DeFreece v. State*, 848 S.W.2d 150, 156-57 (Tex.Crim.App. 1993), *cert. denied*, 114 S.Ct. 284 (1993). An *Ake* motion with nothing more than "undeveloped assertions" of a need for an expert may be denied. *Caldwell v. Mississippi*, 472 U.S. 320, 323-24, 105 S.Ct. 2633, 86 L.Ed.2d 231, n.1 (1985).

An instructive case is *Jordan v. State*, 707 S.W.2d 641, 645 (Tex.Crim.App. 1986), where the Court of Criminal Appeals reviewed the denial of an *Ake* motion, in which the attorney sought a CAT Scan test at a hospital for his client because it would reveal whether he had brain damage. The Court found this offer of proof inadequate for a variety of reasons: it failed to explain the origin, effect or extent of the potential brain damage, nor did the attorney assure the court whether there was an expert to perform the CAT Scan, when he could do it, how much it might cost, or what counsel intended to do with it if his client was indeed brain-damaged.

Perhaps more instructive is *Rey v. State*, *supra*, where the defense made that all-important threshold showing of need for the assistance of a forensic pathologist. The defense explained its theory, which if believed, would likely determine the outcome of the trial, and showed how expert assistance would help establish it. An affidavit from a forensic

pathologist (the codefendant's) who agreed with the defense theory also accompanied the motion, as did reference to another pathologist, along with her quoted fee. (Counsel should specifically ask the court to consider the affidavit as evidence, just to be on the safe side, in order to avoid the appellate rationale that he failed to present "evidence.").

While counsel should present about everything she can during the ex parte showing, it is not always necessary to have the affidavit of an expert. Indigent defendants "cannot be expected to hire medical experts to evaluate their claim in order to support their motion to have an expert appointed. The whole point is that these defendants do not have enough money to hire an expert." *Rodriguez v. State*, 906 S.W.2d 70 (Tex.App.— San Antonio 1995), *pet. dismissed as improvidently granted*, 924 S.W.2d 156 (Tex.Crim.App. 1996)(adequate showing for forensic pathologist made when counsel informed the court that cause of death was likely to be the only contested issue where the prosecution intended to introduce several medical experts to prove homicide and rebut accident).

Your Testifying Expert's Work Product and Waiver

The defense expert is the lawyer's representative under Rule 503(a)(4) of the Texas Rules of Evidence, and as such may be prevented "from disclosing any . . . fact which came to [his] knowledge . . . by reason of the attorney-client relationship." *See DeFreece v. State*, 848 S.W.2d 150, 161 n.8 (Tex.Crim.App. 1993), *cert. denied*, 114 S.Ct. 284 (1993). When an expert is appointed under *Ake v. Oklahoma*, that expert's conclusions are the work-product of defense counsel. *See Williams v. State*, 958 S.W.2d 186, n.7 (Tex.Crim.App. 1997) *and Taylor v. State*, 939 S.W.2d 148 (Tex.Crim.App. 1996).

In *Skinner v. State*, 956 S.W.2d 532 (Tex.Crim.App. 1997), the prosecution sought the bases of a testifying defense expert's opinions, pursuant to Rule 705 of the Texas Rules of Evidence, urging an *in camera* inspection for "anything the Court finds that would not be work product or would not be privileged, that might indicate what documents [the expert] has seen[.]" After conducting an *in camera* inspection, the trial court ordered the disclosure of the expert's "questions and comments" he had prepared for defense counsel, which were the expert's views about the strengths and weaknesses of the defense theory. The Court of Criminal Appeals viewed this as "highly privileged work product," and as "precisely the type of document intended to be protected by the work product doctrine."

As the Court of Criminal Appeals explained, no waiver occurs where defense counsel relies on privileged materials during his examination of the defense expert. However, waiver *does* occur when the witness has made **"testimonial use"** of the material, that is, the

document has been "used before the jury" (shown to the witness on the stand, identified by the witness, or partially read aloud to the jury). When the defense makes such use of otherwise privileged work product material, the "normal rules of evidence come into play with respect to cross-examination and production of the documents." *Skinner v. State*. Thus, if the expert used a document to refresh his recollection before testifying, then the documents would be discoverable by the State under Rule 612 of the Rules of Evidence. If the document contained "facts or data" upon which the expert based the opinion he gave the jury, then it would be discoverable by the State under Rule 705 of the Rules of Evidence.

In *Skinner*, the State argued that the document was discoverable under Rule 705, which requires disclosure of the "underlying facts or data" of an expert's opinion. The Court found that Rule 705 was inapplicable because the document did not "by any stretch constitute 'facts or data'" underlying the defense expert's opinion, but reflected the expert's "mental processes upon his initial review of the case — his thoughts about the strengths and weaknesses of the defense theory and questions he wanted to discuss with defense counsel."

Burdens of Proof, Waiver and Extraneous Offenses

■ **Defendant Testifying at Punishment and Admitting Guilt: *DeGarmo Doctrine is Dead?*** In *Leday v. State*, 983 S.W.2d 713 (Tex.Crim.App. 1998), the Court of Criminal Appeals all but officially declared dead the odious doctrine which deemed errors at guilt/innocence waived whenever the defendant admitted his guilt at punishment. The doctrine was invented in *McGlothlin v. State*, 896 S.W.2d 183, 186 (Tex. Crim. App.), *cert. denied*, 516 U.S. 882, 133 L.Ed.2d 150, 116 S.Ct. 219 (1995), and *DeGarmo v. State*, 691 S.W.2d 657, 661 (Tex.Crim.App.), *cert. denied*, 474 U.S. 973, 106 S.Ct. 337, 88 L.Ed.2d 322 (1985). *See also Reyes v. State*, 994 S.W.2d 151 (Tex.Crim.App. 1999).

■ **Evidentiary Burdens at Punishment:** "[T]here are rarely specific issues at the punishment stage upon which a burden of proof may be imposed upon the State. No burden of proof has ever been assigned to the broad 'issue' of what punishment to assess." *Miller El v. State*, 782 S.W.2d 892, 896-897 (Tex.Crim.App. 1990).

■ **Extraneous Offenses at Punishment:** When extraneous offense evidence is admitted during the punishment phase of a trial, the trial court must instruct a jury, upon request, not to consider the evidence unless it believes beyond a reasonable doubt that the defendant committed the offense. *See Mitchell v. State*, 931 S.W.2d 950, 954 (Tex.Crim.App. 1996).

■ **Appellate Review Standard:** Appellate courts review trial court decisions regarding the admission or exclusion of evidence under an abuse of discretion standard, where the trial court is afforded great discretion in its evidentiary decisions, in part because the trial judge is in a better position to evaluate the impact of the evidence. *See Montgomery v. State*, 810 S.W.2d 372, 378-379 (Tex.Crim.App. 1990). Review of a trial court's "abuse of discretion" means that as long as the trial court's ruling was at least "within the zone of reasonable disagreement," an appellate court will not intercede.

■ **Evidence of "Priors" for Enhancement:** The State must prove that prior convictions used for enhancement purposes became final before the case for which the defendant is on trial. Pen packets are admissible under Rules 901(a) and 902(4) of the Texas Rules of Evidence. *See Reed v. State*, 811 S.W.2d 582 (Tex.Crim.App. 1991). *See also* Tex.Code Crim.Proc. art. 42.09, §8(b).

The State must prove that convictions used for enhancement are "final." If the pen packet or proof of sentence reflects a notice of appeal, the State proves finality by introducing a certified copy of the appellate mandate. *See Johnson v. State*, 784 S.W.2d 413 (Tex.Crim.App. 1990). If there is proof that the defendant was placed on probation, the State must prove that the probation was revoked, such as a certified copy of the order revoking probation. *See Elder v. State*, 677 S.W.2d 538 (Tex.Crim.App. 1984). This requirement includes "shock" probation. *See Ex parte Langley*, 833 S.W.2d 141 (Tex.Crim.App. 1992). Foreign convictions which indicate non-finality must be proven final under the law of the foreign state or nation. *See Diremiggio v. State*, 637 S.W.2d 926 (Tex.Crim.App. 1982).

The State must also prove identity, that is, that the defendant is the same person convicted of the prior offense. *See Beck v. State*, 719 S.W.2d 205 (Tex.Crim.App. 1986). This requirement is usually met by the State through expert fingerprint testimony comparing the defendant's prints with those in the pen packet or judgment, though virtually any other proof will suffice. *See, e.g., Gollin v. State*, 554 S.W.2d 683 (Tex.Crim.App. 1977)(photograph and physical description in pen packet matched defendant); *Garcia v. State*, 135 Tex.Crim.R. 667, 122 S.W.2d 631 (1938)(witness who was present at defendant's conviction).

■ If the State fails in its proof, the defense should move to strike and withdraw the evidence from the jury's consideration, and seek an instruction to disregard. *See Fuller v. State*, 829 S.W.2d 191 (Tex.Crim.App. 1992).

Pitfalls of Extraneous Offense Notice Requests: *"the Other 3g"*

Notice and *Additional* Notice: Article 37.07, §3(g) of the Texas Code of Criminal Procedure requires the State, on timely request, to give the defendant notice of extraneous crimes or bad acts that the State intends to use at trial. The notice must be reasonable. Tex. R.Evid. 404(b).

Article 37.07, §3(g) also requires the State to give ***additional notice*** if it intends to use an extraneous offense that has not resulted in a final conviction. To be reasonable, the notice must include (a) the date on which the offense occurred, (b) the county where it occurred, and (c) the name of the alleged victim.

When *Not* to File a "Motion" or Get it Granted: In *Mitchell v. State*, 982 S.W.2d 425 (Tex.Crim.App.1998), the defense attorney filed a "Motion to Give Notice of Extraneous Acts Under Art. 37.07, Code of Criminal Procedure," one year prior to trial, but presented it to the trial court on the day of voir dire. The **trial court granted his motion** and the State then gave notice that it intended to introduce various extraneous acts at the punishment trial. The defense objected, but was overruled. The appellate court reversed, but the Court of Criminal Appeals reversed the appellate court.

The Court of Criminal Appeals stressed an all-important distinction between requests for action addressed ***to the trial court*** and those addressed ***to the State***, holding that "when a document seeks trial court action, it cannot also serve as a request for notice triggering the State's duty under Article 37.07, §3(g). To hold otherwise would encourage gamesmanship." "Stated another

Judge Baird concurred in *Mitchell*, offering this helpful and straightforward advice:

To make an adequate request under [Tex. R. Crim. Evid.] 404(b) the better practice is for the defendant to file a document entitled **'Rule 404(b) Request for Notice of Intent to Offer Extraneous Conduct'** and to timely serve the State with a copy of the request. In this situation, the defendant is not required to obtain a ruling from the trial judge. Such a document need only be filed because a Rule 404(b) request need not be acted on by the trial court before the State is obligated to comply. Nevertheless, we continue to see cases where defense counsel has made the request in the form of a motion which requires some action by the trial judge. Such a motion obviates the need for the State to disclose 404(b) material until some judicial action is taken. Consequently, when defense counsel resorts to a motion to invoke Rule 404(b), no complaint will be heard when counsel failed to obtain the judicial action he imposed upon himself.

way, **when a document asks the trial court to enter an order and it also asks the State to provide notice, the document is insufficient to trigger the duty to provide notice under Art. 37.07, §3(g)**."

☞ Hence, you would do well to inspect your "Request" for notice of extraneous conduct and make sure that there is nothing even remotely that asks the trial court to do anything, including reviewing how it is styled and your prayer, if any. *See Mitchell v. State*, *supra* (Baird, J., concurring).

37.07§3(g). On timely request of the defendant, notice in writing that the state intends to introduce an extraneous crime or bad act that has *not* resulted in a final conviction or in a deferred adjudication or probated or suspended sentence, notice of that intent is reasonable ***only if*** the notice includes the date on which and the county in which the alleged crime or bad act occurred and the name of the alleged victim of the crime or bad act.

The requirement under this subsection that the attorney representing the state give notice applies only if the defendant makes a timely request to the attorney representing the state for the notice.

State's Notice of Intent — Timeliness. Eve-of-trial "notice" is unreasonable as a matter of law. *See Neuman v. State*, 951 S.W.2d 538 (Tex. App.—Austin 1997, *no pet.*)(notice not given until the morning of trial). *See also Hernandez v. State*, 914 S.W.2d 226 (Tex. App.—Waco 1996, *no pet.*). However, if defense counsel waits until days before trial, s/he can hardly complain when the State promptly gives notice, even when it is days from trial. *Self v. State*, 860 S.W.2d 261, 264 (Tex. App. — Fort Worth 1993, *pet. ref'd*)(5 days before trial constituted reasonable notice where request was made nineteen days before trial). *See also Ramirez v. State*, 967 S.W.2d 919 (Tex.App. — Beamont 1998)(Burgess, J., dissenting).

Manner of Notice. The State need only "substantially comply"with §3(g) because it is not required under the State to follow a particular manner. *See McQueen v. State*, 984 S.W.2d 712 (Tex.App. — Texarkana 1998)(State substantially complied by giving cause number, district court number, type of offense, date and length/place of confinment); *See also Neuman v. State*, 951 S.W.2d 538, 540 (Tex. App. — Austin 1997, *no pet*.).

Reading/Arguing to Jury at Punishment

- Reading the enhancement portions of the indictment before the punishment phase is

objectionable. *See Frausto v. State*, 642 S.W.2d 506 (Tex.Crim.App. 1982). Only where the priors are jurisdictional in nature (such as in DWI's and certain theft cases) is it permitted. *See Gant v. State*, 606 S.W.2d 867 (Tex.Crim.App. 1980). *But see Minnamon v. State*, No. 01-97-01218-CR, (Tex.App. — Houston [1st] 1999); *Tamez v. State*, 980 S.W.2d 845 1(Tex.App. — San Antonio 1998); *Hampton v. State*, 977 S.W.2d 467 (Tex.App. — Texarkana 1998); *Maibauer v. State*, 968 S.W.2d 502 (Tex.App. — Waco 1998, *pet. ref'd*)(attempting to apply *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997) to DWI, theft cases and preclude priors at trial).

Jury Argument

Attitudes of a victim in regard to their assailant's punishment are entirely too subjective and personal to be speculated on with any degree of accuracy by the prosecutor. If a prosecutor wants to argue that a victim desires his or her assailant incarcerated, then these facts need to be in evidence. For the same reason, we do not believe it is of such "common knowledge" that a jury could infer that every victim wants the defendant to do time when the victim never actually testified to that effect. The jury may in fact impose incarceration based on their own interpretation of a victim's testimony, but to allow the prosecutor to state these conclusions, in effect places unsworn, and possibly untrue, testimony before the jury. While an inference such as the one before us may be a deduction from the evidence, we do not believe that it is a reasonable one.

We further find that the distinction of the Court of Appeals between "community demands" and "victims demands" to be unpersuasive. Jurors may not be representatives of the complainant, as opposed to representatives of the community; nevertheless, there is still pressure to accede to the demands and wishes of the prosecutor.

Dorsey v. State, 709 S.W.2d 207 (Tex.Crim.App. 1986).

- It is improper for the prosecutor to argue that the defendant should be more harshly punished because of collateral offenses. *See Lomas v. State*, 707 S.W.2d 566(Tex.Crim.App. 1986).

- It is improper for the prosecutor to ask the jury to give a particular penalty because **the people want** it. Such an argument asks the jury to accede to community expectations or demands. *See Cortez v. Stat*e, 683 S.W.2d 419 (Tex.Crim.App. 1984).

- Prosecutor's argument, **"Let's send a message"** with a harsher punishment has been condemned in other states. *See, e.g., Patterson v. Commonwealth*, 429 S.E.2d 896, 898 (Va.Ct.App. 1993) (holding that it is "improper and prejudicial" for a prosecutor to effectively ask a jury **"to send 'a message'** to those who sell drugs by sentencing the defendant for all the community's ills"); *State v. Rose*, 548 A.2d 1058, 1092-93 (N.J. 1988) (improper to ask jury to impose death penalty in order to **"send a message"** to society where such considerations lie outside statutory aggravating factors); *Commonwealth v. Crawley*, 526 A.2d 334, 344 (Pa. 1987)

("It is extremely prejudicial for a prosecutor to exhort a jury to return a death sentence as a message to the judicial system . . . [or] to make a statement in response to what is portrayed as a failing judicial system."); *Bertolotti v. State,* 476 So.2d 130, 133 (Fla. 1985)(error for prosecutor to urge the jury **"to consider the message its verdict would send to the community at large, an obvious appeal to the emotions and fears of the jurors"**).

● It is improper for the prosecutor to argue that the defendant has failed to express remorse when it is essentially an invitation to penalize the defendant for his **failure to testify**. *See Mercer v. State,* 658 S.W.2d 170 (Tex.Crim.App. 1984); *Swallow v. State,* 829 S.W.2d 223 (Tex.Crim.App. 1992). This is true even when the prosecutor attempts to couch it in terms of **witnesses to his remorse that he failed to call.** *See Thomas v. State,* 638 S.W.2d 481 (Tex.Crim.App. 1982).

Punishment Instructions: *Why not Tell the Jury How Bad it Really Is?*

Article 37.07, §4 requires the jury to be informed of the existence and operation of good conduct time and parole. If probation is at issue in a punishment trial, the defendant may well seek to have the jury also informed about how probation works as well. Following is a sample instruction for representation in a punishment trial of a person found guilty of a sex crime.

NO. 1999

THE STATE OF TEXAS	**§**	**IN THE DISTRICT COURT OF**
	§	
	§	**PUNISHMENT COUNTY, TEXAS**
	§	
STAN MANN	**§**	**277TH JUDICIAL DISTRICT**

DEFENDANT'S REQUESTED JURY INSTRUCTIONS AT PUNISHMENT
TO THE JUDGE OF SAID COURT:

COMES NOW, STAN MANN, Defendant in the above numbered and styled cause, by and through his attorney, KEITH S. HAMPTON, and he would request that the court give the following instruction to the jury on the issue of punishment:

I.

As the factfinder on the punishment to be assessed in this cause, you have been vested with wide discretion by the Legislature. Without attempting to limit your discretion but rather to help you in the exercise of your discretion, the punishment range for the offense of aggravated sexual assault is 5 to 99 years or life in the Texas Department of Criminal Justice, Institutional Division.

This information is given to you to aid you in the exercise of your discretion in sentencing. By giving you this information, I am not attempting to limit your discretion to any specific sentence or range of sentences nor am I attempting to suggest a specific sentence or range of sentence. You are the exclusive judges of the facts proven and the final determination as to the defendant's sentence is yours.

II.

You are further instructed that if there is any testimony before you in this case regarding the defendant's having committed offenses other than the offense alleged against him in the indictment in this case, you cannot consider said testimony for any purpose unless you find and believe beyond a reasonable doubt that the defendant actually committed such other offenses, if any were committed, and even then you may only consider the same in determining whether to recommend to the Court that the defendant be given supervision in this case, and you shall not consider any such testimony, if any, for any other purpose.

III.

County Jail Time As a Condition of Probation [1]

This Court may impose, among the other conditions of supervision upon the defendant if you grant the defendant supervision, that the defendant submit to a period of confinement in a county jail not to exceed 180 days.

IV.

Treatment for Sex Offenders [2]

In addition to other conditions of probation, this Court may also order the defendant to be placed into an in-patient treatment facility for sex offenders for a period of time which the Court deems appropriate.

This Court shall require the defendant, if placed on community supervision, to attend psychological counseling sessions for sex offenders with an individual or organization which provides sex offender treatment or counseling as specified by or approved by this

[1] Article 42.12 §12.

[2] Article 42.12 §13B (a)(2).

Court or the community supervision and corrections department officer supervising the defendant.

A community supervision and corrections department officer who specifies a sex offender treatment provider to provide counseling to a defendant shall contact the provider before the defendant is released, establish the date, time, and place of the first session between the defendant and the provider, and request the provider to immediately notify the officer if the defendant fails to attend the first session or any subsequent scheduled session.

V.

Period of Supervision [3]

The minimum period of community supervision for this offense is five years and the maximum period of supervision is 10 years. This Court can extend the defendant's supervision another 10 years if the defendant has not sufficiently demonstrated a commitment to avoid future criminal behavior, and would be a danger to the public if released from supervision. This Court may extend supervision for a period not to exceed 20 years.

You are further instructed that the Court in its discretion may also "stack" probationary periods, that is, order that they be served consecutively rather than concurrently.[4]

VI.

Castration [5]

The Defendant may also volunteer for castration.

VII.

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[3] Article 42.12 §22A.

[4] Texas Penal Code, §3.03(b)(2.)

[5] Article 42.12 §12(f); Gov't Code § 501.061. But see Article 37.07, §3 (proof that defendant "plans to undergo" castration is prohibited).

Sex Offender Registration[6]

The defendant will be required to register with the local law enforcement authority as a sex offender for ten years after the date on which he discharges community supervision. If he is determined to be a violent sex offender, he will be required to register as a sex offender for the remainder of his natural life.

The local law enforcement will notify the Department of Public Safety and the superintendent of the public school district and the administrator of any private primary or secondary school located in the public school district any information the authority determines is necessary to protect the public.

This Court will ensure that the prerelease notification and registration requirements are conducted on the day of entering the order or sentencing.

VIII.

Child Safety Zones[7]

This Court shall establish a child safety zone applicable to the defendant by requiring as a condition of community supervision that the defendant not supervise or participate in any program that includes as participants or recipients persons who are 17 years of age or younger and that regularly provides athletic, civic, or cultural activities, or go in, on, or within a distance specified by the judge of a premises where children commonly gather, including a school, day-care facility, playground, public or private youth center, public swimming pool, or video arcade facility, and attend psychological counseling sessions for sex offenders with an individual or organization which provides sex offender treatment or counseling as specified by or approved by the judge or the community supervision and corrections department officer supervising the defendant.

IX.

[6] Article 42.12 §12(e); chapter 62.

[7] Article 42.12 §13B(a)(1).

Basic Conditions of Community Supervision[8]

This Court may, at any time, during the period of community supervision alter or modify the conditions. The judge may impose any reasonable condition that is designed to protect or restore the community, protect or restore the victim, or punish, rehabilitate, or reform the defendant.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that the jury be so instructed in this case.

Respectfully submitted,

KEITH S. HAMPTON

Note: This is a "truth in sentencing" jury instruction at the penalty phase of a sex offense case. Most jurors probably do not know everything which community supervision entails. These instructions entitle the defense to argue everything from rehabilitation ("counseling is required if you will give him probation") to stacked probationary periods ("this man can be put under the scrutiny of this no-nonsense judge, the same judge who heard all the same facts y'all did") and other creative arguments.

Pronouncing Sentence: *Victim Allocution*

■ The court shall permit a victim, close relative of a deceased victim, or guardian of a victim (as defined by art. 56.01) to appear in person to present to the court and to the defendant a statement of the person's views about the offense, the defendant, and the effect of the offense on the victim. *See* art. 42.03.

■ The statement must be made ***after*** (1) punishment has been assessed, (2) the court has determined whether or not to grant community supervision in the case, (3) the court has announced the terms and conditions of the sentence, and (4) sentence is pronounced.

■ The victim, relative, or guardian may ***not*** direct questions to the defendant while making the statement.

■ The court reporter may **not** transcribe the statement.

Punishment Programs: *Alternatives to Warehousing People*

[8] Article 42.12 §11(a).

Serving Time on Weekends and Off-Work Hours: Article 42.033

• Trial judge may permit the defendant to serve his sentence or period of confinement intermittently during his off-work hours or on weekends. The judge can do this **at the time of sentencing or any other time.**

• "Weekends" time and "Off Work" jail time is available only to (1) those serving a final sentence for a misdemeanor: (2) those sentenced to confinement in the county jail for a felony: or (3) or those serving jail time as a condition of probation.

• If the court imposes confinement for (1) failure to pay a fine or court costs, (2) as punishment for criminal nonsupport under Section 25.05, Penal Code, or (3) for contempt of a court order for periodic payments for child support, the court may permit the defendant to serve his time on weekends or off-work hours "in order for the defendant to continue employment."

• The judge **may require bail** of the defendant to ensure the faithful performance of the sentence or period of confinement.

• The court may permit the defendant to seek employment or obtain medical, psychological, or substance abuse treatment or counseling or obtain training or needed education under the same terms and conditions that apply to employment under this article.

• The judge may attach conditions regarding the employment, travel, and other conduct of the defendant during the performance of such a sentence or period of confinement.

• The court may also require the defendant to send a letter to his employer to deduct from his "salary" an amount which is sent to the clerk of the court to pay for (1) any child support, (2) his documented expenses, (3) cost of his confinement, and (4) any fine, court costs or restitution. However, such a condition is expressly "not binding on an employer, except that income withheld for child support is governed by Chapter 158, Family Code."

• Participation in county work release program is available only to (1) those serving a final sentence for a misdemeanor; (2) those sentenced to confinement in the county jail for a felony; or (3) or those serving jail time as a condition of probation; ***and*** the person is classified by the sheriff as a low-risk offender under under §511.009, Government Code.

• The defendant serves an alternate term for the same period of time in the county jail work release program "of the county in which the offense occurred."

• The defendant must be confined in the county jail "or in another facility designated by the sheriff," but the person is entitled to be released for (1)work time, (2) traveling to/from work and (3) time spent attending or traveling to or from an education or rehabilitation program approved by the sheriff.

• The court can direct the sheriff not to deduct from the defendant's paycheck if full deduction would cause a "significant financial hardship" to the defendant's dependents.

• A defendant sentenced under the work release program may earn good conduct credit in the same manner as provided by Article 42.032 of this code, but only while actually confined.

• **Felons serving in a county jail work release program** are entitled to the same good conduct time credit as TDCJ inmates classified under Chapter 498, Government Code. *See* Article 42.031 §3(a).

• The sheriff has the authority to remove a person from work release if he is "conducting himself in a manner that is dangerous to inmates in the county jail or to society as a whole," but the defendant is entitled to a hearing before the sentencing court. *See* Article 42.031, §3(b).

Serving Time Under House Arrest/Electronic Monitoring: Article 42.035

■ A court can require a defendant to serve all or part of a sentence of confinement in county jail by submitting to electronic monitoring rather than being confined in the county jail, and can impose this requirement at any time.

■ The judge "may permit the defendant to serve the sentence under "house arrest, including electronic monitoring" "during the person's off-work hours."

■ The judge may require bail to ensure the faithful performance of the sentence.

■ A defendant who submits to electronic monitoring or participates in the house arrest program discharges a sentence of confinement without deductions, good conduct time credits, or commutations.

Community Service instead of Jail Time: Article 42.036

• A court can permit those other than DWI defendants to serve all or part of confinement (as a result of either a sentence or a probationary condition) in county jail by performing community service rather than by being confined in county jail. However, the court does not have this authority if a jury imposed a "sentence of confinement."

• Every 8 hours of CSR under this program equal 1 day in jail.

• An employed person cannot be required to perform more than 16 hours per week of community service under this article unless the court determines that the additional hours would not work a hardship on the defendant or his/her dependents.

• An unemployed person cannot be ordered to perform more than 32 hours per week of community service, but may direct the defendant to use the remaining hours of the week to seek employment.

• The court is required to specify in its CSR order both the number of hours required and where the defendant is supposed to work.

• The court may require bail to ensure faithful performance of community service and may attach conditions to the bail as it determines are proper.

90-day Treatment for Substance Abuse in Misdemeanor Cases

Health & Safety Code §462.081. Commitment by Courts in Criminal Proceedings; Alternative Sentencing.

sentence on a defendant convicted of a criminal offense, the judge may consider whether the defendant should be committed for care and treatment under Section 462.081, Health and Safety Code.

(a) The judge of a court with jurisdiction of misdemeanor cases may remand the defendant to a treatment facility approved by the commission to accept court commitments for care and treatment for not more than 90 days, instead of incarceration or fine, if: (1) the court or a jury has found the defendant guilty of an offense classified as a Class A or B misdemeanor; (2) the court finds that the offense resulted from or was related to the defendant's chemical dependency; (3) a treatment facility approved by the commission is available to treat the defendant; and (4) the treatment facility agrees in writing to admit the defendant under this section.

(b) A defendant who, in the opinion of the court, is mentally ill is not eligible for sentencing

under this section.

(c) The court's sentencing order is a final conviction, and the order may be appealed in the same manner as appeals are made from other judgments of that court.

(d) A juvenile court may remand a child to a treatment facility for care and treatment for not more than 90 days after the date on which the child is remanded if: (1) the court finds that the child has engaged in delinquent conduct or conduct indicating a need for supervision and that the conduct resulted from or was related to the child's chemical dependency; (2) a treatment facility approved by the commission to accept court commitments is available to treat the child; and (3) the facility agrees in writing to receive the child under this section.