

PRETRIAL PROCEEDINGS

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Article 28.01, C.C.P., provides that a “court may set any criminal case for a pretrial hearing before it is set for trial upon its merits, and direct the defendant and his or her attorney, if any of record, and the State’s attorney, to appear before the court at the time and place stated in the court’s order for a conference and hearing.”

Although Article 45.031, C.C.P., requires a prosecutor to be present to represent the State at trial, a prosecutor is not always required at pretrial proceedings. If a pretrial proceeding is held to inform the defendant about procedures, such as his or her right to have an attorney (not appointed by the court), then the prosecutor need not appear. If, however, the pretrial proceeding is held to resolve a contested issue, or when the judge will be required to hear evidence the prosecutor should be present to represent the State. The judge cannot serve as the State’s attorney.

Chapter 45, C.C.P., is silent on pretrial matters; accordingly, Article 28.01, C.C.P., governs pretrial matters in municipal court. Article 28.01 provides that the court may set the case for a pretrial hearing before the case is set for a trial on the merits. The court may direct the prosecutor and the defendant and his or her attorney of record to appear. The defendant must be present at a pretrial proceeding. In municipal courts, pretrial hearings may be held on matters regarding any pleadings of the defendant, special pleas, motions to quash, motions for continuance, motions to suppress, motions for change of venue, discovery, entrapment, and motions for the appointment of an interpreter. See Art. 28.01, Sec. 1, C.C.P.

Although the court is not required to set a matter for a pretrial hearing, it is the local rule in many courts to require that the parties attend a pretrial hearing when the case has been set for a jury trial. It is also a common local rule to set cases for pretrial to allow the parties to reach a plea bargain agreement.

1. Conducting a Hearing

Checklist 6-1

<ul style="list-style-type: none"> <input type="checkbox"/> 1. If a pretrial hearing has been requested by the State or the defendant or local rules require that pretrial hearing be set, the Court will set the matter for pretrial hearing. <input type="checkbox"/> 2. If a hearing is set, notice must be given to both the municipal prosecutor and the defendant. The following matters should be heard: <ul style="list-style-type: none"> <input type="checkbox"/> a. Arraignment, if necessary; <input type="checkbox"/> b. Appointment of counsel, if necessary; <input type="checkbox"/> c. Pleadings of the defendant; <input type="checkbox"/> d. Special pleas, if any (such as double jeopardy); <input type="checkbox"/> e. Exceptions to form or substance of the 	<p>Art. 28.01, C.C.P.</p> <p>Art. 28.01, Sec. 2, C.C.P.</p> <p>See Checklist 6-2.</p> <p>See <i>TMCEC The Municipal Judges Book</i>: Chapter 4 and Art. 1.051(c), C.C.P.</p>
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complaint (Motions to Quash);

- f. Motions for continuance;
- g. Motions to suppress evidence;
- h. Motions for change of venue do not apply to municipal court, unless teen court has been granted;
- i. Discovery;
- j. Entrapment; and
- k. Motions for appointment of interpreter.
- l. Other motions (including but not limited to the election of jury punishment).

Notice can be made in open court if the defendant or attorney of record is present, by personal service, or in writing depending on the order of the court.

- 3. The defense must have 10 days notice of trials or pretrials in which to file motions.
- 4. Matters not raised within seven days of the pretrial hearing are waived, except by permission of the court for good cause shown.
- 5. The defendant has the right to open and close the argument on all defense pleadings presented to the court.
- 6. Testimony should be limited to the issue contained in the motion.
- 7. The Rules of Evidence may not apply in all pretrial proceedings.
 - a. The parties should be provided the opportunity to cross-examine, rebut, or argue if the other side is permitted to present evidence or argue.

For a detailed discussion of election and jury punishment, see *The Recorder*, 9:5, 3 (August 2000).

Art. 28.01, Sec. 3, C.C.P.

Art. 28.01, Sec. 2, C.C.P.

Art. 28.01, Sec. 2, C.C.P.

Art. 28.02, C.C.P.

See Checklist 16-2.

- 8. After the judge makes a decision on the motions presented, the judge announces:
 - a. Granted; or
 - b. Denied.

Rulings are discussed in *TMCEC The Municipal Judges Book*: Chapter 2, Section I, Part C.

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2. Arraignment

Arraignments are not required in misdemeanor cases punishable by fine only. This has historically caused confusion in municipal and justice courts because the Texas Code of Criminal Procedure provides no proper name for a defendant’s initial appearance to enter a plea in municipal or justice court. While in the most general sense of the word, the defendant’s first appearance in municipal court is an arraignment, the lack of a proper name has resulted in cities using various descriptive labels (i.e., “initial appearance” and “appearance docket”). Presumably, Texas law does not classify what occurs in municipal court as an arraignment because most defendants accused of fine-only offenses have the option of entering a plea without making a physical appearance in court (i.e., entering a plea by mail pursuant to Article 27.14 or 27.16, C.C.P.) and because municipal courts are not required to comply with all of the other provisions in Chapter 26 of the Code of Criminal Procedure.

Checklist 6-2	Script/Notes
<ul style="list-style-type: none"> <input type="checkbox"/> 1. If the court has followed the procedures in Checklist 4-3 concerning appearance, a formal arraignment is not necessary. <input type="checkbox"/> 2. The purpose of an arraignment is twofold: <ul style="list-style-type: none"> <input type="checkbox"/> a. Fix identity of the accused; and <input type="checkbox"/> b. Take the plea of the accused. <input type="checkbox"/> 3. Arraignments are required in all felonies and misdemeanors punishable by confinement. <input type="checkbox"/> 4. Only a court having jurisdiction over a particular offense may arraign the defendant. For instance, a municipal judge is permitted only to arraign defendants charged with fine-only misdemeanors filed in the court where the judge presides. <ul style="list-style-type: none"> <input type="checkbox"/> a. When a magistrate administers the warnings required by Article 15.17, C.C.P., it is not an arraignment although it is sometimes improperly referred to as such. 	<p>Arraignments in municipal courts are not specifically required or prohibited.</p> <p>Arts. 26.01-26.03, C.C.P.</p> <p>If the court orders an arraignment, the court cannot refuse to accept a waiver of arraignment from an attorney representing the defendant and require the defendant to appear. Art. 26.011, C.C.P.</p> <p>See Checklist 1-1.</p>

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3. Motions for Continuance

Checklist 6-3	Script/Notes
<input type="checkbox"/> 1. The court must keep a docket in each case showing whether the trial was by bench or jury. The exact method of maintaining and storing the docket is left to the discretion of the court.	Art. 45.017, C.C.P.
<input type="checkbox"/> 2. Motions for continuance are used by the prosecutor or defendant to postpone or continue the trial to a later setting.	Chapter 29, C.C.P., governs continuances.
<input type="checkbox"/> 3. The court may continue the case upon the written motion of either party, upon “sufficient cause shown,” but only for as long as is necessary.	Art. 29.02, C.C.P.
<input type="checkbox"/> 4. The court may continue the trial on its own motion; however, <ul style="list-style-type: none"> <input type="checkbox"/> a. The court must continue the trial as a matter of law where the defendant has neither been arrested nor served with summons, or when insufficient time for trial exists in the term of court (an unlikely event); or <input type="checkbox"/> b. If a jury panel is not available, the whole docket may be continued or reset. 	Art. 29.01, C.C.P.
<input type="checkbox"/> 5. In municipal courts of record, all motions for continuance must be in writing to be appealed. <ul style="list-style-type: none"> <input type="checkbox"/> a. Motions must be sworn to by the moving party and affidavits should be attached showing sufficient facts to justify the continuance. <input type="checkbox"/> b. All motions for continuance must be “for sufficient cause.” The motion must be in writing and state cause for continuance. <input type="checkbox"/> c. The State’s first motion for continuance based on a missing witness must contain the witness’s name and address, allegations of the efforts made to obtain the witness, and an assertion that the testimony is material. <input type="checkbox"/> d. Subsequent motions by the State, in addition to requisites above, must also show the facts 	Arts. 29.01 and 29.02, C.C.P.; see Art. 29.011, C.C.P., for religious continuance. Arts. 29.02 and 29.08, C.C.P., and <i>Montoya v. State</i> , 810 S.W.2d 160 (Tex. Crim. App. 1989). Art. 29.03, C.C.P. Art. 29.04, C.C.P. Art. 29.05, C.C.P.

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| <ul style="list-style-type: none"> <input type="checkbox"/> b. Constitutional grounds <ul style="list-style-type: none"> <input type="checkbox"/> (1) The defendant’s constitutional right to a speedy trial has been violated leading to a denial of due process so great as to require dismissal based on demonstrable harm to the defendant. Evaluate legal issues presented regarding speedy trial issues with care. | <p>U.S. Constitution, 14th Amendment
See <i>TMCEC The Municipal Judges Book</i>: Chapter 4 for a more complete discussion of constitutional issues.</p> <p>Speedy trial motions are not available under Article 32A.02, C.C.P., as it was declared unconstitutional and repealed by the Legislature in 2005. <i>Meshell v. State</i>, 739 S.W.2d 246 (Tex. Crim. App. 1987).</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> 3. The State’s attorney may, by permission of the court, dismiss a criminal action at any time upon filing a written statement with the setting out reasons for such dismissal, which shall be incorporated in the judgment of dismissal. No case shall be dismissed without the consent of the presiding judge. | <p>Art. 32.02, C.C.P.</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> 4. Dismissal is not the appropriate remedy to dispose of case because the defendant is not competent. <ul style="list-style-type: none"> <input type="checkbox"/> a. The conviction of an accused person while he is legally incompetent violates due process. To protect a criminal defendant’s constitutional rights, a trial court must inquire into the accused’s mental competence once the issue is sufficiently raised. | <p>See <i>TMCEC The Municipal Judges Book</i>: Chapter 4 for a discussion of competency.</p> <p>See <i>Drope v. Missouri</i>, 420 U.S. 162, 171-72 (1975) and <i>McDaniel v. State</i>, 98 S.W.3d 704, 709 (Tex. Crim. App. 2003).</p> |
| <ul style="list-style-type: none"> <input type="checkbox"/> 5. Dismissal is not an appropriate remedy for motions alleging: <ul style="list-style-type: none"> <input type="checkbox"/> a. Statute or ordinance is void for vagueness in violation of the due process provisions of the 14th Amendment. <input type="checkbox"/> b. Statute or ordinance in the instant case denies the defendant equal protection in violation of the Constitution. <input type="checkbox"/> c. Prosecutorial misconduct. | <p>See Checklist 11-1.
Relief for defendants making such constitutional attacks when deemed valid by the judge is acquittal (judgment of not guilty) at trial.</p> <p><i>State v. Johnson</i>, 821 S.W.2nd 609 (Tex. Crim. App. 1991).</p> |

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5. Motions to Quash the Complaint

Checklist 6-5	Script/Notes
<p><input type="checkbox"/> 1. A complaint vests the municipal court with jurisdiction to try a case. Motions objecting to the complaint are called motions to quash the complaint. These motions are properly made to the allegations of the complaint on its face; they are not properly related to the evidence that would prove the allegations, or the sufficiency of that evidence.</p>	<p>Arts. 45.018 and 45.019, C.C.P.</p>
<p><input type="checkbox"/> 2. The complaint shall commence:</p> <p style="padding-left: 20px;"><input type="checkbox"/> a. “In the name and by the authority of the State of Texas.”</p>	<p>Art. 45.019, C.C.P.</p>
<p><input type="checkbox"/> 3. The complaint must state:</p> <p style="padding-left: 20px;"><input type="checkbox"/> a. The name or description of the defendant;</p> <p style="padding-left: 20px;"><input type="checkbox"/> b. That the accused committed an offense;</p> <p style="padding-left: 20px;"><input type="checkbox"/> c. A venue allegation that the offense was committed in the territorial limits of the municipality; and</p> <p style="padding-left: 20px;"><input type="checkbox"/> d. The date on which the offense was committed and the date the complaint is signed (these dates must be within two years of each other).</p>	<p>Art. 45.019, C.C.P. See <i>TMCEC The Judges Book</i>: Chapter 4 for a discussion on complaints.</p>
<p><input type="checkbox"/> 4. The complaint shall conclude:</p> <p style="padding-left: 20px;"><input type="checkbox"/> a. “Against the peace and dignity of the State” (penal statutes) and it must, when appropriate, also conclude “Contrary to said ordinance” (municipal ordinances).</p>	<p>Art. 12.02, C.C.P.</p>
<p><input type="checkbox"/> 5. Complaints must be sworn.</p>	<p>Art. 45.018, C.C.P.</p>
<p><input type="checkbox"/> 6. The offense alleged in “plain and intelligible words” should include:</p> <p style="padding-left: 20px;"><input type="checkbox"/> a. Every element of the offense;</p> <p style="padding-left: 20px;"><input type="checkbox"/> b. The facts sufficient to identify a particular offense to be defended against and sufficient</p>	<p><i>Kindley v. State</i>, 879 S.W.2d 261 (Tex. App.—Houston [14th Dist.] 1994).</p>

facts to enable the defendant to plead the judgment in bar of further prosecution;

- c. The intent required under the statute or ordinance, if any;
- d. The name of the owner of property if that is an element of the offense;
- e. A specific description of property if that is an element of the offense;
- f. Language used in the allegation should be clear and concise; and
- g. The exact language of the statute or ordinance is usually most appropriate, but not required.

- 7. If the defendant does not object to a defect, error, or irregularity of form or substance in a complaint before the day trial commences, the defendant waives the right to object to the complaint.

Article 45.019(f), C.C.P., does not mean that a defendant must make a motion to quash before the date on which the case is **set** for trial.

The trial court is not prohibited from requiring that each objection to a complaint be made at an earlier time (e.g., pretrial hearing).

- 8. Granting the motion to quash does not bar re-prosecution with a proper complaint if the new complaint is filed within the statute of limitations.
- 9. The error can be cured if the complaint is dismissed and refiled with appropriate corrections. This must be done:
 - a. In writing;
 - b. Before the date of trial; or
 - c. On the date of trial or during trial if the defense does not object.

Art. 45.019(f), C.C.P.

Sanchez v. State, 138 S.W.3d 324 (Tex. Crim. App. 2004).

See Checklist 6-1.

Art. 28.04, C.C.P.

This method of dismissal and refile is recommended over the process of amendment. It is not clear if a complaint can be amended, nor in what manner it can be done.

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One of the guiding principles of the American system of jurisprudence is the idea of an independent and neutral judiciary. In order to ensure the aims of justice and to protect the integrity of the judicial system, all judges must understand the law governing (1) disqualification and (2) recusal. While the terms disqualification and recusal are used interchangeably, such use is a grievous error. If a judge is disqualified under the constitution, he or she is absolutely without jurisdiction in the case, and any judgment rendered by him or her is void, without effect, and subject to collateral attack. The failure of a judge to recuse when recusal is appropriate can constitute a violation of the Code of Judicial Conduct. Failure to recuse may rise to the level of disqualification when it impacts a litigant’s right to due process.

Article V, Section 11 of the Texas Constitution provides grounds for disqualifying a judge from sitting in any case. Similarly, Article 30.01 of the Code of Criminal Procedure provides instances in which the judge is disqualified regardless of the judge’s application of discretion. The defendant cannot waive the judge’s disqualification.

While disqualification is mandatory, recusal lies in a judge’s appraisal of the individual situation. While this determination can only be made in light of the specifics of a situation, the Texas Rule of Civil Procedure 18b provide grounds for when a judge shall recuse. It should not be forgotten, however that judges are obligated to decide issues presented in cases and must not unnecessarily recuse themselves even when the judges might prefer not to decide the issues. *Ex parte Ellis*, 275 S.W.3d 109 (Tex. App.—Austin 2008).

While disqualification and recusal are very different, the procedure following a judge’s disqualification or recusal is the same. In the 82nd Legislative Session (2011), a comprehensive series of procedures was created in Subchapter A-1 of Chapter 29 of the Government Code. These rules, derived from Texas Rule of Civil Procedure 18A, are designed to accommodate all sizes of municipal courts, and strike a balance between uniformity in application of the law and judicial efficiency. They can be used in any kind of criminal or civil case in which a municipal court has jurisdiction.

6. Recusal and Disqualification

Checklist 6-6	Script/Notes
<p>Recusal</p> <p><input type="checkbox"/> 1. A judge must recuse in any proceeding in which:</p> <ul style="list-style-type: none"> <input type="checkbox"/> a. The judge’s impartiality might reasonably be questioned; <input type="checkbox"/> b. The judge has a personal bias or prejudice concerning the subject matter or a party; <input type="checkbox"/> c. The judge has personal knowledge of 	<p>T.R.C.P. 18b sets out the law concerning recusal and includes instances in which a judge must step down from hearing a case for reasons other than the disqualifying grounds listed in the constitution. <i>Gaal v. State</i>, 332 S.W.3d 448 (Tex. Crim. App. 2011).</p>

disputed evidentiary facts concerning the proceeding;

- d. The judge or a lawyer with whom the judge previously practiced law has been a material witness concerning the proceeding;
- e. The judge participated as counsel, adviser, or material witness in the matter in controversy, or expressed an opinion concerning the merits of it, while acting as an attorney in government service;
- f. The judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
- g. The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
 - (1) Is a party to the proceeding or an officer, director, or trustee of a party;
 - (2) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
 - (3) Is to the judge's knowledge likely to be a material witness in the proceeding; or
- h. The judge or the judge's spouse, or a person within the first degree of relationship to either of them, is acting as a lawyer in the proceeding.

Disqualification:

2.No justice or judge shall sit in any case where:

- a. The judge may be the party injured;
- b. The judge has been of counsel for the State or the accused; or
- c. The accused may be connected with him by consanguinity or affinity within the third degree.

Art. 30.01, C.C.P.

An individual’s relatives within the third degree by consanguinity are the individual’s parent, child, brother, sister, grandparent, grandchild, great-grandparent, great-grandchild, aunt, uncle, nephew, or niece. Sec. 573.023, G.C. Two individuals are related to each other by affinity if they are married to each other or the spouse of one of the individuals is related by consanguinity to the other individual. Sec. 573.024, G.C.

Recusal or Disqualification Without a Motion:

3.If you choose to recuse or disqualify yourself, you are recused or disqualified. Go to step 5.

Sec. 29.055, G.C.

Recusal or Disqualification Upon Party Motion:

4.If a motion has been filed to recuse or disqualify you from presiding over the case, you may do one of the following:

Sec. 29.052, G.C.

- a. Recuse or disqualify yourself (go to step 3); or
- b. Decline to recuse or disqualify yourself and request the Regional Presiding Judge of the Administrative Judicial Region to assign a judge hear the motion; and
 - (1)Forward a referral order, the motion, and statements to the Regional Presiding Judge.

Sec. 29.055, G.C.

- 5. If you are recused or disqualified, a determination must be made as to who will sit for you in the case.
 - a. If you are the only municipal judge in the municipality, you must request the Presiding Judge of the Administrative Judicial Region to assign another judge.
 - b. If you are the presiding municipal judge in the municipality, you must request the Presiding Judge of the Administrative Judicial Region to assign another judge.
 - c. If you are not the presiding municipal judge in the municipality, you must request the presiding municipal judge of the municipality to assign another judge of the city to hear the case.

Sec. 29.057, G.C.

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7. Motions for Discovery

Checklist 6-7	Script/Notes
<p><input type="checkbox"/> 1. Motions for discovery are governed by Article 39.14, C.C.P.</p>	
<p><input type="checkbox"/> 2. Depositions are generally not allowed in criminal proceedings. Depositions for the defendant may be ordered on application and the filing of affidavits “stating facts necessary to constitute a good reason for taking same.” Merely wishing to discover adverse testimony has been held not to constitute “good reason” for deposition of a witness.</p>	<p><i>James v. State</i>, 563 S.W.2d 599 (Tex. Crim. App. 1978); Art. 39.02, C.C.P.</p>
<p><input type="checkbox"/> 3. Discovery of papers and physical items should be:</p> <ul style="list-style-type: none"> <input type="checkbox"/> a. On motion by the defendant; <input type="checkbox"/> b. On a showing of good cause; <input type="checkbox"/> c. At the court’s discretion; <input type="checkbox"/> d. Limited to production for examination, copying, and photographing; <input type="checkbox"/> e. Only for items in control of the State; <input type="checkbox"/> f. Not to be removed from the possession of the State or inspected outside the presence of the State; and <input type="checkbox"/> g. Not to include witness statements or other work products of the State. 	<p>Art. 39.14, C.C.P.</p>
<p><input type="checkbox"/> 4. No general right to discovery of inculpatory evidence exists. However, the defendant has the constitutional right to discover “Brady” evidence, or exculpatory evidence, that shows the defendant may not be guilty.</p> <ul style="list-style-type: none"> <input type="checkbox"/> a. Prosecutors also have an ethical duty to provide the defense with both exculpatory and mitigating evidence. Defendant need not request this information. 	<p><i>Quinones v. State</i>, 592 S.W.2d 933 (Tex. Crim. App. 1980); <i>Brady v. Maryland</i>, 373 U.S. 83 (1963).</p> <p>Rule 3.09, Texas Disciplinary Rules of Professional Conduct.</p>
<p><input type="checkbox"/> 5. If either party so requests, the court may order the parties to disclose the name and address of each person the party may call as a witness at trial. This is generally referred to as a “witness list.” The judge</p>	<p>Art. 39.14(b), C.C.P.</p>

shall specify when witness lists must be disclosed, no
later than 20 days before trial. |

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Two motions specifically affect the admission of evidence at trial. The motion to suppress evidence is generally based on constitutional or statutory grounds. On the other hand, the motion in limine is advisory in nature only. This motion provides a way to pre-judge the admissibility of evidence at trial.

Motions About Evidence

8. Motions to Suppress

Checklist 6-8	Script/Notes
<p><input type="checkbox"/> 1. The motion to suppress can be used to exclude:</p> <ul style="list-style-type: none"> <input type="checkbox"/> a. Physical evidence based on police violation of the 4th Amendment of the U.S. Constitution, Art. 38.23, C.C.P., and Art. I, Sec. 10 of the Texas Constitution prohibiting “unreasonable searches or seizures.” <input type="checkbox"/> b. The court must determine: <ul style="list-style-type: none"> <input type="checkbox"/> (1) Did a search or seizure occur? To be a search, police conduct must intrude upon the defendant’s “reasonable expectation of privacy. A seizure occurs if a reasonable person would have believed that he was not free to leave; <input type="checkbox"/> (2) Did the defendant have an interest in the items or area searched? If not, then the defendant does not have “standing” to complain of the search or seizure; and <input type="checkbox"/> (3) Is the area private as opposed to open to the public or exposed to the public by the defendant? Open fields, overheard conversations, and items abandoned or relinquished to others may not be protected by the 4th Amendment. <p><input type="checkbox"/> 2. Was seizure pursuant to a warrant?</p> <ul style="list-style-type: none"> <input type="checkbox"/> a. Was the warrant valid? <input type="checkbox"/> b. Was the item seized within the scope of the warrant? 	<p>See <i>TMCEC The Judges Book</i>: Chapter 4 for a discussion on the 4th Amendment.</p> <p><i>Katz v. United States</i>, 389 U.S. 347 (1967); <i>Brendlin v. California</i>, 551 U.S. 249 (2007).</p> <p><i>Rakas v. Illinois</i>, 439 U.S. 128 (1978).</p> <p>See Checklist 2-3.</p>

- 3. Was there an exception to the requirement of a warrant?
 - a. Was the seizure in “plain view?”
 - (1) The court must find that the officer was properly in the place where the discovery was made and it was immediately apparent the item was, in fact, evidence.
 - b. Was the search made with consent of the defendant or another person with the right to consent to the search?
 - c. Was the search or seizure only a temporary detention or “frisk” based on reasonable suspicion?
 - d. Was the search of the person or the area within his or her reach incident to a proper arrest?
 - e. Was the search based on an inventory policy of searching a properly seized vehicle?
 - f. Was the seizure or stop based on a valid roadblock or traffic stop?
 - g. Was the search based on emergency or exigent circumstances?
- 4. Has the defendant properly supported the motion to suppress with law and evidence? If so, the court grants the motion to suppress illegally obtained evidence.
- 5. If an illegal search or arrest leads to other evidence it too must be suppressed as “fruit of the poisonous tree.”
- 6. Statements of the accused must be suppressed as violating the defendant’s 5th Amendment right against self-incrimination if:
 - a. The statements were involuntarily made;
 - b. The statements were involuntary due to promises or threats made by the police;
 - c. The statements were made subject to

Terry v. Ohio, 392 U.S. 1 (1968).

Mich. Dept. of State Police v. Sitz, 496 U.S. 444 (1990).

Wong Sun v. U.S., 371 U.S. 471 (1963).

See *TMCEC The Judges Book*: Chapter 4.

Miranda v. Arizona, 384 U.S. 436

<p>“custodial interrogation” (the defendant must be in legal custody and the statements must be the result of questioning) and the police failed to “Mirandize” the defendant; or</p>	<p>(1966).</p>
<p><input type="checkbox"/> d. The statements were made subject to “custodial interrogation” that does not comply with the requirement in Article 38.22, C.C.P., that the entire statement be recorded or in writing with the statutory warnings of that section included in the recording or writing.</p>	
<p><input type="checkbox"/> e. Exceptions to this section include:</p> <ul style="list-style-type: none"> <input type="checkbox"/> (1) Any statements that contain any assertions of fact or circumstances which are later found to be true; <input type="checkbox"/> (2) Prior testimony of the defendant; <input type="checkbox"/> (3) Statements introduced for the purposes of impeaching the defendant’s testimony at trial; or <input type="checkbox"/> (4) Statements obtained by federal law enforcement in compliance with federal law or obtained in another state and in compliance with the laws of that state. 	<p>Art. 38.22, C.C.P.</p>
<p><input type="checkbox"/> f. If the defendant raises the issue of voluntariness as stated above, the court must hold a hearing outside the presence of the jury and make findings concerning the voluntariness of the statement.</p>	<p>Art. 38.22, Sec. 8, C.C.P.</p>
<p><input type="checkbox"/> 7. An in-court identification of a defendant by a witness must be suppressed if the court finds that the identification was based on an improperly suggestive police identification procedure.</p>	
<p><input type="checkbox"/> a. Police misconduct in this situation must be of such an improper nature that it causes the court to believe that there is a substantial likelihood of irreparable misidentification by the witness.</p>	
<p><input type="checkbox"/> b. Factors to consider include:</p> <ul style="list-style-type: none"> <input type="checkbox"/> (1) The witness’s opportunity to observe the defendant; 	

- (2) Nature of the suggestion;
 - (3) Whether the in-court identification is based in any way on the improper procedure;
 - (4) Accuracy of prior description;
 - (5) Time between the offense and the identification; and
 - (6) Totality of the circumstances.
8. In the hearing on a motion to suppress, the initial burden of establishing standing (or the right to complain) is upon the defendant.
- Once standing is established, the burden to show evidence was properly obtained shifts to the State.
9. Hearings on motions to suppress can often turn into a trial of the entire case. The court can and should limit pretrial testimony to only those legal and factual matters that must be developed for a proper ruling on the motion.

CHAPTER 6 PRETRIAL PROCEEDINGS

The motion in limine is a mechanism by which either the prosecutor or defendant may raise issues of the admissibility of evidence prior to trial.

Motions About Evidence

9. Motions in Limine

Checklist 6-9	Script/Notes
<ul style="list-style-type: none"> <input type="checkbox"/> 1. The motion in limine is simply a judicial order that certain evidence be brought before the court outside of the jury’s presence so that it can be ruled on at the proper point in trial. <input type="checkbox"/> 2. This motion is used by counsel and the court to avoid mistrials and trial by ambush. <input type="checkbox"/> 3. The court as a practical matter should not make final rulings on matters of evidence until those matters are brought before the court in trial. <input type="checkbox"/> 4. The court should, in appropriate circumstances, order that the attorneys not go into certain areas of evidence in front of the jury until opposing counsel has had an opportunity to make objections and the court has had the opportunity to hear arguments and make a proper ruling. <input type="checkbox"/> 5. Granting or denying a motion in limine is not a final ruling by the court. <input type="checkbox"/> 6. Regardless of the ruling on the motion in limine, counsel must still tender or object to the evidence at trial to preserve an issue for appeal in a court of record. 	

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