

# TECHNOLOGY IN THE COURTROOM

**By Robert H. Featherston**

*Law Office of Robert H. Featherston, P.C.*

*1150 N Loop 1604 W*

*Suite 108-301*

*San Antonio, Texas 78248*

*(210)279-3711*

*email: <mailto:robert@rhflaw.net>*

*Web Site: <http://www.rhflaw.net>*

## INTRODUCTION

William Shakespeare wrote: "All the World's a stage, and all the men and women merely players:..." Oh so true for the courtroom! Some times even your shoe laces matter. In a close case, the side that looks more professional, that appears to know their case, has the best probability of prevailing.

Ok, those are some pretty good global reasons for using technology, what about specifics. If you are going to prepare exhibits for presentation in court, it focuses you on the theory of your case, allows you to organize your thoughts into a logical flow. Makes you appear to be polished in front of the jury. Gives you a place to go when your mind goes blank in the heat of battle.

When you have identified legal issues ahead of time you can prepare a Power Point or Keynote brief of those issues for argument in front of the Court. Case law, projected six feet tall in front of the judge can be very persuasive. For legal issues that you did not anticipate, being able to do computer based legal research in the courtroom and then present it can also be very powerful.

This being said, you must be true to yourself. You have to know how to use your technology - COLD and you must know how to get along with out it when it malfunctions.

This article is just a brief introduction to the subject. Included are some examples of computer projected presentations that have been used in court before juries and judges.

## THE LAW OF DEMONSTRATIVE EVIDENCE (updated 01 Nov 09)

The scope of this paper is limited to information you would want to show the jury through the use of a computer projector.

This information really falls into two basic categories: (1) Evidence that is admissible as "*demonstrative evidence*" and given to the jury, as evidence, during their deliberations. (2) Information which is not admissible as evidence, but is

viewed by the jury in open court and is used “for demonstrative purposes only.” This information will not be given to the jury during their deliberations.

For example, a picture or video of the crime scene, a map, chart or scale diagram, a document can all be *admissible evidence* in the case and the computer projector is used to merely to display the admissible evidence to the jury. On the other hand, charts summarizing a witnesses testimony, un-scaled diagrams, and models are examples of *demonstrative evidence* that may be admissible as evidence if the rules discussed below are met. Bulleted issue points, summaries of evidence in the form of charts, other visual presentations illustrating trial issues, used in voir dire, opening or closing arguments may be *viewed* by the jury in open court, but are not *admissible as evidence*, and are merely used for argument.

Demonstrative evidence, under most circumstances, is created precisely for litigation, after the material events have already occurred. It is, by definition, self-serving, “*Comprehensive Evidence*,” Ashley S. Lipson, Transmedia, Inc. (2008)

The admission of demonstrative evidence rests within the sound discretion of the trial court. *Vollbaum v. State*, 833 S.W.2d 652, 657 (Tex.App.---Waco 1992, pet refd). The court's discretion in deciding whether the proper predicate has been laid for the admission of the evidence is very broad. *Parks v. State*, 843 S.W.2d 693, 696 (Tex.App.---Corpus Christi 1992, pet refd). Demonstrative evidence must be properly identified and authenticated in order to be admissible. *Vollbaum* at 657; *Farrell v. State*, 837 S.W.2d 395, 400 (Tex.App.---Dallas 1992), affd, 864 S.W.2d 501 (Tex.Crim.App. 1993); *Hinojosa v. State*, 788 S.W.2d 594, 600 (Tex.App.---Corpus Christi 1990, pet refd); *Hasley v. State*, 786 S.W.2d 733, 734 (Tex.App.---Beaumont 1989, pet refd); and TEX. R.CRIM.EVID. 901. Further, the proffered evidence must be relevant to the issues at hand. TEX.R.CRIM.EVID. 401. The evidence "must logically increase one's knowledge and enhance the likelihood of ascertaining the truth about the fact." *Sorensen v. State*, 856 S.W.2d 792, 794 (Tex.App.---Beaumont 1993, no pet); *Baker v. State*, 879 S.W.2d 218, 220 (Tex.App. --- Houston, 14<sup>th</sup> Dist 1994).

Demonstrative or illustrative evidence is an object which replicates or is similar to the real thing but which is admittedly not the very thing itself. See HERASIMCHUK, TEXAS RULES OF EVIDENCE HANDBOOK, Rules 401-403 at 239 (4th ed.2001). Such evidence has no independent relevance to the case but it is offered to help explain or summarize the witness's testimony or to put events and conditions into a better perspective. *Id.* at 239. To establish the relevancy of demonstrative evidence, the proponent must first authenticate it. *Id.* at 241. The proponent is then required to establish that the evidence is fair and accurate and that it helps the witness to demonstrate or illustrate his testimony. *Id.* at 241; see also *Simmons v. State*, 622 S.W.2d 111, 113 (Tex.Crim.App.1981)(demonstrative evidence is admissible if it tends to solve some issue in the case and is relevant, that is, if it sheds light on the subject at hand). An item of demonstrative evidence must be properly identified by showing that the item in question is what its proponent claims as opposed to any idea of speculation, conjecture, or presumption of what the

exhibit represents. *Vollbaum v. State*, 833 S.W.2d 652, 657 (Tex.App.-Waco 1992, pet. ref'd). Demonstrative evidence has no probative force beyond that which is lent to it by the credibility of the witness whose testimony it is used to explain. HERASIMCHUK, at 241.

The trial court may exclude demonstrative evidence if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. See TEX.R.EVID. 403, *Torres v. State*, 116 S.W.3d 208, 212 (Tex.App. – El Paso 2003)

A trial court's admission of demonstrative evidence is reviewed under an abuse-of-discretion standard. *Kelly v. State*, 824 S.W.2d 568, 574 (Tex.Crim.App. 1992); *Montgomery v. State*, 810 S.W.2d 372, 390—93 (Tex.Crim.App.1990) (op. on reh'g). The trial court does not abuse its discretion if its ruling lies within the "zone of reasonable disagreement." *Montgomery*, 810 S.W.2d at 391. Make sure that what you intend to use is relevant.

**Rule 402** of the Texas Rules of Evidence sets out the general rule of admissibility of evidence:

All relevant evidence is admissible, except as otherwise provided by Constitution, by statute, by these rules, or by other rules prescribed pursuant to statutory authority. Evidence which is not relevant is inadmissible.

Under **Rule 401** of the Texas Rules of Evidence:

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

To be admissible as demonstrative evidence, the object or thing must in some manner be relevant to the issues involved in the case and have evidentiary value; that is, it must shed light on the subject at hand. *Simmons v. State*, 622 S.W.2d 111, 113 (Tex.Crim.App.1981); *Sorensen v. State*, 856 S.W.2d 792, 794 (Tex. App.---Beaumont 1993, no pet.); *Vollbaum v. State*, 833 S.W.2d 652, 657 (Tex.App.---Waco 1992, pet. ref'd); *Reyna v. State*, 797 S.W.2d 189, 193 (Tex.App.---Corpus Christi 1990, no pet.); *Tezino v.. State*, 765 S.W.2d 482, 486 (Tex.App.---Houston [1<sup>st</sup> Dist.] 1988, pet. ref'd).

An object, which is not an exact replica of the original used in the commission of a crime, may be admissible if:

- (1) the original is not available;
- (2) if available, the original would be admissible;
- (3) it is relevant *and* material to an issue in controversy;
- (4) its probative value outweighs any inflammatory effect; and,
- (5) the jury is instructed that the object is not the object used in the

commission of the crime, and is to be considered by the jury solely as evidence that *demonstrates* or *illustrates* what the object used in the offense looks like. *Simmons*, 622 S.W.2d at 113; *Devis v. State*, 18 S.W.3d 777, 785 (Tex.App.---San Antonio 2000, no pet.); *Miskis v. State*, 756 S.W.2d 350, 352 (Tex.App.---Houston [14th Dist.] 1988, pet. ref'd).

However, the substitute object should have no inflammatory attributes. *Miskis*, 756 S.W.2d at 352. Furthermore, when it is not an exact replica and differs in its distinguishing characteristics, "the probative value of the non-exact weapon or instrumentality will be very slight." *Simmons*, 622 S.W.2d at 114; *Miskis*, 756 S.W.2d at 352.

If the evidence is relevant it must also be authenticated or identified by a witness under **Rule 901**.

**RULE 901. REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION**

**(a) General Provision.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

**(b) Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) *Testimony of witness with knowledge.* Testimony that a matter is what it is claimed to be.

(2) *Nonexpert opinion on handwriting.* Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) *Comparison by trier or expert witness.* Comparison by the trier of fact or by expert witness with specimens which have been found by the court to be genuine.

(4) *Distinctive characteristics and the like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) *Voice identification.* Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at anytime under circumstances connecting it with the alleged speaker.

(6) *Telephone conversations.* Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if:

(A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called; or

(B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) *Public records or reports.* Evidence that a writing authorized



by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) *Ancient documents or data compilation.* Evidence that a document or data compilation, in any form,

(A) is in such condition as to create no suspicion concerning its authenticity,

(B) was in a place where it, if authentic, would likely be, and

(C) has been in existence twenty years or more at the time it is offered.

(9) *Process or system.* Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) *Methods provided by statute or rule.* Any method of authentication or identification provided by statute or by other rule prescribed pursuant to statutory authority. (emphasis added)

The required authentication or identification for admissibility is satisfied by evidence that supports a finding that the matter in question is what its proponent claims. Tex.R.Crim.Evid. 901(a). It is proper and legitimate to introduce diagrams to explain and clarify the testimony of a witness. *Holding v. State*, 460 S.W.2d 133, 135 (Tex.Crim.App.1970); *Smith v. State*, 626 S.W.2d 843, 844 (Tex.App.---Corpus Christi 1981, no pet.).

Whether its admissible as demonstrative evidence or merely used in argument, always keep in mind that the actual purpose of a demonstrative exhibit is to **clarify, simplify, explain** and **illustrate** the inter-relationship between other previously admitted items of evidence. It is a tool of persuasion and a very powerful one. Demonstrative presentations have proven their worth. They can make lasting impressions, far beyond un-illustrated oral argument.

## HARDWARE

How many ways are there to get to New York City? *The hardware that you use should be based upon the software that you want to run on it!* Below is the equipment list that my Firm uses in court.

Our objective is to be able to present Power Point or Keynote presentations, video, audio, sync text to video, conduct legal research in court, alter our presentations on the fly, print briefs. . . , *"to crush our enemies, see them driven before us, and to hear the lamentation of their women!"* and of course, win our case.

**Computer:**

If your laptop is less than three years old it will probably run the programs necessary to present data in court: Our firm currently uses:

Apple 13" MacBook Pro (primary in court), Mac OS 10.5.8 & Windows XP

Apple 12" PowerBook G4 (secondary in court), Mac OS 10.5.8 & Windows XP

Alienware 16" Area-51M, XP

HP 15" Pavilion N3295, XP

Dell 15" Latitude CPi, XP

**Computer Display:**

Dell 15" E151FP LCD Monitor 1024x768 display, (Used as a secondary monitor to primary computer via a video splitter for passing notes between defense counsel)

**Video Splitter:**

Iogear, 4 port video splitter.

**Computer Projector:**

Epson PowerLite 835P Projector, 1024x768, 3000 lumens, IR remote, 2 cmpr ports, 2 video ports, Ethernet, pcmcia card slot.

**Overhead Projector:**

Apollo overhead projector model Concept 2200.

**Scanner:**

Visoneer Strobe XP100, (used in court) Windows XP

IRIScan hcrspa4pk301, (used in court) Mac Leopard

Xerox Phaser 8560MFP (used in office) Mac/Windows/Unix

**Printer:**

Canon Pixma iP90, bluetooth, IR USB color inkjet (used in court)

Xerox Phaser 8560MFP (used in office) Mac/Windows/Unix

**Digital Still Camera:**

Canon EOS 10D SLR

**Digital Video Camera:**

Sony HDR-XR500, 1080p product

Sony DCR-PC100, 480p product

**DVD Recorder:**

Panasonic DMR-85H, (used primarily to record live demonstrations from computer displays, 480p product)

**PDA/Smart Phones:**

2 Apple iPhones

**Speakers:**

Klipsch Promedia GMX A-2.1

**Miscellaneous:**

Various VGA, audio, video and power cables and folding tables for use in court. A Samson Omni Directional microphone with ART professional tube mic preamp for use with DMR-85H, green screen.

## **SOFTWARE**

**MS Office:** Our firm uses MS Office in both the windows and Mac environment, completely interchangeably. We no longer use WordPerfect, however it is still a viable word processor.

**Word:** Our word processor of choice. Integrates well with Power Point.

**Power Point:** Our presentation software of choice. You can learn to produce basic presentation slides in less than a day. The National Institute for Trial Advocacy, [www.nita.org](http://www.nita.org) has some good publications on using Power Point and Herb Rubinstein publishes a good CD on courtroom use of Power Point at [www.powerpointforcourt.com](http://www.powerpointforcourt.com).

**iLife & iWorks:** Apple based software suites. iLife, \$79.00, contains programs for organizing photos (iPhoto), making movies (iMovie), producing music (GarageBand), constructing web sites (iweb) and producing DVDs' (iDVD). iWorks, \$79.00, contains programs for word processing (Pages), spread sheets (Numbers), and presentation (Keynote). These software suites are cheap and more powerful integrated and versital than Microsoft Office. Additionally any document that Office can create can be opened used and saved by the Apple program counterparts. You can also produce searchable pdf documents (for use in Federal court filings) from any word processing program directly through Apple's print program without having to purchase Adobe Acrobat.

**Adobe Acrobat Professional & Reader:** The true power of these programs is your ability to scan police, lab and other reports / documents into it and then OCR the document to make it *searchable*. Acrobat can also be used as a presentation software and can display video clips. We use this program to index all of our discovery and motions for trial.

**Adobe Photoshop Elements:** This program is essential for editing digital photographs.

**Video Editing Software, Mac iMovie:** Our firm uses this program primarily on DWI and CPS video files. We use the program to separate the admissible from the inadmissible and for impeachment purposes. The program is easy to use with a small learning curve.



**Optical Character Recognition,**

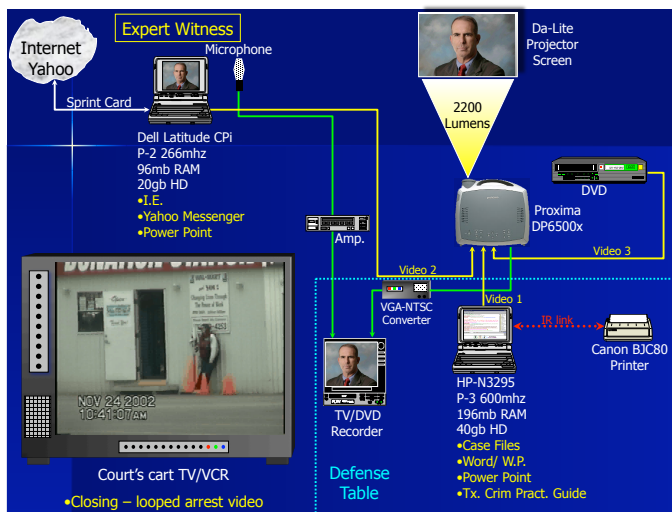
**OmniPage:** The key to being able to search documents that you have scanned into your computer is a good OCR program. Our firm uses OmniPage in conjunction with Adobe Acrobat professional to produce searchable pdf files for use in court. It is invaluable when you have a searchable transcript that you can use to cross examine a hostile witness.

**Video & Text Synchronization:** Very powerful. Used primarily in DWI, CPS and other criminal cases which have videotaped witness interviews. When our firm obtains a witness video tape we usually have a court reporter transcribe it in ascii text format and convert the video to mpeg-1 format. We then give the files to a syncing service who sync the video to the transcript. TS Legal Video located at 144 San Jacinto, Mission TX 78572 (956) 580-3901 can do the work for you and will give you a CD Disk that contains the synced text and video files for use in Sanction II, Trial Director, LiveNote, Trial Pro, Trial Max, SMI for Microsoft & Visionary, which is a stand alone program that comes with the disk. Our firm only uses Visionary in a windows environment, we have not found the need to use the other trial management programs. Other sources for syncing text to video include: [www.videosynching.com](http://www.videosynching.com), [www.sybcvideo.com](http://www.sybcvideo.com), [www.synchronvideo.com](http://www.synchronvideo.com).



## PREPARING FOR TRIAL

Before you walk into a courtroom for trial, have a plan as to what equipment you will need, where it will physically be located, what type and length of cable runs you will have to make, where the power plugs are located. If your equipment is extensive, as in the below example, then you may want to approach the court and inform the judge of what you want to do. If you plan to record any of the proceedings to supplement the reporters record, make sure the judge knows this ahead of time. If you don't know the judge you will be appearing before consider filing an ex parte motion under seal explaining what you want to do. Remember, it's your client who has the Due Process/Due Course of Law rights, not the State! *State of Texas, ex rel., Bill R. Turner v. W.T. McDonald, Jr.*, 676 S.W.2d 371, 373 (Tex.Crim.App. 1984).



## LEGAL RESEARCH AT TRIAL

Occasionally, at trial, you may run across a legal issue you did not anticipate. If you have an internet connection then the best free legal research site is sponsored by our own Texas Bar at [www.texasbarcle.com/CLE/HOME.ASP](http://www.texasbarcle.com/CLE/HOME.ASP). Another excellent source, though somewhat pricy (\$1919.00/year), is the "Texas Criminal Practice Guide" on CD, published by LexisNexis/Matthew Bender. Our firm has found no better search tool for in court use than the "Texas Criminal Practice Guide." When loaded to the computer's hard drive, searches can be done quite fast and the results can either be displayed via a computer projector or printed out and handed to the Court. Unfortunately, the Bexar Law Library no longer carries the product, you will have to go out to St. Mary's to see it.

Why use Technology in the Court room? Focus, focus, focus on your case, professionalism and of course "to crush our enemies, see them driven before us, and to hear the lamentation of their women!"

## IN COURT EXAMPLES

All of these in court examples were used at trial or in hearings before the Court. The actual Power Point, Acrobat and video files can be down loaded at our firm's primary web site, [www.correafeatherston.com/articlesbriefs.html](http://www.correafeatherston.com/articlesbriefs.html).

## BRIEFS

### Arrest without Warrant

- In Texas, the authority to arrest a suspect without a warrant is **governed exclusively by statute**.
  - *Johnson v. State*, 32 S.W.3d 204, 208 (Tex.App. - San Antonio 2000, pet. rel'd.)
  - *State v. Parsons*, 988 S.W.2d 254, 258 (Tex.App. - San Antonio 1988, no pet.)
  - *Patt v. State*, 927 S.W.2d 850, 853 (Tex.App. - Corpus Christi 1996, no pet.)
  - *Simpson v. State*, 709 S.W.2d 737, 802 (Tex.App. - Fort Worth 1986, pet. rel'd.)
- **Texas law**, rather than federal law, governs the legality of a state arrest unless it violates the Fourth Amendment.
  - *Sandoval v. State*, 35 S.W.3d 763, 767 (Tex.App. - El Paso 2000, pet. rel'd.)

### Texas Statutory Authority

- The Texas statutory authority to make a warrantless arrest is more restrictive than the requirements of the United States Constitution.
  - *Hughes v. State*, 24 S.W.3d 833, 838 (Tex.Crim.App. 2000 [generally, Arrest must be made with warrant, but statutory exceptions exist].)
  - *Jossey v. State*, 981 S.W.2d 831, 841 (Tex.App. - Houston [14th Dist.] 1998, pet. rel'd.) [Texas law requires warrant unless one of statutory exceptions is met].
  - *Arreola v. State*, 843 S.W.2d 598, 601 (Tex.App. - Amarillo 1992, no pet.).
  - *Stevenson v. State*, 7805 W.2d 294, 295 (Tex.App. - Tyler 1989, no pet.)

### Arrest without Warrant

- In Texas, a person may be arrested without a warrant only if
  1. There is **probable cause**, & **and**
  2. The arrest **falls within the provision of one of the statutes authorizing a warrantless arrest**.
    - *Anderson v. State*, 932 S.W.2d 502, 506 (Tex.Crim.App. 1996).
    - *Llendo v. State*, 728 S.W.2d 865, 866 (Tex.Crim.App. 1987).
    - *Oyer v. State*, 98 S.W.3d 713, 715 (Tex.App. - Austin 2001, no pet.).
    - *Moore v. State*, 65 S.W.3d 852, 859 (Tex.App. - San Antonio 2001, no pet.).
    - *Chismore v. State*, 225 W.3d 85, 86 (Tex.App. - Houston [14th Dist.] 2006, pet. rel'd.).
    - *State v. Steinhilber*, 16 S.W.3d 483, 487-488 (Tex.App. - El Paso 2000, pet. granted).

### State's Burden

- An arrest without a warrant is **deemed to be unreasonable** and unlawful, and the **State has the burden** of establishing the statutory authority for the arrest.
  - *Wilson v. State*, 621 S.W.3d 799, 803-04 (Tex.Crim.App. 1998 1:).
  - *Darden v. State*, 763 S.W.2d 239, 242 (Tex.App. - Corpus Christi 1989, pet. rel'd.).
  - *Beasley v. State*, 728 S.W.2d 353, 355 (Tex.Crim.App. 1987).

### State's Burden

- When a defendant has shown that an arrest was made without a warrant, the **burden shifts to the State** to establish that the warrantless arrest was **statutorily authorized**.
  - *McClain v. State*, 954 S.W.2d 700, 702 (Tex.App. - Texarkana 1998, no pet.).
  - *Sims v. State*, 980 S.W.2d 539, 539-40 (Tex.App. - Beaumont 1998, no pet.).

### Strict Construction

- Because of the **legislative preference** that every arrest be made with a warrant, the statutes authorizing warrantless arrests are **strictly construed**.
  - *Hulif v. State*, *supra*, note 1 [Art. 1, § 9, Texas Constitution, does not require that arrest be made with warrant, but statutes that require warrants may not be ignored].
  - *Vasquez v. State*, 739 S.W.2d 37, 41 (Tex.Crim.App. 1987), reh. denied, 816 S.W.2d 750 (Tex.Crim.App. 1991, en banc) [The rule favoring arrest with warrant is not constitutionally mandated but is a product of legislative action.].
  - *Reichardt v. State*, 830 S.W.2d 348, 349 (Tex.App. - San Antonio 1992, pet. rel'd.).
  - *DeJarnett v. State*, 732 S.W.2d 346, 349 (Tex.Crim.App. 1987).

### Strict Construction

- The validity of an arrest without a warrant depends on the facts which existed at the time of the arrest, and those facts **must** come "**squarely**" within the provisions of one of the statutes authorizing an arrest without a warrant.
  - *Simpson v. State*, 709 S.W.2d 797, 802 (Tex.App. - Fort Worth 1986, pet. rel'd.).
  - *Heath v. Bond*, 175 S.W.2d 214, 215 (Tex. 1943).

### Facts After Arrest

- Facts discovered or knowledge acquired **subsequent to the arrest** may **not** be utilized retrospectively to establish probable cause at the time of the arrest.
  - *Amores v. State*, 816 S.W.2d 407, 415 (Tex.Crim.App. 1991).
  - *Jones v. State*, *supra*, [lack of probable cause cannot be cured by bolstering the arrest with evidentiary fruits illegally seized].
  - *Atkinson v. State*, 848 S.W.2d 813, 815 (Tex.App. - Houston [14th Dist.] 1993, no pet.) [Probable cause is determined based upon the legal significance of facts known to the officer **at the time of the arrest**, and facts coming to light after the arrest going to establish guilt would not be relevant to show probable cause.].



### Hierarchical Governance

- Constitution of the United States (6th)
- Federal statutes that control States under the Supremacy Clause
- Constitution of the State of Texas (A1,S10)
- Code of Criminal Procedure (39.14)
- Penal Code
- Civil Statutes (Family Code 261.201)
- Rules of Evidence
- Common Law

Texas Rules of Evidence 101(c)

### Δ's Right to Discovery

- A Defendant's right to discovery is limited to **exculpatory** or **mitigating** evidence. *Dickens v. Court of Appeals for the Second Supreme Judicial District of Texas*, 727 S.W.2d 542, 551 (Tex.Crim.App. 1987)
- **Due Process** requires the State to turn over Evidence which is **Favorable & Material**. *Pennsylvania v. Ritchie*, 480 US 39, 94 L.Ed.2d 40, 107 S.Ct.989

### Favorable Evidence

- Includes both **exculpatory** and **impeachment** evidence. *O'Rarden v. State*, 777 S.W.2d 455, 458 (Tex.App. – Dallas 1989, pet. ref.)

### Material Evidence

- A trial court abuses its discretion if it does not permit discovery of evidence that is material to the defense of the accused.

*Quinones v State*, 592 S.W. 2d 933, 941; *Nowling v. State*, 801 S.W. 2d 182, 185 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1990)

### Submission to Trial Court

- When a substantial basis exists for believing that evidence is **material** as **impeachment** or **exculpatory evidence**, both the United States Supreme Court and the Texas Court of Criminal Appeals have directed prosecutors either to **disclose the evidence** to defense counsel or to submit the problem to the trial court for determination.

*United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 2399 (1976); *Thomas v. State*, 841 S.W. 2d 399, 407 (Tex.Crim.App 1992)

### Court Must Review Evidence

- Where prosecution submits potential **Brady** evidence to the trial court as **Agurs & Thomas** require, appeal does not provide an adequate remedy for the trial court's refusal to examine the evidence. *Smith v. Flack*, 728 S.W. 2d 784, 792 (Tex.Crim.App 1994).
- Trial Court's Review of the evidence is a **ministerial act**. The defendant has a right to have the court perform the ministerial act of making that pretrial determination. *State ex rel. Curry v Gray*, 726 S.W.2d 125, 128 (Tex.Crim.App 1987).

### Framework Requiring Due Process

- *Willover, Cartmill, Davis & Hall* establish the **Constitutional framework**.
- *Willover*, Defendant's responsibility to offer only admissible portions of a video file.
- *Cartmill*, Defendant's responsibility to object to inadmissible portions of a video file.
- *Davis*, Parties **duty** to segregate the admissible from the inadmissible.
- *Hall*, Failure to allow Defendant opportunity to introduce specific portions of video file for impeachment constitutes **Reversible Error**.

### Waiver of 39.14 Privilege

- A person seeking to limit or exclude items from the purview of discovery because of a privilege has the burden of establishing the applicability of the privilege.
- **However**, the privilege may be **waived** by **voluntarily disclosing** or consenting to disclosure of any significant part of the otherwise privileged material.

### Waiver of 39.14 Privilege

- If such disclosure has occurred, the party asserting the privilege has the additional burden of disproving the waiver or establishing its limited scope.

*State ex rel. Simmons v. Peca*, 799 S.W. 2d 426, 431 (Tex.App. – El Paso 1990).

### Copy of Discovery Evidence

- If material is discoverable in a criminal case, whether by **right** or by **reason of waiver**, it is also subject to **photocopying**.

*State ex rel. Simmons v. Peca*, 799 S.W. 2d 426, 432 (Tex.App. – El Paso 1990).

## VOIR DIRE – DWI NO TEST

### WELCOME

Robert Featherston  
Louis Correa  
Taylor & Correa, P.C.

### REPRESENTING

Mark Rios

### PARTICIPATION

- There are no **Right** or **Wrong** Answers, we are only trying to **understand your views**.

### RESPONSIBLE SOCIAL DRINKERS

Who does not drink ?

**Some people say its illegal to have a drink and drive,**  
**What do you think?**

### BACKGROUND

- Know the Judge, attorneys, court personnel or witnesses ?
- Any one in law enforcement ?
- Know any one hurt by a drunk driver ?
- Prior jury experience ?
- Membership in civic organizations ?
- MADD membership ?

### BACKGROUND

- Military duty ?
- Physical problems precluding jury service ?
- Who **does not want to serve** on this type of case ?
- Do you know any of the other panel members ?
- Interest in law or employment in legal field ?

### BACKGROUND

- Prior accusations of **criminal conduct** by or against you ?
- Know anyone **accused of a crime** ?
- **Objections**
- Meeting in the hall

## NORMAL USE

- What is “Normal Use”
- Same through out the day ?
- Fatigue affect it ?
- Stress of arrest affect it ?
- Who is the best judge of it ?

## BREATH TEST

- Why would anyone not take a breath test ?

## FIELD SOBRIETY TESTS

- NHTSA SPONSORED:
  - HGN
  - Walk & Turn
  - One Leg Stand
- Objective of tests ?
- Do they measure “Normal Activity” ?
- What level of reliability would you expect ? (25%, 50% 77%, 90%...)

## CHARGE OF THE COURT

- This is your Bible.
- You will swear an Oath to follow the law in the Charge.
- You must follow the law.
- Who agrees with this. – Raise your hand.

## THE LAW – FACT JUDGES

- You are the exclusive judges of the facts proven, of the credibility of the witnesses, and the weight to be given to their testimony, but you are bound to receive the law as stated in these instructions and to be governed thereby.

(CCP Art 38.13, 38.04)

## THE LAW – WHO’S BURDEN

- The law does not require an accused person to prove his innocence or produce any evidence at all.

## THE LAW - TESTIFYING

- A decision by an accused person not to testify cannot be considered as evidence or as a circumstance against the accused person and cannot be held against the accused person.
- No conclusion of guilt can be based solely or in part upon an election not to testify.
- You are not to consider, discuss, or even refer to this matter during your consideration of this case.

(CJ1042)

## JURY DELIBERATIONS

- In the jury room a person starts to talk about Mark not testifying, what is your sworn duty?

Should the Citizen Accused be  
Required to prove his/her  
Innocence ?

- **NO! - PRESUMPTION  
OF INNOCENCE**
- **Fundamental !**

## THE LAW - PRESUMPTION

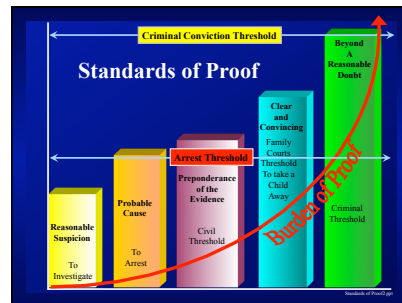
➤ All persons are **presumed to be innocent** and no person may be convicted of an offense unless **each element of the offense is proven beyond a reasonable doubt.**

➤ The fact that a person has been arrested, confined, or indicted for, or otherwise charged with an offense **gives rise to no inference of guilt** at his trial.

(CCP Art. 38.01, PC Sec. 2.01)

## TRAFFIC TICKET

- Justified ?
- Nervous ?
- Fumble for drivers license ?
- Trouble finding insurance papers?
- Level of proof ?



## Kansas Killer

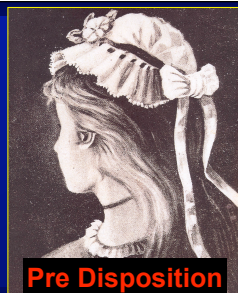
- "Transported to a surreal landscape, a young girl kills the first woman she meets and then teams up with three complete strangers to kill again."

Marin county, calif., Newspaper's TV  
Listing for **'The Wizard of Oz'**



The Old Wicked Witch of the West

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C.C.P. Art. 35.16(a) (10) & (c)(2)

- As Mark sits before you **right now** how many of you are **leaning just a little bit** towards **guilt**, feeling that it would take **some evidence** to remove this from your mind?

- ◆ Who says **Yes**?
- ◆ Who says **No**?
- ◆ Who **does not know**?

## WHAT MUST THE JURY DO ?

Is the jury here to decide if Amir Husain is  
**Innocent ?**

**NO !**

The jury **Must** decide whether, the **State has proven their case**.

**Beyond A Reasonable Doubt !**

➤ **Standards of Proof**

Before I Become a Judge, I  
Think You Should Know ...

**Embarrassed ?** Ask the bailiff to  
approach the Judge.

## VERDICT

- After looking at **ALL** of the evidence, if **one piece** of evidence raises in your mind **a single doubt** as to intoxication what is your **duty** as to your verdict ?
- **NOT GUILTY**

**Thank you !**

Fin

## THE LAW – REASONABLE DOUBT

- The law **does not require** an accused person to prove his innocence or produce any evidence at all.
- It is not required that the prosecution prove guilt beyond all possible doubt; it is required that the **prosecution's proof excludes ALL reasonable doubt** concerning the defendant's guilt.

## REASONABLE SUSPICION

- The reasonableness of a **temporary detention** must be examined in terms of the **totality of the circumstances** and will be justified when the detaining officer has **specific articulable facts**, which taken together with **rational inferences** from those facts, lead the officer to believe that the detained person actually is, has been, or soon will be engaged in criminal activity.

Reidy v. State, 916 S.W.2d 33, 38 (Tex.Cr.App. 1997)

## PROBABLE CAUSE

- **Probable cause** for an **arrest** requires that, at the moment of arrest, the facts and circumstances within the knowledge of the arresting officer and of which the officer has reasonably trustworthy information would justify a reasonable and prudent person in believing that a particular person has committed or is committing a crime.

McCray v. Illinois, 386 U.S. 300, 304, 87 S.Ct. 1056, 18 L.Ed.2d 62, 66-67 (1967)

## OPENING

**OPPORTUNITIES TO PRESERVE THE TRUTH**

- **KEY EVIDENCE NOT PRESERVED**
- **MISTAKES BY THE STATE**
- **NO FORMAL COMPUTER TRAINING**
- **DEFINITIVE POINTERS TO PARTICIPANT'S IDENTITY NOT SAVED BY STATE**

- **UNDERCOVER OPERATION ON THE INTERNET CONTROLLED BY S.A.P.D. VICE.**

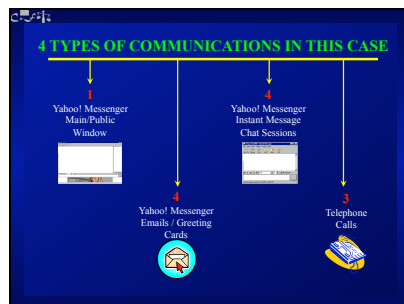
THERE ARE  
**NO CHILDREN**  
INVOLVED WITH THIS CASE !

**DR. AMIR HUSAIN**

- **YOU WILL HEAR FROM DR. HUSAIN**
- **HE DID NOT SOLICIT A CHILD**
- **HIS BACKGROUND**
  - Highly Intelligent
  - Multiple Languages
  - Speech Impediment
  - Grew up in **India**
  - Trained as a Doctor & Cardiologist in **Russia**
  - In U.S. 18mo prior to this incident

**DR. AMIR HUSAIN**

- On Yahoo! Messenger to meet **Adult Females**
- Willing to accommodate to establish a relationship
- The **definitive pointers to Identity** that he observed:
  - On the Internet
  - From the Telephone
  - At the Arrest location
- **Sexually Graphic** conversation of Det Lowe in the **public window** of Yahoo Messenger (**not preserved by State**)
- Role of the **Public Window** in his deciding he was communicating with an **Adult**.



Detective Lowe Will Also Testify That:

- **COMPUTER EVIDENCE COLLECTION:**
  - ◆ **HE ONLY PRESERVED THAT EVIDENCE THAT HE DEEMED PERTINENT**
  - ◆ **HE LEFT EVIDENCE OUT**
  - ◆ **HE CAN'T TELL WHAT EVIDENCE IS MISSING OR HOW MUCH**

**Yahoo! Messenger Main/Public Communications Window**

Detective Lowe Will Also Testify That:

THE 1<sup>st</sup> COMMUNICATION BETWEEN DET. LOWE & DR. HUSAIN **WAS NOT SAVED**

**Yahoo! Messenger Main/Public Communications Window**


Detective Lowe Will Also Testify That:

- **YAHOO! MESSENGER:**
  - ◆ **IS INTENDED FOR ADULTS**
  - ◆ **FOLKS ROLE PLAY ALL OVER THE SYSTEM**



Yahool! Messenger Main:Public Communications Window


Detective Lowe  
Will Also Testify  
That:



- In the Public Window:
  - ◆ REASONABLE EXPECTATION PERSON IS 18 YEARS OF AGE
  - ◆ LIKE A MASQUERADE PARTY
  - ◆ FOLKS ASSUME IDENTITIES HERE
  - ◆ COME TO ACT OUTRAGEOUS
  - ◆ HOW OUTRAGEOUS IS ESTABLISHED BY WHAT'S GOING ON

Yahool! Messenger Main:Public Communications Window

Detective Lowe  
Will Also Testify  
That:



- Conversations in the Public Window:
  - ◆ ARE MATERIAL
  - ◆ ESTABLISH CHARACTER OF THE ROOM
  - ◆ JURY HAS NO OPPORTUNITY TO JUDGE FOR THEMSELVES
  - ◆ "CANT RECALL" HAVING A CONSERVATION IN THE PUBLIC ROOM

The evidence will also show:

- NO SOP.
- NO Automatic Collection of Computer Evidence.
- NO use of Screen Logger Program
- NO use of Key Logger Program
- NO use of Video Tape to collect Computer Evidence

The evidence will show:

- NO use of Hashing Program.
- Officer Maulding – Audio Tape Quality
- Officer Maulding – NO Audio from body microphone.

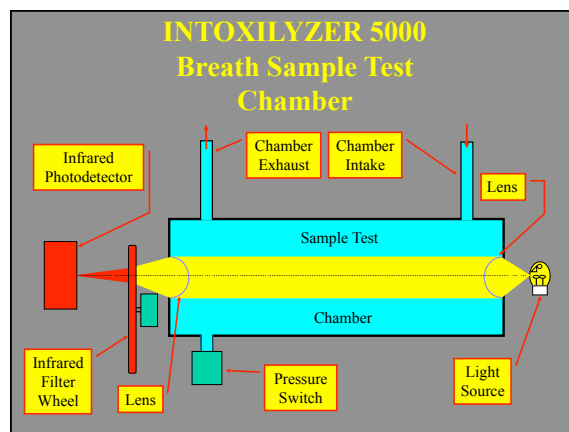
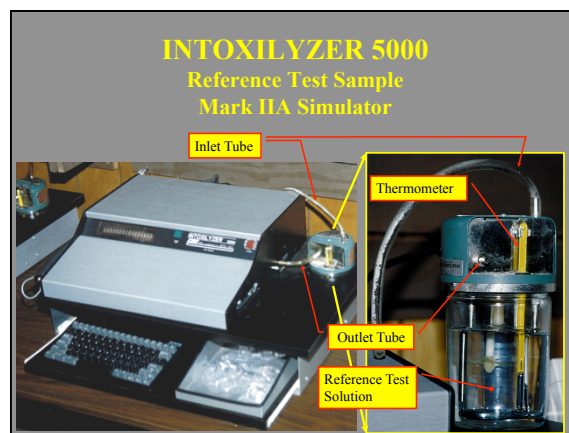
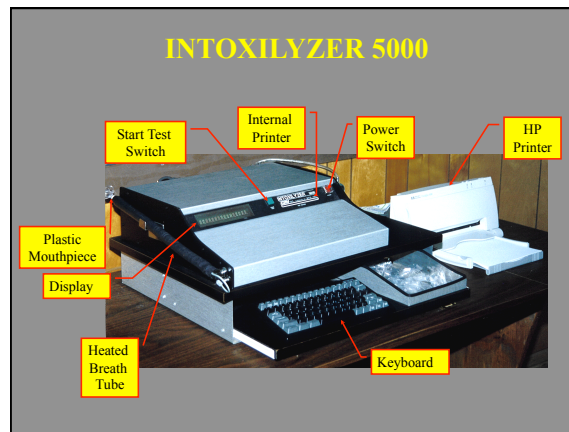
The evidence will show:

- No video tape or audio tape of Dr. Husain's alleged statement.
- This statement was Not Voluntary
- Pay very close attention to Arrest Video

The evidence will show:

- Affirmatively, Dr, Husain had No Intent to have sex with a child.
- THE EVIDENCE WILL SHOW THAT DR. HUSAIN IS:  
**NOT GUILTY.**

## EXPERT/WITNESS SUPPORT



## CLOSING

Officer Johnson

WASHING HANDS  
verses  
COUGHING SIGNAL

DISCREPANCIES

SANTOS DELGADO

- NO JOY, NO PAIN, NO NOTHING +
- NO ERECTION +
- NO INTENT TO AROUSE AND GRATIFY SEXUAL DESIRE OF DEFENDANT +
- NO RECKLESSNESS =
- NO CONVICTION

CREDIBILITY

Officer Johnson Diagram

