

# Baker's Texas Criminal Evidence Handbook

2012 Edition

by Lang Baker

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# **Baker's Texas Criminal Evidence Handbook**

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## ON USING THIS BOOK

Some court of appeals decisions are under review by the Court of Criminal Appeals on petition for discretionary review. Some no doubt will have been reversed or affirmed on review by the time this book is off the press and in your hands.

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### ABBREVIATIONS:

|          |   |
|----------|---|
| *        | indictment or charge set out in opinion |
| c/w(s)   | complaining witness(es)                 |
| CCA      | Code Construction Act                   |
| CCP      | Code of Criminal Procedure              |
| Ch       | Chapter                                 |
| circ     | circumstantial                          |
| co-def   | co-defendant                            |
| conv     | conviction                              |
| CS       | Civil Statutes                          |
| def      | defendant                               |
| DWI      | driving while intoxicated               |
| evid     | evidence                                |
| fund     | fundamental(ly)                         |
| insuff   | insufficient(cy)                        |
| MD       | doctor                                  |
| p/o(s)   | peace officer(s)                        |
| PC'25    | 1925 Penal Code                         |
| PC'74    | 1974 Penal Code                         |
| poss     | possession                              |
| pros     | prosecution                             |
| rev prob | revocation of probation                 |
| suff     | sufficient(cy)                          |
| TDC      | Texas Department of Corrections         |
| w/o      | without                                 |

### CITATION FORM

|   |
|---|
| v S = v State                               |
| Ep = Ex Parte                               |
| : = S.W.2d or 3d, Texas Supreme Court       |
| / = S.W.2d or 3d, Court of Criminal Appeals |
| <#> = S.W.2d or 3d, Court of Appeals        |
| vol. no. 338 or less = S.W.3d               |

### COURTS OF APPEALS

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### **Special Note on 2011 Legislative Amendments:**

*The statutory text presented in the 2012 editions of Baker's Texas Handbooks includes text from both before and after amendments by the Regular and 1st Called Sessions of the Texas Legislature in 2011, except that only the post-amendment versions of non-substantive amendments (by Senate Bill 1303) are presented.*

**Sample pages continue on the next page  
with text from another part of the book.**

It was abuse of discretion for trial court to partially grant motion to suppress, where violation of 14.06 occurred by def being arrested in one county and taken before magistrate in another county; def failed to show harm by violation of 14.06 or to show

there was any causal connection between failure to take her before magistrate in county of arrest and making of statements on videotape. *S v Vogel*, 852<5>567.

### OUTLINE OF ARREST WITHOUT WARRANT CASENOTE TOPICS

TEXAS CONSTITUTION  
 ROLE OF APPEALS COURT  
 APPROACH  
 STOP & DETENTION  
 FACTS SHOWED DETENTION  
 FACTS SHOWED NO DETENTION  
 AIRPORT etc.  
 FACTS SHOWED MORE THAN DETENTION  
 LICENSE CHECK  
 BASIS FOR STOP  
 HUNCH IS NOT SUFF  
 PURPOSE FOR STOP  
 TRAFFIC STOP  
 PRESERVING ISSUE  
 LAWFUL STOP  
 ROAD BLOCK  
 LICENSE CHECK  
 TRAFFIC STOP  
 TRAFFIC STOP NOT PRETEXT  
 DURATION OF STOP  
 INVESTIGATION OF REPORTED CRIME  
 PEDESTRIAN  
 VEHICLE  
 SUSPICION OF DRUG OFFENSE  
 PEDESTRIAN  
 INFORMANT TIP  
 AIRPORT etc.  
 VEHICLE  
 OF OTHER CRIMINAL ACTIVITY  
 PEDESTRIAN  
 VEHICLE  
 BORDER PATROL  
 UNLAWFUL STOP  
 ROAD BLOCK  
 TRAFFIC STOP  
 DURATION  
 LICENSE CHECK  
 REPORTED CRIME  
 PEDESTRIAN  
 VEHICLE  
 DRUG OFFENSE  
 INFORMANT TIP  
 AIRPORT etc.  
 OTHER SUSPICIOUS ACTIVITY  
 PEDESTRIAN  
 VEHICLE  
 BORDER PATROL  
 FRISK  
 LAWFUL FRISK  
 SCOPE  
 STOPPED CAR  
 INVESTIGATING REPORTED CRIME  
 SUSPICIOUS CONDUCT  
 TIP  
 UNLAWFUL FRISK  
 EXCEEDED SCOPE  
 LACK OF REASONABLE SUSPICION  
 HARMLESS  
 CASES ON ARREST

DEFINITION OF ARREST  
 FACTS SHOWED AN ARREST  
 PHYSICAL RESTRAINT  
 RESTRAINT BY VERBAL ORDER  
 RESTRAINT BY POLICE CONDUCT  
 PLACED IN PATROL CAR  
 AT CAR  
 AT HOME  
 AT STATION  
 FACTS SHOWED NO ARREST  
 APPROACHED  
 STOP OR DETENTION NOT ARREST  
 VOLUNTARY TO STATION  
 VOLUNTARY TO SCENE  
 DEF IN HOSPITAL  
 HANDCUFFS NOT ARREST  
 OTHER NOT ARREST  
 PRESERVING ARREST ISSUE  
 ARREST ISSUE PRESERVED  
 ARREST ISSUE NOT PRESERVED  
 ARREST ISSUE WAIVED  
 BURDEN TO JUSTIFY ARREST  
 RULES  
 GROUNDS FOR ARREST  
 PROBABLE CAUSE FOR ARREST  
 EXIGENT CIRC'S FOR ARREST  
 ARREST LAWFUL  
 BASED ON POLICE OBSERVATNS  
 AFTER APPROACH  
 AFTER STOP DETENTION  
 AFTER SEARCH  
 UNDERCOVER OPERATION  
 RADIO REPORT  
 COMBINED OFFICERS' KNOWLEDGE  
 INFORMANT TIP  
 DEF MATCH DESCRIPTN  
 DEF ID'D BY WITNESS TO CRIME  
 BASED ON INVESTIGTN  
 BASED ON DEF'S ADMISSION  
 EXIGENT CIRC'S  
 PLACE OF ARREST  
 NOT PRETEXT  
 ARREST UNLAWFUL  
 BASED ON POLICE OBSERVATNS  
 AFTER STOP DETENTION  
 RADIO REPORT  
 INFORMANT TIP  
 BASED ON INVESTIGTN  
 NO EXIGENT CIRC'S  
 CASES ON ARREST - FRUITS OF ARREST  
 NOT ERROR  
 ERROR  
 HARMLESS  
 COMMUNITY CARETAKING FUNCTION  
 AUTHORITY OF OFFICER  
 OFFICER CONDUCT LAWFUL  
 OFFICER CONDUCT UNLAWFUL

Art. I, Sec. 9, Texas Const., does not offer greater protection to the individual than the Fourth Amendment to the United States Constitution, and it may offer less protection. *Hulit v S*, 982/431 (1998)

Because of the similarities of the search and seizure provisions in the state and federal constitutions, United States Supreme Court cases may be permissive authority in interpreting the Texas Constitution. *Hulit v S*, 982/431 (1998)

Art. I, Sec. 9, Texas Const., comprises two, independent clauses. The first recognizes the right to be free from unreasonable seizures or searches. The second imposes limits on warrants. Neither clause requires a warrant or even authorizes a warrant. The warrant clause does not say when a warrant must issue, or when it may issue; it says only when warrants may not issue. It is cast in the negative ("no warrant ... shall issue"). And even if a warrant met the minimum requirements of the warrant clause (description, probable cause, and affidavit), the warrant still would be unlawful if the seizure or search that it authorized were unreasonable. The

warrant clause in Section 9 does not mean that a warrant is indispensable to a valid search and seizure. *Hulit v S*, 982/431 (1998)

Art. I, Sec. 9, Texas Constitution, contains no requirement that a seizure or search be authorized by a warrant. A seizure or search that is otherwise reasonable will not be found to be in violation of that section because it was not authorized by a warrant. (This is not to say that statutes which require warrants for seizure or search may be ignored, nor that the issuance of a warrant by a neutral magistrate may not be a factor in the totality of circumstances by which to judge whether a seizure or search was reasonable.) *Hulit v S*, 982/431 (1998)

Texas Court of Criminal Appeals, when analyzing and interpreting Art. I, Sec. 9, Texas Const, will not be bound by USSC decisions addressing the comparable Fourth Amendment issue; the decisions of USSC represent the minimum protections which a state must afford its citizens; cause remanded to court of appeals for consideration of def's state constitutional claim. *Heitman v S*, 815/681.

TEXAS  
 CONSTI  
 TUTION

## CHAPTER 14 - ARREST WITHOUT WARRANT

Art. I sec 9 Texas Constitution protects Texas citizens from unreasonable searches and seizures by the state in the same way they are protected under Fourth Amendment of US Constitution. Because of the similarity of the two provisions, USSC Fourth Amendment decisions should be viewed, at most, as providing guidance in interpretations of Art. I sec. 9. However, if Texas courts decide to raise the ceiling of the freedom of Texas citizens from unreasonable searches and seizures, it will be done by choosing in individual cases to interpret Art. I sec. 9 in a manner justified by the facts of the case, state precedent on the issue, and state policy considerations. Johnson v S, 912/227 (1995)

There is nothing in language of Art. I sec. 9 to indicate that the Texas Constitution would provide for a definition of seizure that did not include a requirement either that a suspect submit to a demonstration of authority, or that he be subjected to the use of

physical force, in order to be considered to have been seized. Johnson v S, 912/227 (1995)

Def's rights under Art. I, Sec. 9, Texas Constitution, were not violated when peace officer went to the aid of a motorist (def) who was unconscious in his vehicle on a public highway. Hult v S, 982/431 (1998)

Police officers acted reasonably when they approached the vehicle in which def was slumped unconscious on a public highway, awakened him, and asked him to step out so they could see if he was in need of assistance. Art. I, Sec. 9, Texas Constitution, was not violated by their actions. From the totality of the circumstances, after considering the public and private interests that are at stake, their action was not an unreasonable seizure. Hult v S, 982/431 (1998)

### ROLE OF APPEALS COURT

Where (1) trial court in one county granted motion to suppress in pros for DWI; (2) def filed motion to suppress same evid in trial court in second county in response to state's motion to adjudicate guilt in case in that county; (3) trial court in second county granted motion to suppress on basis of collateral estoppel; (4) state appealed ruling by court in second county: Court of appeals erred when it applied a deferential standard to review order granting motion to suppress in second county. Although an "almost total deference" standard would be appropriate in the DWI case, because that court heard witness testimony and was in a position to make credibility determinations, that decision was not under review in instant case. The ruling here under review was that of court in second county, and appropriate standard of review should be based solely on the circumstances surrounding that decision. Judge in that case held two pretrial hearings, after the first of which he reviewed the entire record of proceeding in first county; he heard no witness testimony, only arguments of counsel; he made no credibility determinations or determinations of historical facts; he explicitly stated that his granting of motion to suppress was based on doctrine of collateral estoppel. Appellate courts review de novo applications of law to facts that do not involve determinations of credibility and demeanor; a decision to apply collateral estoppel is a question of law, applied to the facts, for which de novo review is appropriate. State v Stevens, 235/736 (2007)

Failure to signal a lane change is an objective determination, and the court of appeals erred in failing to defer to the trial court's implied findings of fact (that officer stopped def for failure to signal a lane change) when it denied def's motion to suppress. Castro v S, 227/737 (2007)

A reasonable-suspicion determination is made by considering the totality of the circumstances, giving almost total deference to

the trial court's determination of historical facts and reviewing de novo the trial court's application of the law to facts not turning on credibility and demeanor. Castro v S, 227/737 (2007)

Because trial court did not make explicit findings of fact, appeals court reviews the evidence in a light most favorable to the trial court's ruling and assumes that the trial court made implicit findings of fact supported by the record. Castro v S, 227/737 (2007)

Although court of appeals, in reviewing denial of motion to suppress on issue of reasonable suspicion for vehicle stop, properly conducted a deferential review of historical facts and de novo review of whether those facts gave rise to reasonable suspicion, it erred by examining each factor in isolation to determine whether each militates in favor of or against finding a reasonable suspicion, instead of viewing the totality of the circo. Court of appeals also apparently utilized the disavowed "as consistent with innocent activity as with criminal activity" construct. Court of appeals judgment vacated and cause remanded for reconsideration. Loesch v S, 958/830 (1997)

As a general rule, appellate courts should afford almost total deference to trial court's determination of historical facts that the record supports especially when trial court's fact findings are based on an evaluation of credibility and demeanor. Appellate courts should also afford same amount of deference to trial court's rulings on application of law to fact questions (mixed questions of law and fact) if the resolution of those ultimate questions turns on an evaluation of credibility or demeanor. Appellate courts may review de novo mixed questions of law and fact not falling within this category. An abuse of discretion standard does not necessarily apply to application of law to fact questions whose resolution do not turn on an evaluation of credibility and demeanor. Guzman v S, 955/85 (1997)

### CASES ON APPROACH

Initial interaction between officer and def was properly designated as a consensual encounter, and subsequent info authorized arrest without warrant, where on the way to investigate a tipster's report about a single-vehicle accident, officer X saw def walking alone on a sidewalk approximately a quarter of a mile from the reported accident; X had a "hunch" that def was somehow involved in the reported accident based on a tipster's vague description of the driver's clothing; X had no information from which he could conclude that the tipster was either credible or reliable and had no personal knowledge as to whether there was in fact an accident; X did not observe def committing an offense while he was walking down the sidewalk in what the trial judge identified as a non-suspicious location; X stopped def and asked him if he had indeed been involved in the reported accident. Record did not support conclusion that a reasonable person in def's shoes would not have felt free to leave. Def, in response to X's query, voluntarily confirmed his involvement in the accident and then confessed to driving while intoxicated when he stated that he was drunk and should not have been driving; X noticed that def smelled of alcohol, staggered when he walked, and had blood shot, glazed eyes; another officer then informed X that he discovered alcoholic beverages in the car; this info provided X reasonable suspicion to detain def and administer field sobriety tests; failure of those tests with prior info gave probable cause for arrest under 14.01(b). S v Woodard (Tx.Cr.App., 4/6/11, PD-0828-10)

Encounter between def and officer was a consensual encounter, and reasonable suspicion was not required, where officer approached def and his companion and asked them for ID and why they were where they were; considering the time, place, and surrounding circumstances of the interaction (def

testified he was walking from a bar to his apartment, which was located about one block from scene; explained that the area was "well lit enough where you could, you know, see what's going on;" officer said that a person would not need a flashlight to walk there safely because it was lit by ambient light from surrounding area; and def also explained that the area had "quite a bit" of foot traffic at 3:00 a.m.), court concluded that a reasonable person in def's shoes would have felt free to terminate the encounter, making it consensual. Because an officer is just as free as anyone to question, and request identification from, a fellow citizen, his conduct showed that the interaction was a consensual encounter. S v Castleberry, 332/460 (2011)

It was not error to deny motion to suppress on claim officer lacked reasonable suspicion for stop, where initial interaction between def and officer was a consensual encounter. Officer had conversation with citizen who had followed def and called 911, and then officer approached def's open garage, inquired who had been driving the car parked there, and asked to speak with def after def acknowledged driving the vehicle. Banda v S, 317<14>903 (2010)

A police officer does not need reasonable suspicion before he talks to a person in a public place or knocks on a person's door. No merit to contention that facts in instant case constituted a detention, not an encounter, so reasonable suspicion was required. At first, officer merely slowed down his vehicle to get a closer look at def. This was at most an encounter. When def ran to his apartment, officer followed him and knocked on the door. This, too, was simply an encounter. Reasonable suspicion was not required for either encounter. S v Perez, 85/817 (2002)

**Sample pages continue on the next page  
with text from another part of the book.**

information pertaining to a subscriber to or customer of such service when governmental unit obtains a court order for such disclosure. *Uresti v S*, 98<1>321 (2003)

It was not error to deny motion to suppress trap and trace evid and pen register evid, over claim was no probable cause. 18.21 sec. 2(c) does not require probable cause, but only an application stating the installation and utilization of the pen register or trap and trace device will be material to investigation of a criminal offense. Also, installation and use of a pen register is not a search because def did not show he had an actual expectation of privacy that society is prepared to recognize as reasonable. Use of trap and trace device was not a search; def failed to show he had an actual expectation of privacy in telephone numbers belonging to others who placed calls to def's phone numbers. *Uresti v S*, 98<1>321 (2003)

The use of a pen register may well constitute a "search" under Article I, Sec 9 of the Texas Constitution; the question remaining is whether such a search would be "unreasonable" in the absence of probable cause; if so, then to the extent it authorizes a court ordered pen register without a showing of probable cause, 18.21, violates Article I, sec. 9, Tex. Const.; because the court of appeals did not decide the question of reasonableness, cause remanded for further disposition. *Richardson v S*, 865/944 (1993)

In the context of both the Fourth Amendment and Article 1, sec. 9, Tex. Const., whether government's installation and use of a pen register constitutes a search necessarily depends upon whether def has a "legitimate expectation of privacy" in the numbers he dialed on the telephone; in other words, in determining the legitimacy of def's expectation of privacy, the appropriate inquiry is whether def expected that the numbers he dialed on the telephone would be free from governmental intrusion, and, if he did, is this expectation one that society is prepared to recognize as reasonable. *Richardson v S*, 865/944 (1993)

Society recognizes as objectively reasonable the expectation of the telephone customer that the numbers he dials as a necessary incident of his use of the telephone will not be published to the rest of the world. *Richardson v S*, 865/944 (1993)

The mere fact that a telephone caller has disclosed the number called to the telephone company for the limited purpose of obtaining the services does not invariably lead to the conclusion

that the caller has relinquished his expectation of privacy such that the telephone company is free to turn the information over to anyone, especially the police, absent legal process. *Richardson v S*, 865/944 (1993)

Def did not show trial court abused its discretion by overruling his motion to suppress for failure of police to obtain court order authorizing installation of mobile tracking device under 18.21 sec. 14 where record did not show that a court order for installation of the device was not obtained. *Nored v S*, 875<5>392

Pen register authorization was proper over contention application did not refer to fact DPS initiated the request, where record showed application was requested by an officer and the officer's affidavit was attached to the application. *Van Dyke v S*, 800<11>908.

Application met requirement of 18.21 sec. 2(b) that it be in writing under oath, where sworn affidavit of officer was attached to application. *Van Dyke v S*, 800<11>908.

Application met requirement of sec. 2(b) to give name of subscriber of phone number where affidavit attached to application gave the name and the order authorizing use of pen register included name of subscriber. *Van Dyke v S*, 800<11>908.

By recording the existence, time and duration of incoming calls, capabilities not within the statutory definition of a pen register, police acted beyond the authority of the authorizing order, but issue was not preserved for appeal where no complaint on that ground was raised. *Richardson v S*, 902<7>689 (1995)

It was not error to deny motion to suppress evid obtained from phone monitoring because def had no reasonable expectation of privacy in numbers he dialed from his employer's phone, and because methods used in tracing def's call did not violate 16.03 or 18.21. GTE monitored only the electronic impulses indicating the origin of incoming calls, so def had no reasonable expectation of privacy and was no violation of Fourth Amendment or Texas Constitution. Trap and trace device did not violate 16.03 or 18.21 where facts showed type of monitoring used was excluded from 18.21 definition of trap and trace device (identification services provided in connection with 800 numbers). *McArthur v S*, 1<2>323 (1999)

#### **Art. 18.22. Testing for Communicable Diseases Following Certain Arrests**

(a) A person who is arrested for a misdemeanor or felony and who during the commission of that offense or an arrest following the commission of that offense causes a peace officer to come into contact with the person's bodily fluids shall, at the direction of the court having jurisdiction over the arrested person, undergo a medical procedure or test designed to show or help show whether the person has a communicable disease. The court may direct the person to undergo the procedure or test on its own motion or on the request of the peace officer. If the person refuses to submit voluntarily to the procedure or test, the court shall require the person to submit to the procedure or test. Notwithstanding any other law, the person performing the procedure or test shall make the test results available to the local health authority, and the local health authority shall notify the peace officer of the test result. The state may not use the fact that a medical procedure or test was performed on a person under this article, or use the results of the procedure or test, in any criminal proceeding arising out of the alleged offense.

(b) Testing under this article shall be conducted in accordance with written infectious disease control protocols adopted by the Texas Board of Health that clearly establish procedural guidelines that provide criteria for testing and that respect the rights of the arrested person and the peace officer.

(c) Nothing in this article authorizes a court to release a test result to a person other than a person specifically authorized by this article, and Section 81.103(d), Health and Safety Code, does not authorize that disclosure.

#### **Art. 18.23. Expenses for Motor Vehicle Towed and Stored for Certain Purposes**

(a) A law enforcement agency that directs the towing and storage of a motor vehicle for an evidentiary or examination purpose shall pay the cost of the towing and storage.

(b) Subsection (a) applies whether the motor vehicle is taken to or stored on property that is:

- (1) owned or operated by the law enforcement agency; or
- (2) owned or operated by another person who provides storage services to the law enforcement agency, including:
  - (A) a governmental entity; and
  - (B) a vehicle storage facility, as defined by Section 2303.002, Occupations Code.

(c) Subsection (a) does not require a law enforcement agency to pay the cost of:

(1) towing or storing a motor vehicle for a purpose that is not an evidentiary or examination purpose, including towing or storing a vehicle that has been abandoned, illegally parked, in an accident, or recovered after being stolen; or

(2) storing a motor vehicle after the date the law enforcement agency authorizes the owner or operator of the property to which the vehicle was taken or on which the vehicle is stored to release the vehicle to the vehicle's owner.

(d) This subsection applies only to a motor vehicle taken to or stored on property described by Subsection (b)(2). After a law enforcement agency authorizes the release of a motor vehicle held for an evidentiary or examination purpose, the owner or operator of the storage property may not refuse to release the vehicle to the vehicle's owner because the law enforcement agency has not paid the cost of the towing and storage.

(e) Subchapter J, Chapter 2308, Occupations Code, does not apply to a motor vehicle directed by a law enforcement agency to be towed and stored for an evidentiary or examination purpose.

### OUTLINE OF SEARCH AND SEIZURE CASENOTE TOPICS

|                                     |   |
|-------------------------------------|---|
| PRESENTING ISSUE                    | SCOPE                                   |
| OBJECTION RULES                     | NOT ERROR                               |
| ISSUE PRESERVED                     | IMPOUNDMENT NOT ERROR                   |
| ISSUE NOT PRESERVED                 | INVENTORY NOT ERROR                     |
| LATE OBJECTION                      | LOCKED COMPARTMNT OF CAR                |
| NO OBJECTION                        | OPENING CONTAINER FOUND IN CAR          |
| DIFFERENT OBJECTION                 | OTHER INVENTORY NOT ERROR               |
| MOTION TO SUPPRESS                  | ERROR                                   |
| ISSUE PRESERVED                     | OPEN FIELDS DOCTRINE                    |
| ISSUE NOT PRESERVED                 | RULES ON AFFIDAVIT FOR SEARCH WARRANT   |
| WAIVER FACTORS                      | RULES ON INFORMANTS                     |
| ISSUE NOT WAIVED                    | RULES ON FALSE INFO                     |
| WAIVED BY DEF'S TESTIMONY           | RULES ON STALE INFO                     |
| ISSUE WAIVED                        | SEARCH WARRANT RULES                    |
| GUILTY PLEA AND JUDICIAL CONFESSION | THINGS TO SEIZE                         |
| NO FRUITS INTRODUCED                | PLACE TO SEARCH                         |
| DEFENSE BURDEN: WARRANT             | SCOPE OF SEARCH WARRANT                 |
| DEFENSE BURDEN: AFFIDAVIT           | RULES ON SEARCH WITHOUT WARRANT         |
| STATE'S BURDEN                      | SHOWING PROBABLE CAUSE                  |
| ROLE OF APPEALS COURT               | INFORMANT TIP                           |
| SEARCH AND SEIZURE - GENERAL RULES  | INCIDENT TO ARREST                      |
| CONDUCT OF PRIVATE PERSON           | AUTOMOBILE                              |
| FOURTH AMENDMENT RIGHTS             | AFFIDAVIT FOR SEARCH WARRANT - NO ERROR |
| TEXAS CONST RIGHTS                  | PROBABLE CAUSE                          |
| RETROACTIVITY                       | DRUGS                                   |
| SEARCH AND SEIZURE - STANDING AND   | PROBABLE CAUSE & INFORMANT RELIABLE     |
| EXPECTATION OF PRIVACY              | DRUGS                                   |
| PRESENTING ISSUE                    | INFORMANT RELIABLE                      |
| RULES                               | DRUGS                                   |
| NO STANDING                         | FALSE INFORMATION                       |
| NO EXPECTATION OF PRIVACY           | TAINED INFORMATION                      |
| VEHICLE                             | HEARSAY INFORMATION                     |
| BUILDING                            | STALE INFORMATION                       |
| THIRD PARTY                         | SEARCH UNDER WARRANT - NO ERROR         |
| OTHER                               | CONTENT OF WARRANT                      |
| RECORD SHOWED STANDING OR           | ISSUANCE OF WARRANT                     |
| REASONABLE EXPECTATION OF PRIVACY   | EXECUTION OF WARRANT                    |
| CONSENT TO SEARCH                   | NO KNOCK ENTRY                          |
| PRESENTING ISSUE                    | THINGS SEIZED                           |
| RULES ON CONSENT EXCEPTION          | PLACE SEARCHED                          |
| BURDEN TO SHOW CONSENT              | SCOPE                                   |
| FACTORS OF CONSENT                  | SEARCH WITHOUT WARRANT - NO ERROR       |
| RULES ON THIRD PARTY CONSENT        | SEARCH OF AUTOMOBILE                    |
| SCOPE OF CONSENT                    | SEARCH OF PERSON                        |
| SEARCH LAWFUL ON BASIS OF CONSENT   | SEARCH OF PERSONAL EFFECTS              |
| NO TAIN BY ILLEGAL ARREST           | INCIDENT TO ARREST                      |
| LUGGAGE etc.                        | SEARCH OF AUTOMOBILE                    |
| AIRPORT etc.                        | SEARCH OF PERSON                        |
| MOTEL ROOM                          | SEARCH OF PERSONAL EFFECTS              |
| VEHICLE                             | SCOPE OF INCIDENT TO ARREST             |
| THIRD PARTY CONSENT LAWFUL          | BASED ON OBSERVATIONS                   |
| WITHIN SCOPE OF CONSENT             | SEARCH OF AUTOMOBILE                    |
| SEARCH NOT AUTHORIZED BY CONSENT    | SEARCH OF AUTOMOBILE FOR DRUGS          |
| TAINED BY ILLEGAL CONDUCT           | SEARCH OF PERSON                        |
| LUGGAGE etc.                        | SEARCH OF PERSONAL EFFECTS              |
| THIRD PARTY CONSENT NOT VALID       | BASED ON INFORMANT                      |
| NOT WITHIN SCOPE OF CONSENT         | FOR WEAPONS                             |
| PLAIN VIEW DOCTRINE                 | EXIGENT CIRCS                           |
| RULES                               | VEHICLE                                 |
| PLAIN VIEW DOCTRINE SATISFIED       | PREMISES                                |
| ON PERSON                           | SEARCH UNDER WARRANT - ERROR            |
| IN CAR OR DURING TRAFFIC STOP       | DEFICIENT AFFIDAVIT                     |
| INSIDE PREMISES                     | LACK OF PROBABLE CAUSE                  |
| OTHER LOCATIONS                     | LACK OF PROBABLE CAUSE FOR TIME         |
| ISSUE OF IMMEDIATELY OBVIOUS        | LACK OF PROBABLE CAUSE FOR PLACE        |
| PLAIN VIEW DOCTRINE NOT SATISFIED   | INFORMANT                               |
| BORDER SEARCH                       | FALSE INFO                              |
| WHAT IS A SEARCH                    | BASED ON TAINED INFO                    |
| CONDUCT NOT A SEARCH                | ERROR WITH WARRANT                      |
| THROW-AWAY AND ABANDONMENT          | SEARCH WITHOUT WARRANT - ERROR          |
| RULES                               | SEARCH OF PERSON                        |
| NOT ERROR                           | SEARCH OF EFFECTS                       |
| CAR ABANDONED                       | SEARCH OF VEHICLE                       |
| LUGGAGE ABANDONED                   | SEARCH OF PREMISES                      |
| DRUGS, etc THROWN AWAY              | SEARCH CONDUCTED BY PRIVATE CITIZEN     |
| ABANDONMENT TAINED                  | SEARCH UNDER EMERGENCY CIRCUMSTANCES    |
| IMPOUNDMENT AND INVENTORY           | NO ERROR                                |
| RULES                               | BODY SEARCH                             |
| IMPOUNDMENT                         | PROTECTIVE SEARCH                       |
| INVENTORY                           | LAWFUL PROTECTIVE SEARCH                |
| BURDEN                              | SEARCH OF PERSON                        |

## SEARCH AND SEIZURE CASES

SEARCH OF EFFECTS  
SEARCH OF PREMISES  
SEARCH OF VEHICLE  
NOT LAWFUL PROTECTIVE SEARCH  
ADMINISTRATIVE SEARCH  
VARIOUS SEARCH ISSUES

ILLEGAL SEARCH & SEIZURE AND HARMLESS ERROR  
DOCTRINE  
INEVITABLE DISCOVERY (see notes at 38.23)  
HARMLESS ERROR TEST  
NOT HARMLESS  
HARMLESS

Also see Chapter of USSC cases under Fourth Amendment.

|  |   |   |
|--|---|---|
| <p>On appeal by state from order granting motion to suppress, where state at hearing on motion to suppress argued search was valid pursuant to an inventory, and did not argue it was incident to arrest, state waived theory of incident to arrest. <i>S v Mercado</i>, 993&lt;8&gt;815 (1999)</p> <p>Nothing presented for review where claim of illegal search and seizure was raised for first time in brief on appeal. Trial objection based only on claim of illegal arrest did not preserve issue asserted in brief on appeal. <i>Bell v S</i>, 938/35 (1996)</p> <p>Def waived issue of admissibility of fruits of search by failing to object when introduced at trial, where, when raised pre-trial, both counsel agreed that hearing on motion to suppress would occur during trial upon objection by def. <i>Jackson v S</i>, 888&lt;1&gt;912 (1994)</p> <p>Nothing preserved for review on issue of search and seizure where def did not obtain a hearing or ruling on motion to suppress before trial and agreed the motion could be carried over to trial and raised by objection at appropriate time, but def did not object during trial until after two police officers had testified extensively before jury concerning search of def and</p> | <p>discovery of evid. <i>Thomas v S</i>, 884&lt;8&gt;215 (1994)</p> <p>Although there was no probable cause for arrest, cocaine would have inevitably been discovered where def gave his true name, outstanding warrants were produced, and def's arrest on those warrants resulted in book-in procedure and inventory in which cocaine was found on his person. <i>Reed v S</i>, 809&lt;5&gt;940.</p> <p>No merit to claim of illegal search and arrest, where evid was seized after def's arrest under arrest warrant, and def did not contest validity of warrant. <i>Cook v S</i>, 858/467 (1993)</p> <p>No merit to state's contention that def did not bring suff record to challenge ruling on motion to suppress fruits of search, by failure to show he was arrested or searched or any fruits were introduced, and failure to show he was arrested on basis of warrant, where state provided evid of the affidavit, warrant, and arrest. By bringing forward state's exhibits, motion to suppress, other documents in transcript, and statement of facts from suppression hearing, def provided suff record for review. <i>Borsari v S</i>, 919&lt;14&gt;913 (1996)</p> | <p><b>PRESENTING<br/>ISSUE</b></p>                      |
| <p>It was not error to deny motion to suppress over claim officers lacked exigent circo for warrantless entry, where assuming warrantless entry was illegal search, evid admitted at trial was seized under search warrant which was not contested and which was based on probable cause gathered before warrantless entry, so warrantless entry did not contribute in any way to discovery of marihuana def was charged with possessing. <i>Olivarez v S</i>, 171&lt;14&gt;283 (2005)</p>   | <p>When complaining of invalid portions of a search warrant, def must identify the evid seized pursuant to that portion of warrant. <i>Massey v S</i>, 933/141 (1996)</p> <p>Error, if any, in admission of evid allegedly obtained by illegal search and seizure is waived when proper objection is not made at time evid is introduced. <i>Brooks v S</i>, 599/312.</p> <p>Any objection to admission of evid based on illegal search and arrest may not be raised for first time on appeal. <i>Welch v S</i>, 680&lt;1&gt;834.</p>   | <p><b>OBJECTION<br/>RULES</b></p>                       |
| <p>No merit to state's contention that def failed to preserve for review his complaint that information in search warrant affidavit was stale. There was no doubt def was challenging the sufficiency of the affidavit's showing of probable cause. Timeliness of the information was necessarily included within def's challenge to the sufficiency of probable cause. <i>Flores v S</i>, 287&lt;3&gt;307 (2009)</p> <p>Objection* to admission of marihuana that def was "set up" and "entrapped" was suff to preserve for review challenge that it was seized as result of pretext arrest without probable cause. <i>Russell v S</i>, 904&lt;7&gt;191 (1995)</p>  | <p>Course of events, voir dire* of witness and objection* was suff, and record was clear that court and prosecutor understood basis of trial counsel's complaint, to preserve issue of whether administrative officer exceeded his statutory authority in making administrative search, where state at trial conceded there was no search warrant and stated it would rely on agent's administrative authority, defense counsel voir dired agent on his reasons and authority for search, and argued* to trial court about agent's authority and objected that search and seizure was improper and was not conceding agent was legitimately on premises, and trial court ruled agent had authority to be there because place was listed as def's office. <i>Weatherford v S</i>, 840&lt;11&gt;727.</p>  | <p><b>ISSUE<br/>PRESERVED</b></p>                       |
| <p>Nothing presented for review on claim was error to deny motion for directed verdict in forfeiture proceeding because seizure of vehicle was based on unlawful search, where no objection to admission of evid from such search was made at time evid was offered. Objection to admission of evid made for first time in motion for directed verdict presents nothing for review. Issue was also waived when def, after motion for directed verdict was denied, presented one witness and did not renew motion for directed verdict at close of case. <i>1986 Dodge 150 Pickup v S</i>, 129&lt;6&gt;180 (2004)</p>   | <p>Appeals court must consider suff of affidavit for search warrant even though was no objection in trial court, in order to determine if def was denied effective assistance of counsel by failure of counsel to object at trial to legality of search. <i>Ellis v S</i>, 677&lt;5&gt;129.</p> <p>Nothing presented for review on claim videotape was product of illegal warrantless seizure, where def presented no evid to show a seizure occurred without a warrant; only evidence presented at suppression hearing was the videotape; the circumstances surrounding the alleged seizure were not in the record. <i>Jamail v S</i>, 731&lt;1&gt;708.</p>  | <p><b>ISSUE NOT<br/>PRESERVED</b></p>                   |
| <p>Nothing presented for review on claim pistol should have been excluded as fruit of unlawful search, where def did not object until gun was offered into evid, after two witnesses had made repeated references to it. <i>Stults v S</i>, 23&lt;14&gt;198 (2000)</p> <p>Nothing presented for review on admission of cocaine where def did not object until three officers testified extensively about the cocaine, and where trial objection* differed from contention on appeal that cocaine was obtained by illegal search and seizure. <i>Laurant v S</i>, 926&lt;1&gt;782 (1996)</p>  | <p>Objection to admission of fruits of warrantless search was untimely where objection* came after several questions* on subject. <i>Tell v S</i>, 908&lt;2&gt;535 (1995)</p> <p>Error, if any, admitting gun over objection that it was illegally obtained, was harmless, where gun was already in evid and c/w had already testified a gun was used to assault her and she believed exhibit was gun used by def. <i>Hazelwood v S</i>, 838&lt;13&gt;647.</p>  | <p><b>NOT<br/>PRESERVED:<br/>LATE<br/>OBJECTION</b></p> |
| <p>Nothing preserved for review on claim of improper inventory of car, where issue was not raised in trial court. <i>Butler v S</i>, 300&lt;6&gt;474 (2009)</p> <p>Nothing preserved for review on challenge to inventory of items in zipper bag in def's car where was no trial objection about inventory. <i>Goudeau v S</i>, 209&lt;14&gt;713 (2006)</p>  | <p>Nothing presented for review on admission of evid seized in search, where def did not file motion to suppress and did not otherwise object to admission of this evid. <i>Bennett v S</i>, 82&lt;3&gt;397 (2002)</p> <p>Nothing presented for review on claim of error to admit fruits of search where every time evid recovered from search was offered defense stated there was "no objection." <i>Hoyos v S</i>,</p>   | <p><b>NOT<br/>PRESERVED:<br/>NO<br/>OBJECTION</b></p>   |

## SEARCH AND SEIZURE - PRESENTING ISSUE

81<4>853 (2002)

Nothing presented for review where complaint was not raised in trial court, that officer was required to obtain a warrant before searching box in back of def's pickup. Taylor v S, 20<6>51 (2000)

Nothing presented for review on claim that evid was seized under unconstitutional statute where issue was not raised in trial

court. Webb v S, 899<10>814 (1995)

Contention package was illegally seized before obtaining warrant and without exigent circs justifying warrantless seizure, not presented where was not raised in trial court. Mason v S, 838<13>657.

**NOT PRESERVED:  
DIFFERENT  
OBJECTION** Nothing preserved for review of claim search of car (yielding cocaine found in trunk) exceeded scope of consent, where challenges to search in trial court were on other grounds (no valid warrant, probable cause, or reasonable suspicion; no exigent circs; vehicle was not def's vehicle; consent was given at time when only offense def was suspected of committing was impersonating a public servant, so search was limited to that violation). Rice v S, 195<5>876 (2006)

Nothing presented for review on claim was error to admit fruits of search because def had reasonable expectation of privacy in attic and third party did not have consent to search, but only complaint raised at trial sought suppression of def's statement. Pando v S, 133<8>830 (2004)

Nothing preserved for review on claim affidavit for search warrant contained perjured statements or that warrant to search

residence was an anticipatory search, where those contentions were not asserted at suppression hearing for trial court's consideration, and only objection asserted at hearing was challenge to probable cause. Robuck v S, 40<4>650 (2001); Bradshaw v S, 40<4>655 (2001)

Nothing presented for review where trial objections\* to issuance of search warrant were on different grounds than grounds\* urged on appeal. Barnes v S, 839<5>118.

Admission of ten-dollar bill was not considered in determining whether was error in overruling objection to evid on grounds of illegally obtained evid, where it was not admitted at trial, and photocopy of bill was properly admitted and was no objection to photocopy on claim of illegal seizure. Johnson v S, 857<14>812 (1993)

**MOTION TO SUPPRESS** Under Franks v Delaware, 438 US 154 (1978), a defendant who makes a substantial preliminary showing that a false statement was made in a warrant affidavit knowingly and intentionally, or with reckless disregard for the truth, may be entitled by the Fourth Amendment to a hearing, upon the defendant's request. This hearing is required only where the false statement is essential to the probable cause finding. If at the hearing the defendant establishes the allegation of perjury or reckless disregard by a preponderance of the evidence, the affidavit's false material is set aside. If the remaining content of the affidavit does not then still establish sufficient probable cause, the search warrant must be voided and the evidence resulting from that search excluded. Harris v S, 227/83 (2007)

In order to be granted a Franks hearing def must: (1) allege deliberate falsehood or reckless disregard for the truth by the affiant, specifically pointing out the portion of the affidavit claimed to be false; (2) accompany these allegations with an offer of proof stating the supporting reasons; and (3) show that when the portion of the affidavit alleged to be false is excised from the affidavit, the remaining content is insufficient to support issuance of the warrant. Specific allegations and evidence must

be apparent in the pleadings in order for a trial court to even entertain a Franks proceeding. The attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. Harris v S, 227/83 (2007)

It was not error to deny motion to suppress, on claim testimony of officer during trial showed illegal search, where testimony was not presented at hearing on motion to suppress and was not before trial court at time motion to suppress was denied; and unchallenged testimony of that officer also showed person who shared possession of premises with capital murder victim freely and voluntarily consented to officers entering and looking around. Saunders v S, 49<11>536 (2001)

After granting motion to suppress, county court did not have authority to dismiss prosecutions, even though suppression of evid may have had practical effect of making convs impossible. S v Nolan, 808<3>556.

C/w's identification of his property was a fruit of prior illegal search to extent it described what had been unlawfully seized. Livingston v S, 731<9>744.

**MOTION TO SUPPRESS:  
ISSUE  
PRESERVED** No merit to state's contention def waived any challenge to search a cell phone by failing to present challenge to the trial court. Defendant's motion to suppress challenge search of his apartment on two grounds, one of which was the legality of the cell phone search. During trial he objected to the evidence based on "his motion to suppress" previously filed. Cisneros v S, 290<14>457 (2009)

No merit to state's contention def waived issue of admission of seized evid by stating "no objections" when evid was offered, where after admission of evid trial court held evidentiary hearing on def's motion to suppress over state's objection that def had waived issue and permitted def to call and question witnesses on the issue and then ruled on merits of motion to suppress. By overruling state's objection, trial court clearly did not construe def's "no objection" as a waiver of his motion to suppress. Bouyer v S, 264<4>265 (2008)

No merit to state's contention def did not preserve error regarding denial of motion to suppress, where def filed motion to suppress any and all evid acquired as result of stop and search of car in which he was passenger, at hearing trial court heard argument and evid, and court subsequently implicitly denied the motion and permitted def to appeal its ruling; was no indication that trial court was not sufficiently aware of grounds on which def sought to suppress. Castro v S, 202<2>348 (2006)

No merit to state's contention def did not preserve for review, complaint of lack of probable cause for arrest and search, when def's motion to suppress only claimed search was conducted without an arrest or search warrant. While def's motion only complained search was without warrant and record failed to show def made any further objection or complaint once state offered evid showing search allegedly fell within several warrant exceptions, def may always challenge suff of evid for first time on appeal; def's contention, at trial and on appeal, was the same: that state's evid, even if true, failed to show probable cause. Johnson v S, 171<14>643 (2005)

Nothing preserved for review on claim was error to deny motion to suppress because officers executing search warrant acted outside their jurisdiction where issue was not raised in motion to suppress, was first raised orally during hearing on motion to suppress and no ruling was made during that hearing, issue was not raised during second hearing on motion to suppress, and parties agreed to resolve the issue prior to trial and assuming it was not resolved def did not meet his burden of bringing that fact to court's attention and obtaining a ruling on it if he intended to rely on the objection on appeal. Porath v S, 148<14>402 (2004)

Def did not waive objection to denial of motion to suppress and admission of confession and seized evid, by stipulating to chemical analysis and chain of custody, where his stipulation was subject to his suppression motion, trial court findings\* of fact in record implicitly denied motion to suppress, and trial court overruled def's reassertion of objection when state offered confession into evid. Moreno v S, 124<13>339 (2003)

No merit to state's contention def did not preserve for review denial of pretrial motion to suppress, on claim def did not identify which images seized from def's hard drive were obtained under which challenged search. (Def challenge both search before warrant was obtained, and search under warrant.) Determination of which images were discovered at each stage of search was not relevant to review on appeal because trial court denied motion to suppress regardless of the stage at which various images were obtained. Rogers v S, 113<4>452 (2003)

Issue was properly preserved where trial court never formally ruled on motion to suppress, but every time state raised challenged evid def consistently objected on same grounds raised during suppression hearing, and trial court overruled those objections. Trial court implicitly overruled motion to suppress by its actions during guilt stage of trial. James v S, 102<2>162 (2003)

## SEARCH AND SEIZURE - PRESENTING ISSUE

Def's motion to suppress, supporting memorandum of law, and argument\* at hearing on motion to suppress were suff to alert trial court of constitutional basis for def's objection, where he referred to violation of knock and announce rule, cited US Supreme Court decision on issue, and attached article from monthly lawyers publication on issue. Price v S, 93<14>358 (2002)

Specific issue (authority of officer) in challenge to legality of search was preserved for review, where it was raised in argument at hearing on motion to suppress and had been raised in a prior motion to suppress, so trial court had opportunity to address the issue. DeMoss v S, 12<4>553 (1999)

Specific issue (scope of search) in challenge to legality of search was preserved for review, where line of questioning of officer during hearing on motion to suppress implied challenge to scope of search and gave trial court opportunity to decide the

issue. DeMoss v S, 12<4>553 (1999)

On appeal raising issues of denial of motion to suppress, jury charge on 38.23, and jury charge on reasonable suspicion for stop, no merit to state's contention that def waived all points of error be not including reporter's record of guilt stage jury args and of punishment stage in record on appeal. Record was suff for appeals court to address merits of issues. Reynolds v S, 967<1>493 (1998)

Def preserved issue challenging consent to search even though record did not contain written motion to suppress or statement of facts from any pretrial motion to suppress hearing, where record included statement of facts from bench trial, including def's objections to admission of seized evid and oral motion to suppress urged at close of trial. Cardenas v S, 857<14>707 (1993)

Nothing preserved for review of claim that was error to deny motion to suppress evid seized in search of residence because exigent circs did not justify initial entry, where that issue was not raised in trial court in motion to suppress or during hearing on motion to suppress. Rothstein v S, 267<14>366 (2008)

Def failed to preserve for review, claim that issuance of search warrant violated Franks v Delaware, 438 US 154 (1978), where motion to suppress contained no mention of what specific portion of affidavit was allegedly false, nor any offer of proof to contradict whatever those alleged misrepresentations were, and no evid was presented at the hearing to establish even a prima facie violation under Franks. Harris v S, 227/83 (2007)

Nothing preserved for review of claim was error to deny motion to suppress because of material omissions from search warrant affidavit, where the claim presented to trial court was of material misrepresentations in affidavit, not material omissions. Also, even if alleged omissions had been included in affidavit, magistrate would still have had probable cause to issue warrant. Renteria v S, 206/689 (2006)

Nothing preserved for review of denial of motion to suppress, where def on appeal asserted lack of probable cause in search warrant affidavit but only claim at trial was that search exceeded scope of warrant. Lane v S, 174<14>376 (2005)

Nothing preserved for review of claim was error to deny motion to suppress evid seized in search of apartment without consent, where issue was initially preserved through trial court's ruling on pretrial motion to suppress, but when evid was offered at trial defense counsel expressly stated "No objection." Mikel v S, 167<14>556 (2005)

Nothing presented for review on claim consent to search was not voluntary where def's motion to suppress raised issue but at hearing on motion to suppress he did not assert that ground and in brief in support of motion def informed court that issue of consent did not need to be decided because prior arrest was unlawful. Strauss v S, 121<7>486 (2003)

Nothing preserved for review on claim was error to deny motion to suppress custodial statement because warnings did not appear on face of statement, where that claim was not raised in trial court. Objections in hearing on motion to suppress claimed def was denied request for attorney, was discrepancy over whether def read statement or it was read to him, and name on statement did not conform to name on indictment. Morales v S, 95<1>561 (2002)

Constitutional protections against unreasonable searches and seizures may be waived. Meeks v S, 692/504.

When def testifies on direct examination that he possessed fruits of search, he normally waives any contention concerning legality of search. Murphy v S, 640/297.

When a defendant testifies and admits he possessed items in question, he forecloses himself from later questioning the legality of the search that produced the items. Reyes v S, 741/414.

Def's guilt-stage and punishment-stage testimony admitting his guilt did not waive claimed error in overruling motion to suppress cocaine. As to his punishment stage testimony, after considering basis for DeGarmo doctrine [DeGarmo v S, 691/657, cert. denied, 474 U.S. 973 (1985)], Court held that doctrine could not be invoked to prevent appellate review of whether evid was illegally seized. Def's guilt stage testimony did not waive issue because def could rely on exceptions to waiver for (1) defendant's testimony was impelled by the State's introduction of evidence that was obtained in violation of the law, and (2) the harmful effect of improperly admitted evidence

Nothing preserved for review on claim blood specimen was taken without a warrant in violation of US and Texas constitutions, where neither ground was asserted in motion to suppress or at hearing on the motion. Badgett v S, 7<14>645 (1999)

Nothing presented for review on contention that it was error to deny motion to suppress because officers acted in flagrant disregard of terms of search warrant by seizing items not specified in warrant, where motion to suppress and argument made at suppression hearing did not raise this ground. Issue was first raised late in trial, after cocaine had been admitted by stipulation. Beasley v S, 5<4>812 (1999)

Def did not preserve for review contentions that search was illegal for involuntary consent to search, that consent was tainted by illegal arrest, and that evid was product of a second search of def's home, where those grounds were not raised at trial. Motion to suppress asserted lack of probable cause for issuance of search warrant, and no additional objections were raised during trial. Bradley v S, 960<8>791 (1997)

Def waived right to object to lawfulness of seizure on appeal where counsel affirmatively stated he had no objection to admission of seized evid when it was admitted at trial, even though he had filed a pretrial motion to suppress. Hardin v S, 951<14>208 (1997)

Nothing presented for review on challenge to search where def failed to obtain a ruling on motion to suppress and when evid was presented at trial def stated "no objection." Tuffiash v S, 948<4>873 (1997)

Nothing preserved for review on claim of illegal search where trial court refused request for pre-trial hearing on motion to suppress and did not rule on motion, and def did not make trial objection. Meador v S, 941<13>156 (1996)

Adverse ruling on motion to suppress was waived where when item was offered in evid def affirmatively stated he had no objection. Jones v S, 833/118.

Nothing is presented for review under the claim that evidence was seized as a result of an illegal search or seizure, even though pretrial motion to suppress had been overruled, where counsel expressly stated\* he had no objection when evid was offered. Wilson v S, 857<13>90 (1993)

Improper admission of evid over objection is rendered harmless by admission of other evid of same facts, but the harmful effect is not cured by introduction of rebuttal evid designed to meet, destroy, or explain the improper evid. Howard v S, 599/597.

Harmful effect of improperly admitted evid that is obtained by illegal police practices is not cured when def gives testimony on direct examination that establishes same or similar facts unless state can show that its illegal action in obtaining and introducing the evid did not impel def's testimony. Thomas v S, 572/507.

is not cured by the fact that the defendant sought to meet, destroy, or explain it by introducing rebutting evidence. Court of Appeals erred in deeming the issue was waived by def's guilt stage testimony under an extension of the "DeGarmo doctrine." Leday v S, 983/713 (1998)

Def's testimony was tainted by illegally seized evid and state could not rely on doctrine of curative admissibility, where def's counsel specifically stated he would not have called def to stand but for overruling of his motion to suppress and that he was not waiving his objection to search warrant; although state introduced other evid tending to show def's guilt, appeals court

**MOTION TO SUPPRESS: ISSUE NOT PRESERVED**

**WAIVER FACTORS**

**ISSUE NOT WAIVED**

## SEARCH AND SEIZURE - PRESENTING ISSUE

could not say that other evid should have induced def to testify in same manner where appears only evid inducing def to testify about presence of weapons seized in challenged search was introduction of those items. *Sherlock v S*, 632/604.

Def did not waive issue of legality of search by testifying and admitting possession of fruits of search, where state failed to meet its burden to show def's testimony was not impelled by state's illegal action in obtaining and introducing fruits; under facts of case evid of def's poss of fruits was central and dispositive of charges against him, and other evid, standing alone, had little weight. *Rivas v S*, 855<8>777.

Def did not waive objection to admission of seized evid by later testifying to his possession of seized drugs, where state did not show his testimony was not impelled by state's illegal action, and the illegally seized evid was the only evid against him. *Miller v S*, 786<4>494.

Def did not waive appeal on issue of denial of motion to suppress, by stipulating to testimony and presenting statement of facts only from suppression hearing. *Garcia v S*, 704<14>512.

**WAIVED BY DEF'S TESTIMONY** Any error in admission of gun and cocaine over contention evid was fruit of illegal search of def's room was rendered harmless by def's own testimony, where def on direct testimony in his own defense testified about buying the gun, using it in shooting four men, and leaving it in his room; and testified about taking two kilograms of cocaine as he fled the shootings and taking it to his room. Evid was not offered to meet, destroy or explain his possession of gun or cocaine, but was to rebut state witness' testimony about shootings and advance self-defense claim. *Montemayor v S*, 55<3>78 (2001)

Def waived any error in admitting his handwritten notes recovered from murder scene where def testified to the notes and used them to raise a mental health defense. *Angelo v S*, 977<3>169 (1998)

Def waived any complaint about search and seizure where he testified at punishment stage and freely and voluntarily admitted possession of the contraband. *Lozada-Mendoza v S*, 951<13>39 (1997)

Def waived objection to legality of search where his testimony admitted he possessed the items that were seized. *Jones v S*, 843/487.

Any error in admitting gun over objection to lack of search warrant was cured when def testified to present issue of self defense and admitted shooting c/w with the "weapon that's here in evidence." *Liveoak v S*, 717<4>691.

**ISSUE WAIVED** Def waived claim of improper automobile inventory search, where counsel's argument\* at suppression hearing in trial court stated evid was obtained in proper inventory and conceded the evid was admissible. *Cole v S*, 194<1>538 (2006)

Def waived challenge to search where after trial court denied motion to suppress outside hearing of jury, when evid was offered to jury def responded to each offer, "No objections." *Nhem v S*, 129<1>696 (2004)

It was not error to admit def's trousers taken from him about 30 minutes after his arrest, where it was admissible under *US v Edwards*, 415 US 800, and other testimony about the clothing

and its condition was earlier admitted without objection. *Russell v S*, 665/771.

No error in presenting evid of def's identification and evid seized w/o search warrant, where was no objection to identification and defense introduced the seized evid. *Rainey v S*, 662<9>79.

In forfeiture hearing def waived any objection to testimony on fruits of search where he failed to request a suppression hearing, obtain a ruling, or request a continuance until after suppression hearing being held in another court on same search. *\$56,700 v S*, 710<8>65.

**GUILTY PLEA AND JUDICIAL CONFESSION** Denial of pretrial motion to suppress fruits of search was waived by guilty plea and judicial confession. *Nycum v S*, 650<14>91.

Attack on validity of search warrant did not present reversible error where def judicially admitted he committed the offense by signing a stipulation of his guilt. *Benavides v S*, 652<1>464.

Def waived any error in admission of evid and ruling on motion to suppress fruits of search and seizure, where he made judicial confession and stipulation of evid. *Fuentes v S*, 681<14>91.

Challenge to search and seizure presented nothing for review where def after adverse ruling on motion to suppress gave notice of appeal of that ruling, waived right to trial by jury, entered plea of guilty, took stand and made judicial confession, and no evid seized pursuant to challenged search was introduced or used to support def's conviction. *Gano v S*, 684<7>727.

Nothing presented for review on motion to suppress product of search where def entered guilty plea and no product of search was introduced. *Ellis v S*, 686<4>329.

**NO FRUITS INTRODUCED** Where record did not reflect any evid obtained as result of alleged illegal search was introduced at def's guilty plea, nothing presented for review on that matter. *Prochaska v S*, 587/726.

Appeals court did not have to determine if def had standing to complain of p/o's perusal of def's wallet or whether X had authority to consent thereto, where record did not reflect admission of any evid obtained as result thereof. *King v S*,

631/486.

Appeals court need not decide lawfulness of entry of airplane where no evidence was obtained as result of entry. *Johnson v S*, 670<3>394.

Review of overruling motion to suppress was unnecessary where no material obtained as result of challenged search was introduced in evid. *Renzi v S*, 682<1>387.

**DEFENSE BURDEN: WARRANT** It was not error to deny motion to suppress, on claim judge was not shown search warrant and no warrant existed, where search warrant affidavit but not warrant itself were presented at suppression hearing; affiant testified to presenting affidavit to judge and that judge issued search warrant; and judge testified her signature on affidavit indicated to her that a search warrant was presented to her at same time as affidavit; absence of search warrant from clerk's files did not negate existence of warrant. *De La O v S*, 127<4>799 (2003)

It was not error to deny motion to suppress on claim arrest and search were made without warrant and without probable cause where only evid introduced at hearing on motion were two affidavits\* of officers of what they would testify to if called, which did not show arrest was without a warrant. Def presented no

evid to meet her initial burden to show seizure occurred without a warrant, so burden never shifted to state. *Garcia v S*, 979<14>809 (1998)

Nothing presented for review where def failed to include warrant and affidavit in record on appeal. *Nevarez v S*, 847<8>637.

Nothing presented for review on claim affidavit for search and arrest warrant did not provide probable cause, where def did not meet his responsibility to see these documents were included in the record on appeal. *Moreno v S*, 858/453 (1993)

Challenge to search warrant was waived where def failed to have warrant and affidavit introduced into evidence. *Rivera v S*, 730<14>824.

**DEFENSE BURDEN: AFFIDAVIT** Nothing presented for review on claim affidavit for search warrant did not establish probable cause where affidavit was not in record on appeal. *Rainey v S*, 949<3>537 (1997)

Challenge to search warrant was waived where def failed to have warrant and affidavit introduced into evidence. *Rivera v S*, 730<14>824.

Where def's motion to suppress failed to allege material omission of statement from affidavit, trial court should not have

allowed the parties to go behind the allegations in the four corners of the affidavit. *Bernard v S*, 807<14>359.

Def did not make substantial preliminary showing of false information in affidavit, where def's motion to suppress alleged an intentional falsehood but did not accompany his motion with any affidavits or other reliable statements of witnesses, nor explain the lack of such support. *Ashorn v S*, 802<2>888.

**Sample pages continue on the next page  
with text from another part of the book.**

## UNITED STATES SUPREME COURT FIFTH AMENDMENT CASES

It does not violate privilege against self-incrimination to charge jury over def's objection that jury is not to draw any adverse inference from def's decision not to testify. *Lakeside v Oregon*, 435 US 333.

Prosecutor's repeated references in closing remarks to the state's evidence as unrefuted and uncontradicted did not violate constitutional prohibitions where def's counsel had clearly focused jury's attention on def's silence by outlining her contemplated defense in his opening statement and stating to the court and jury near the close of the case that def would be the next witness; in this context the prosecutor's closing remarks added nothing to the impression already created by defense counsel. *Lockett v Ohio*, 438 US 586.

Under facts of case, prosecutor's comment on failure of defendants to rebut prosecution's case was harmless beyond a reasonable doubt. *US v Hasting*, 461 US 499.

It was reversible error for court to charge\* jury and for prosecutor to comment on inferences to be drawn from failure of

def to testify. *Griffin v California*, 380 US 609.

State's jury argument and trial court charge on failure of def to testify was not harmless error. *Chapman v California*, 386 US 18.

Comment on def's failure to testify cannot be harmless error where such comment is extensive, where an inference of guilt from silence is stressed to the jury as a basis of conviction, and where there is evidence that could have supported acquittal. *Anderson v Nelson*, 390 US 523.

State failed to prove comment on failure of def to testify was harmless beyond a reasonable doubt. *Fontaine v California*, 390 US 593.

Trial judge has the constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to a def's failure to testify; it was error to refuse requested charge\* that failure of def to testify cannot be used as an inference of guilt. *Carter v Kentucky*, 450 US 288.

### IMMUNITY

Indictment on tax and fraud charges had to be dismissed, where indictment was based on contents of documents that def was compelled to present by grand jury subpoena under grant of use and derivative use immunity under federal statute. The compelled testimony relevant here was not in the contents of the documents produced, but was the testimony inherent in the act of producing those documents. No merit to government's contention that immunity did not preclude its derivative use of the produced documents because its possession of the documents was the fruit only of the simple physical act of production: The Government had already made "derivative use" of the testimonial aspect of that act in obtaining the indictment and preparing for trial: The testimonial aspect of def's act of production was the first step in a chain of evidence leading to instant prosecution. No merit to government's contention that the communicative aspect of respondent's act of production is insufficiently testimonial to support a privilege claim because the existence and possession of ordinary business records is a "foregone conclusion." The Government showed no prior knowledge of either the existence or the whereabouts of the documents ultimately produced here. *United States v. Hubbell*, 530 U. S. 27 (2000).

Federal immunity statute is constitutional because the scope of the "use and derivative-use" immunity it provides is coextensive with the scope of the constitutional privilege against self-incrimination. When a person is prosecuted for matters related to immunized testimony, the prosecution has an affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of that testimony. This ensures that the grant of immunity leaves the witness and the Government in substantially the same position as if the witness had claimed his privilege in the grant's absence. *United States v. Hubbell*, 530 U. S. 27 (2000).

A witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal prosecution. *Lefkowitz v Turley*, 414 US 70.

A grant of immunity is valid only if it is coextensive with the scope of the privilege against self-incrimination. *Murphy v Waterfront Com'n*, 378 US 52.

A witness has a constitutional right to stand on the privilege against self-incrimination until it has been fairly demonstrated to him that an immunity, as broad in scope as the privilege it replaces, is available to him. *Stevens v Marks*, 383 US 234.

A state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him; in order to implement this constitutional rule and accommodate the interests of the state and federal governments in investigating and prosecuting crime, the federal government must be prohibited from making any such use of compelled testimony

and its fruits. *Murphy v Waterfront Com'n*, 378 US 52.

A state must affirmatively demonstrate to the witness that a valid immunity from prosecution is his before it may hold him in contempt for refusing to answer questions that would otherwise be incriminating; whether the state has met its burden must be measured at the time of the alleged contempt; a declaration that there was a valid immunity uttered for the first time on appeal would come too late. *Stevens v Marks*, 383 US 234.

The state may not substitute for the privilege against self-incrimination an intricate scheme for conferring immunity and thereafter hold in contempt those who fail to fully perceive its subtleties. *Stevens v Marks*, 383 US 234.

The privilege against self-incrimination may be waived in appropriate circumstances if the waiver is knowingly and voluntarily made; answers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying. *Gardner v Broderick*, 392 US 273.

Use immunity suff to meet constitutional requirements. *Kastigar v US*, 406 US 441; *Zicavelli v US*, 406 US 472.

In prison disciplinary proceeding, def may not be compelled to testify without granting immunity from use of his testimony in later criminal proceeding, but his silence may be used in the prison proceeding to draw adverse inferences. *Baxter v Palmigiano*, 425 US 308.

A person's testimony before a grand jury under a grant of immunity cannot constitutionally be used to impeach him when he is a defendant in a later criminal trial. *New Jersey v Portash*, 440 US 450.

In pros for perjury, it was not error to admit evidence of statements by def before grand jury after he was given immunity; proper invocation of Fifth Amendment privilege allows witness to remain silent, but not to swear falsely. *US v Apfelbaum*, 445 US 115.

Under facts of case, contents of business records were not privileged but act of producing the documents would involve testimonial self-incrimination and could not be compelled without grant of use immunity. *US v Doe*, 465 US 605.

If def, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, the privilege against self-incrimination would not have been a bar to his dismissal; but it was improper to dismiss def for refusal to waive his privilege against self-incrimination when summoned to testify before a grand jury in an investigation of alleged criminal conduct. *Gardner v Broderick*, 392 US 273.

### ART. 38.22: CONFESSION OF DEFENDANT

#### OUTLINE OF CASENOTE TOPICS UNDER ART. 38.22

PRESENTING ISSUE  
IN TRIAL COURT  
BENCH TRIAL  
TO APPEALS COURT  
INSUFF RECORD ON APPEAL  
CONFESSION NOT INTRODUCED

ISSUE PRESERVED  
NOT WAIVED BY DEF'S TESTIMONY  
ISSUE NOT PRESERVED  
MOTION TO SUPPRESS HEARING  
ISSUE ON APPEAL NOT RAISED AT TRIAL  
WAIVED BY STATING "NO OBJECTION"

## CONFESSION OF DEFENDANT

WAIVED BY DEF'S TESTIMONY  
WAIVED BY EVIDENCE PRESENTED BY DEF  
RULES ON CONFESSION  
PRIVILEGE NOT VIOLATED  
PRIVILEGE VIOLATED  
TOTALITY OF CIRCS  
TESTIMONIAL CHARACTER  
CONFESSION AFTER ILLEGAL ARREST  
COERCION & THREATS  
PROMISES  
MENTAL STATE OF DEFENDANT  
MAGISTRATE  
WARNINGS  
INVOKING RIGHT TO SILENCE  
RIGHT TO COUNSEL  
INVOKING RIGHT TO COUNSEL  
RIGHT TO COUNSEL NOT INVOKED  
RIGHT TO COUNSEL INVOKED  
WAIVING RIGHT TO COUNSEL AFTER INVOKED  
WAIVING RIGHT TO COUNSEL  
NOT ERROR TO ADMIT CONFESSION  
MENTAL CONDITION CAPACITY  
INTOXICATION  
NOT FRUIT OF ILLEGAL ARREST  
NO TAINT FROM ILLEGAL ARREST  
NO TAINT FROM PRIOR STATEMENT  
NO TAINT FROM SEARCH  
COERCION & THREATS  
PROMISES  
PROMISE OF LENIENCY  
ALLEGED PROMISE WAS NOT PROMISE  
PROMISE NOT BROKEN  
ALLEGED PROMISE WAS NOT INDUCEMENT  
ALLEGED PROMISE NOT BY ONE IN AUTHORITY  
AT DEF'S INITIATIVE  
STATEMENT OR CONDUCT OF POLICE  
WARNINGS  
WAIVER OF RIGHTS  
MAGISTRATE  
ENGLISH LITERACY  
RIGHT TO COUNSEL WAIVED  
WHETHER RIGHT TO COUNSEL INVOKED  
AFTER RIGHT TO COUNSEL INVOKED  
AFTER COUNSEL INVOKED IN CASE  
AFTER COUNSEL APPOINTED ON OTHER CHARGES  
RIGHT TO SILENCE  
PARTS OF CONFESSION  
ERROR TO ADMIT CONFESSION  
ERROR TO ADMIT CONFESSION  
AFTER ILLEGAL ARREST  
COERCION & THREATS  
PROMISES  
NO WARNINGS  
RIGHT TO COUNSEL  
RIGHT TO SILENCE  
ERROR NOT HARMLESS  
ERROR CURED  
ERROR HARMLESS  
38.22 Sec. 2: WRITTEN CONFESSION ISSUES  
PRESENTING ISSUE  
RULES  
NOT ERROR Sec. 2  
NOT ERROR Sec. 2(a)  
NOT ERROR Sec. 2(b)  
ERROR

HARMLESS ERROR  
38.22 Sec. 3: ORAL CONFESSION ISSUES  
PRESENTING ISSUE  
RULES Sec. 3  
RULES Sec. 3(a)  
RULES Sec. 3(c)  
NOT ERROR Sec. 3  
NOT ERROR Sec. 3(a)  
NOT ERROR Sec. 3(c)  
ERROR Sec. 3  
ERROR Sec. 3(a)  
ERROR Sec. 3(c)  
ERROR CURED OR HARMLESS  
38.22 Sec 5 ISSUES  
RULES  
RES GESTAE  
WHAT IS CUSTODY  
WHAT IS NOT CUSTODIAL INTERROGATION  
ADMISSION OF NONCUSTODIAL STATEMENT  
IMPEACHMENT  
NOT ERROR TO ADMIT  
PRIOR TESTIMONY OR STATEMENT IN COURT  
RES GESTAE  
NOT PRODUCT OF CUSTODIAL INTERROGATION  
NOT PRODUCT OF INTERROGATION  
VOLUNTEERED STATEMENT  
NOT IN CUSTODY  
ON-THE-SCENE INVESTIGATION  
DEF WAS FREE TO LEAVE  
STATEMENT MADE TO NON-POLICE  
LETTERS & PHONE CALLS  
IMPEACHMENT  
ERROR TO ADMIT STATEMENT  
HARMLESS ERROR  
ISSUES UNDER 38.22 Sec. 6  
PRESENTING ISSUE  
PRESENTING ISSUE IN APPEALS COURT  
RULES: HOLDING HEARING  
RULES: MAKING FINDINGS  
NO ERROR: HOLDING HEARING  
NO ERROR: FINDINGS OF FACT  
FAILURE TO MAKE FINDINGS MOOT  
ERROR  
ERROR HARMLESS  
APPEAL ABATED  
ISSUES UNDER 38.22 Sec. 7  
PRESENTING ISSUE  
RULES  
CHARGE NOT ERROR  
FAILURE TO CHARGE NOT ERROR  
ERROR  
EVIDENCE OF SILENCE OF DEFENDANT  
PRESENTING ISSUE  
RULES  
NO ERROR  
ERROR  
ERROR CURED OR HARMLESS  
WITNESS' PRIVILEGE AGAINST SELF-INCRIMINATION  
PRESENTING ISSUE  
RULES  
NO ERROR  
ERROR  
ERROR CURED OR HARMLESS  
CO-DEFENDANT'S STATEMENT

## CONFESSION OF DEFENDANT - PRESENTING ISSUE

See notes at Secs. 6 and 7 for cases on presenting issue regarding hearing on admissibility of confession and on jury charge on issue of admissibility.

Where def did not make trial objection to admission of confession for violation of Sixth Amendment right to counsel, appeals court only considered whether his Fifth Amendment right to counsel was violated. *Benoit v S*, 87<4>668 (2002)

When a defendant presents evidence raising a voluntariness question, the prosecution must controvert that evidence and prove voluntariness by a preponderance of the evidence. However, the prosecution is not put to this burden unless a defendant presents evidence that raises a voluntariness question. *S v Terrazas*, 4/720 (1999)

Appropriate relief for inadmissible confession is to file motion to suppress. *Jacobs v S*, 681<14>119.

Requirement of a trial objection applies with equal force to alleged Miranda violations. *Gauldin v S*, 683/411.

Where def was served with interrogatories and request for production in forfeiture proceeding under Controlled Substances Act and asserted privilege against self incrimination, held: def could not make a blanket objection to all the interrogatories, but must state his objection to each; trial court must make its findings on each individual interrogatory; trial judge may in his discretion, but is not obligated to require, written documents be examined in camera. *Burton v West*, 749<1>505.

**PRESENTING  
ISSUE  
IN TRIAL  
COURT**

- PRESENTING ISSUE:** Where videotape of sobriety test was taken in custodial setting and after def had requested counsel, the audio portion of the tape should have been suppressed at trial to the extent it contained compelled testimony given in response to custodial interrogation; but in trial to the court, def failed to show the trial judge relied on any inadmissible portions of the audio recording; *Miffleton v S, 777/76.*
- 
- PRESENTING ISSUE TO APPEALS COURT:** It was error for court of appeals to reverse conviction on holding that trial court erred in admitting def's confession where record reflected trial court did not issue written findings of fact and conclusions of law as required by 38.22 sec. 6, and court of appeals made its decision without benefit of requisite findings and conclusions. Cause remanded with instructions to require compliance by the trial court with 38.22, sec. 6, and to reconsider the voluntariness of def's confession in light of those findings of fact and conclusions of law. *Urias v S, 155/141 (2004)*
- It was not error to admit def's unrecorded oral statement to child protective services investigator, on claim state did not provide copy of statement to def within 20 days of trial, where evid was admitted in bench trial and when def objected under 38.22 trial court ruled it would disregard anything that may have been said in custody that is inadmissible under 38.22 or 38.23, so appeals court presumed trial court did not consider any statement admitted in violation of either provision. *Herford v S, 139<2>733 (2004)*
- Where def won in the trial court and the trial court made no express or written fact findings, court of appeals was required to imply all necessary fact findings that would support the trial court's ruling. And court of appeals was required to defer to these implied fact findings that the record supports especially when these findings are based on an evaluation of credibility and demeanor. In other words, since def won in the trial court, the evidence must be viewed in the light most favorable to the trial court's ruling that def's statement is involuntary. *S v Terrazas, 4/720 (1999)*
- Where the ultimate resolution of the voluntariness question did not turn on implied fact finding, Court of Criminal Appeals may review de novo the trial court's and the Court of Appeals' legal ruling on the voluntariness question. *S v Terrazas, 4/720 (1999)*
- Where def on appeal claimed confession was admitted in violation of state and federal constitutions but failed to analyze, argue or provide authority to establish his protection under Texas Constitution exceeded or differed from that under federal constitution, appeals court did not address def's state constitutional argument. *Arnold v S, 873/27*
- When reviewing denial of motion to suppress confession, appeals court will generally consider only evid presented at suppression hearing because ruling was based on it rather than evid introduced later, but not where suppression issue has been consensually relitigated by parties during trial on merits. Where state raises issue at trial, either without objection or with subsequent participation in the inquiry by defense, def makes an election to re-open evid and appeals court may consider relevant trial testimony in review of issue. *Rachal v S, 917/799 (1996)*
- Where trial court did not state the reason it found statements inadmissible, the ruling will be sustained if it is correct under any theory of law applicable to the case; this is true even when trial judge gives the wrong reason for his decision, and is especially true with regard to admission of evid. *Romero v S, 800/539.*
- 
- INSUFF RECORD ON APPEAL:** Issue of admissibility of def's oral statement could not be decided where was no statement of facts on appeal, but under facts recited in def's brief the matter was admissible. *Davila v S, 718<7>350.*
- Def did not preserve issue of admission of conf on claim it was obtained by duress and in violation of right to counsel, where motion to duress was not in record on appeal and oral objections\* did not state specific grounds. *Cannady v S, 827<13>15.*
- Nothing presented for review on challenge to confession on basis of arrest without probable cause where arrest warrant and affidavit were not in record on appeal. *Fields v S, 627/714.*
- 
- CONFESSION NOT INTRODUCED:** Challenge to denial of motion to suppress def's written and oral statements was moot where the statements were not admitted into evidence before the jury. *Gonzalez v S, 296<8>620 (2009)*
- Issue of voluntariness of confession not presented where confession was not introduced in evid. *McMahon v S, 582/786.*
- 
- ISSUE PRESERVED:** Def did not waive objection to denial of motion to suppress and admission of confession and seized evid, by stipulating to chemical analysis and chain of custody, where his stipulation was subject to his suppression motion, trial court findings\* of fact in record implicitly denied motion to suppress, and trial court overruled def's reassertion of objection when state offered confession into evid. *Moreno v S, 124<13>339 (2003)*
- Def preserved error where specific grounds (for def's motion to suppress audio portion of video tape in pros for DWI) were clear from record\*, where counsel stated to trial judge that def's invocation of right to terminate interview was on audio portion. *Cooper v S, 961<1>222 (1997)*
- No merit to state's contention that def did not preserve error because he did not object to introduction of confession during trial on same basis as used in motion to suppress. Since trial court conducted evidentiary hearing and def was asserting on appeal the same issues as urged in motion to suppress, issue was properly preserved. *Renfro v S, 958<6>880 (1997)*
- Def did not waive issue of admissibility of his statements under DeGarmo doctrine (def's admission, at punishment stage, of offense charged) by his testimony\* at punishment stage, where def did not clearly admit his guilt of the specific crime charged, where he admitted firing gun but claimed he was not trying to hurt or shoot anybody and denied he was guilty of offense he had been convicted of. But def's testimony did waive issue under curative admissibility doctrine, where he testified to same facts as those admitted in his statements, and he did not seek to meet, destroy, or explain contents of his statements when he testified. *Smith v S, 957<6>881 (1997)*
- Def did not waive right to hearing on voluntariness of confession by failure to specifically state he considered statement to have been involuntary, where def's request for a "Jackson v. Denno hearing" made immediately after officer testified the statement was given voluntarily; was clear from context that def was challenging voluntariness. *Morales v S, 951<13>59 (1997)*
- Def's request for hearing on voluntariness of confession was not untimely where it was made before statement was offered into evid or discussed by any witnesses. Failure to object to references to statement did not waive right to object to admission of statement. *Morales v S, 951<13>59 (1997)*
- Def preserved issue of whether admission of videotape, showing him taking sobriety test consisting of reciting part of alphabet and his efforts to count backwards, violated Fifth Amendment even though he did not specifically refer to Fifth Amendment in his objection, where under facts of case the Fifth Amendment basis for objection was understood and presumed by all concerned. *Vickers v S, 878<2>329 (1994)*
- Pre-trial request for hearing on voluntariness of video-taped interview was suff to require state to prove voluntariness, even without def specifically alleging it was coerced or involuntary. *Fuentes v S, 846<13>527.*
- Def preserved issue where trial court accepted form of def's objection\* and specifically indicated he understood substance of objection; it was clear from objection def was complaining of uncounseled interrogation after he had been indicted, which

## CONFESSION OF DEFENDANT

38.22

rendered written waiver ineffective and his statement involuntary, and it was undisputed the police initiated the interrogation. *Young v S*, 820<5>180.

Def did not waive objection by failing to refer to prior motion or state a specific ground for objection, where it appeared from

Def did not waive objection to confession by testifying and admitting he shot c/w, where he challenged accuracy of several statements in confession and sought to explain statements in the confession. *Ochoa v S*, 573/796.

Error in admission of portions of def's statement was not rendered harmless by testimony of def to same facts as those objected to in statement\* where testimony\* of def was not same as that in statement. *Withers v S*, 642/486.

Error in admitting confession was not harmless under doctrine of curative admissibility, where after state introduced confession with parts deleted, defense sought to explain the erroneously

The right to have counsel present during post-indictment def-initiated interrogation is not a systemic or absolute right, and is not a waivable-only right. Defendant waived the challenge to admission of his inculpatory statements by failing to make a timely objection. *Hall v S*, 303<7>336 (2009)

Def waived challenge to admission of confession as fruit of illegal arrest where (1) motion to suppress alleged every possible way to suppress evid in the case, but did not bring to trial court's attention issue raised on appeal, that def was illegally arrested; def's generic motion to suppress did not preserve error raised on appeal; (2) during hearing on motion def never objected to admission of statement based on illegality of arrest, but objected only on issue of voluntariness, and only issue addressed by parties during hearing was whether statement was voluntary and whether officer complied with 38.22; and (3) when statement was offered at trial def did not object it was product of illegal arrest, but reurged prior motions. *Johnson v S*, 263<1>287 (2007)

No merit to contention def's statements were inadmissible because they were obtained in violation of right to counsel under US and Texas constitutions and under 38.23 where global statements in his motion to suppress were not sufficiently specific to preserve arguments made on appeal, and at hearing on motion to suppress he did not complain about being questioned after asserting his right to counsel. *Swain v S*, 181/359 (2005)

Nothing preserved for review on claim confession was induced by promise of leniency where no trial objection was made on that ground. *Gutierrez v S*, 150<14>827 (2004)

Nothing preserved for review of admissibility of def's incriminating oral statement where objection was untimely, no adverse ruling was obtained on objection, statement was later elicited without objection, and trial objections made were different from complaint on appeal. *Camarillo v S*, 82<3>529 (2002)

Nothing preserved for review on admission of oral statement, where none of grounds stated in motion to suppress related to admissibility of oral statement, but was based on voluntariness of consent to search form; and issue of admissibility of oral statement did not arise during hearing on motion to suppress. *Leal v S*, 82<4>84 (2002)

Nothing presented for review on claim was error to deny motion to suppress confession, where at end of hearing on motion one witness was not available and trial court did not rule at that time; record did not show court later ruled on motion or that matter was later discussed; when statement was admitted in evid def affirmatively stated he had no objection. *Graham v S*, 96<6>658 (2003)

It was not error to deny motion to suppress confession on claim it was not voluntary because def was intoxicated at time of

Nothing preserved for review on claim statement should have been suppressed for failure of police to give def his Miranda warnings, where video tape and transcript of interview showed def was given warnings after he had made some initial inculpatory admissions and prior to more detailed questioning. Only issues would have been whether police were required to give warnings at an earlier time than actually done, if so when, and if there were any incriminating statements after that time that should have been suppressed; def did not bring such a contention to attention of trial court; general statements in motion to suppress were insuff to preserve issue. *Mbugua v S*, 312<1>657 (2009)

recorded colloquy between court and counsel that the court and state were aware of bases for def's objection. *Wynne v S*, 831<7>513.

admitted confession by admitting the entire confession and def took the stand and admitted the confession and testified in great detail about the offense; there were no other witnesses to the offense so there was no one else he could call without taking the stand himself. *Nehman v S*, 742<2>102.

Improper admission of def's illegally obtained confession was not cured by def's testimony where state failed to prove it's illegal action in obtaining def's conf did not impel def to testify. *Sweeten v S*, 693/454.

Nothing preserved for review on claim of error to admit def's custodial statements where was no trial objection. Reference in motion\* to suppress only challenged admission of fruits of search, not statements made before search. *Laney v S*, 76<14>524 (2002)

Nothing preserved for review on claim def's statement was not voluntary, where only objection at trial was that def had not had opportunity to read statement after it was prepared. This is not a contention of involuntariness. *Hartfield v S*, 28<6>69 (2000)

Any error in admission of statements was waived, where at suppression hearing context showed statements were made while def was not in custody so denial of motion to suppress was correct when made, but in trial context indicated def was in custody but def failed to make objection at that time. *Braddock v S*, 5<6>748 (1999)

Def waived points of error on admissibility of audio portion of video tape (on claim tape did not comply with 38.22) by failing to present a complete record, where the tape was not in record on appeal. *Hogan v S*, 954<14>875 (1997)

Objection to def's prearrest statements was too late where it was made after direct and cross examination on the subject. *Sendejo v S*, 953<10>443 (1997)

Nothing preserved for review on admission of oral statement where counsel did not secure ruling on his objection. Trial court's admonishments to state did not constitute a ruling on def's objection, and def did not request a ruling or object to its absence. *Venhaus v S*, 950<8>158 (1997)

Any error in denial of motion to suppress statement on claim was product of illegal arrest was waived where state offered arrest warrant and produced affidavit at trial but def failed to object to failure to offer affidavit into evid. Affidavit was available for review by trial court, so def waived issue on appeal by failure to object to failure of state to offer it in evid. *Roy v S*, 892<6>96 (1994)

Def failed to preserve for appellate review any error relating to the admissibility of the oral statements, where he did not obtain ruling on admissibility of oral statements at trial. *TRAP 52(a)*. *Wilson v S*, 857<13>90 (1993)

interrogation, where def did not testify at hearing on motion to suppress and presented no evid at hearing to raise issue that he was intoxicated. *Ogier v S*, 730<4>189.

No error on claim of confusion by giving Miranda warnings at time def refused to take breath test and requested counsel, where def presented no evid at suppression hearing that he was confused or misled by officers. *Jamail v S*, 731<1>708.

Nothing preserved for review of complaint, where focus of complaint on appeal was that officer being allowed to testify about information contained in the statement, rather than the statement itself being admitted, violated statutory requirements of 38.22 sec. 3(a)(1), where trial objections were to admission of portions of statement and that statement was product of police coercion; complaint raised on appeal was not raised in trial court. *Lugo v S*, 299<2>445 (2009)

Claim on appeal of improper police conduct during interrogation, based on evid presented at trial after confession had been admitted before jury and never urged in trial court, was not considered on appeal. *Oursbourn v S*, 251<1>552 (2006)

NOT WAIVED  
BY DEF'S  
TESTIMONY

ISSUE NOT  
PRESERVED

ISSUE NOT  
PRESERVED:  
MOTION TO  
SUPPRESS  
HEARING

ISSUE NOT  
PRESERVED:  
ISSUE ON  
APPEAL NOT  
RAISED  
AT TRIAL