CODE OF CRIMINAL PROCEDURE

TITLE 1. CODE OF CRIMINAL PROCEDURE

CHAPTER 38. EVIDENCE IN CRIMINAL ACTIONS

Art. 38.01. TEXAS FORENSIC SCIENCE COMMISSION

Sec. 1. CREATION. The Texas Forensic Science Commission is created.

Sec. 2. DEFINITION. In this article, "forensic analysis" has the meaning assigned by Article 38.35(a).

Sec. 3. COMPOSITION. (a) The commission is composed of the following nine members:

(1) four members appointed by the governor:

(A) two of whom must have expertise in the field of forensic science;

(B) one of whom must be a prosecuting attorney that the governor selects from a list of 10 names submitted by the Texas District and County Attorneys Association; and

(C) one of whom must be a defense attorney that the governor selects from a list of 10 names submitted by the Texas Criminal Defense Lawyers Association;

(2) three members appointed by the lieutenant governor:

(A) one of whom must be a faculty member or staff member of The University of Texas who specializes in clinical laboratory medicine selected from a list of 10 names submitted to the lieutenant governor by the chancellor of The University of Texas System;

(B) one of whom must be a faculty member or staff member of Texas A&M University who specializes in clinical laboratory medicine selected from a list of 10 names submitted to the lieutenant governor by the chancellor of The Texas A&M University System;

(C) one of whom must be a faculty member or staff member of Texas Southern University who has expertise in pharmaceutical laboratory research selected from a list of 10 names submitted to the lieutenant governor by the chancellor of Texas

Southern University; and

(3) two members appointed by the attorney general:

(A) one of whom must be a director or division head of the University of North Texas Health Science Center at Fort Worth Missing Persons DNA Database; and

(B) one of whom must be a faculty or staff member of the Sam Houston State University College of Criminal Justice and have expertise in the field of forensic science or statistical analyses selected from a list of 10 names submitted to the lieutenant governor by the chancellor of Texas State University System.

(b) Each member of the commission serves a two-year term. The term of the members appointed under Subsections (a)(1) and (2) expires on September 1 of each odd-numbered year. The term of the members appointed under Subsection (a)(3) expires on September 1 of each even-numbered year.

(c) The governor shall designate a member of the commission to serve as the presiding officer.

Sec. 4. DUTIES. (a) The commission shall:

(1) develop and implement a reporting system through which accredited laboratories, facilities, or entities report professional negligence or misconduct;

(2) require all laboratories, facilities, or entities that conduct forensic analyses to report professional negligence or misconduct to the commission; and

(3) investigate, in a timely manner, any allegation of professional negligence or misconduct that would substantially affect the integrity of the results of a forensic analysis conducted by an accredited laboratory, facility, or entity.

(b) An investigation under Subsection (a)(3):

(1) must include the preparation of a written report that identifies and also describes the methods and procedures used to identify:

(A) the alleged negligence or misconduct;

(B) whether negligence or misconduct occurred; and

(C) any corrective action required of the

laboratory, facility, or entity; and

(2) may include one or more:

(A) retrospective reexaminations of other forensic analyses conducted by the laboratory, facility, or entity that may involve the same kind of negligence or misconduct; and

(B) follow-up evaluations of the laboratory, facility, or entity to review:

(i) the implementation of any corrective action required under Subdivision (1)(C); or

(ii) the conclusion of any retrospective reexamination under Paragraph (A).

(c) The commission by contract may delegate the duties described by Subsections (a)(1) and (3) to any person the commission determines to be qualified to assume those duties.

(d) The commission may require that a laboratory, facility, or entity investigated under this section pay any costs incurred to ensure compliance with Subsection (b)(1).

(e) The commission shall make all investigation reports completed under Subsection (b)(1) available to the public. A report completed under Subsection (b)(1), in a subsequent civil or criminal proceeding, is not prima facie evidence of the information or findings contained in the report.

Sec. 5. REIMBURSEMENT. A member of the commission may not receive compensation but is entitled to reimbursement for the member's travel expenses as provided by Chapter 660, Government Code, and the General Appropriations Act.

Sec. 6. ASSISTANCE. The Texas Legislative Council, the Legislative Budget Board, and The University of Texas at Austin shall assist the commission in performing the commission's duties.

Sec. 7. SUBMISSION. The commission shall submit any report received under Section 4(a)(2) and any report prepared under Section 4(b)(1) to the governor, the lieutenant governor, and the speaker of the house of representatives not later than December 1 of each even-numbered year.

Added by Acts 2005, 79th Leg., Ch. 1224, Sec. 1, eff. September 1, 2005.

Art. 38.03. PRESUMPTION OF INNOCENCE. All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that he has been arrested, confined, or indicted for, or otherwise charged with, the offense gives rise to no inference of guilt at his trial.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Amended by Acts 1981, 67th Leg., p. 2247, ch. 539, Sec. 1, eff. June 12, 1981.

Art. 38.04. JURY ARE JUDGES OF FACTS. The jury, in all cases, is the exclusive judge of the facts proved, and of the weight to be given to the testimony, except where it is provided by law that proof of any particular fact is to be taken as either conclusive or presumptive proof of the existence of another fact, or where the law directs that a certain degree of weight is to be attached to a certain species of evidence.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Art. 38.05. JUDGE SHALL NOT DISCUSS EVIDENCE. In ruling upon the admissibility of evidence, the judge shall not discuss or comment upon the weight of the same or its bearing in the case, but shall simply decide whether or not it is admissible; nor shall he, at any stage of the proceeding previous to the return of the verdict, make any remark calculated to convey to the jury his opinion of the case.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Art. 38.07. TESTIMONY IN CORROBORATION OF VICTIM OF SEXUAL OFFENSE. (a) A conviction under Chapter 21, Section 22.011, or Section 22.021, Penal Code, is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within one year after the date on which the offense is alleged to have occurred.

(b) The requirement that the victim inform another person of an alleged offense does not apply if at the time of the alleged

offense the victim was a person:

(1) 17 years of age or younger;

(2) 65 years of age or older; or

(3) 18 years of age or older who by reason of age or physical or mental disease, defect, or injury was substantially unable to satisfy the person's need for food, shelter, medical care, or protection from harm.

Added by Acts 1975, 64th Leg., p. 479, ch. 203, Sec. 6, eff. Sept. 1, 1975.

Amended by Acts 1983, 68th Leg., p. 2090, ch. 382, Sec. 1, eff. Sept. 1, 1983; Acts 1983, 68th Leg., p. 5317, ch. 977, Sec. 7, eff. Sept. 1, 1983; Acts 1993, 73rd Leg., ch. 200, Sec. 1, eff. May 19, 1993; Acts 1993, 73rd Leg., ch. 900, Sec. 12.01, eff. Sept. 1, 1993. Amended by Acts 2001, 77th Leg., ch. 1018, Sec. 1, eff. Sept. 1, 2001.

Art. 38.071. TESTIMONY OF CHILD WHO IS VICTIM OF OFFENSE.

Sec. 1. This article applies only to a hearing or proceeding in which the court determines that a child younger than 13 years of age would be unavailable to testify in the presence of the defendant about an offense defined by any of the following sections of the Penal Code:

(1) Section 19.02 (Murder);

(2) Section 19.03 (Capital Murder);

(3) Section 19.04 (Manslaughter);

(4) Section 20.04 (Aggravated Kidnapping);

(5) Section 21.11 (Indecency with a Child);

(6) Section 22.011 (Sexual Assault);

(7) Section 22.02 (Aggravated Assault);

(8) Section 22.021 (Aggravated Sexual Assault);

(9) Section 22.04(e) (Injury to a Child, Elderly Individual, or Disabled Individual);

(10) Section 22.04(f) (Injury to a Child, Elderly Individual, or Disabled Individual), if the conduct is committed intentionally or knowingly;

(11) Section 25.02 (Prohibited Sexual Conduct);

(12) Section 29.03 (Aggravated Robbery);

(13) Section 43.25 (Sexual Performance by a Child); or

(14) Section 21.02 (Continuous Sexual Abuse of Young Child or Children).

Sec. 2. (a) The recording of an oral statement of the child made before the indictment is returned or the complaint has been filed is admissible into evidence if the court makes a determination that the factual issues of identity or actual occurrence were fully and fairly inquired into in a detached manner by a neutral individual experienced in child abuse cases that seeks to find the truth of the matter.

(b) If a recording is made under Subsection (a) of this section and after an indictment is returned or a complaint has been filed, by motion of the attorney representing the state or the attorney representing the defendant and on the approval of the court, both attorneys may propound written interrogatories that shall be presented by the same neutral individual who made the initial inquiries, if possible, and recorded under the same or similar circumstances of the original recording with the time and date of the inquiry clearly indicated in the recording.

(c) A recording made under Subsection (a) of this section is not admissible into evidence unless a recording made under Subsection (b) is admitted at the same time if a recording under Subsection (b) was requested prior to the time of the hearing or proceeding.

Sec. 3. (a) On its own motion or on the motion of the attorney representing the state or the attorney representing the defendant, the court may order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact. To the extent practicable, only the judge, the court reporter, the attorneys for the defendant and for the state, persons necessary to operate the equipment, and any person whose presence would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony. Only the attorneys and the judge may question the child. To the extent practicable, the persons necessary to operate the equipment shall be confined to an adjacent room or behind a screen

or mirror that permits them to see and hear the child during his testimony, but does not permit the child to see or hear them. The court shall permit the defendant to observe and hear the testimony of the child and to communicate contemporaneously with his attorney during periods of recess or by audio contact, but the court shall attempt to ensure that the child cannot hear or see the defendant. The court shall permit the attorney for the defendant adequate opportunity to confer with the defendant during cross-examination of the child. On application of the attorney for the defendant, the court may recess the proceeding before or during cross-examination of the child for a reasonable time to allow the attorney for the defendant to confer with defendant.

(b) The court may set any other conditions and limitations on the taking of the testimony that it finds just and appropriate, taking into consideration the interests of the child, the rights of the defendant, and any other relevant factors.

Sec. 4. (a) After an indictment has been returned or a complaint filed, on its own motion or on the motion of the attorney representing the state or the attorney representing the defendant, the court may order that the testimony of the child be taken outside the courtroom and be recorded for showing in the courtroom before the court and the finder of fact. To the extent practicable, only those persons permitted to be present at the taking of testimony under Section 3 of this article may be present during the taking of the child's testimony, and the persons operating the equipment shall be confined from the child's sight and hearing as provided by Section 3. The court shall permit the defendant to observe and hear the testimony of the child and to communicate contemporaneously with his attorney during periods of recess or by audio contact but shall attempt to ensure that the child cannot hear or see the defendant.

(b) The court may set any other conditions and limitations on the taking of the testimony that it finds just and appropriate, taking into consideration the interests of the child, the rights of the defendant, and any other relevant factors. The court shall also ensure that:

(1) the recording is both visual and aural and is recorded on

film or videotape or by other electronic means;

(2) the recording equipment was capable of making an accurate recording, the operator was competent, the quality of the recording is sufficient to allow the court and the finder of fact to assess the demeanor of the child and the interviewer, and the recording is accurate and is not altered;

(3) each voice on the recording is identified;

(4) the defendant, the attorneys for each party, and the expert witnesses for each party are afforded an opportunity to view the recording before it is shown in the courtroom;

(5) before giving his testimony, the child was placed under oath or was otherwise admonished in a manner appropriate to the child's age and maturity to testify truthfully;

(6) the court finds from the recording or through an in camera examination of the child that the child was competent to testify at the time the recording was made; and

(7) only one continuous recording of the child was made or the necessity for pauses in the recordings or for multiple recordings is established at the hearing or proceeding.

(c) After a complaint has been filed or an indictment returned charging the defendant, on the motion of the attorney representing the state, the court may order that the deposition of the child be taken outside of the courtroom in the same manner as a deposition may be taken in a civil matter. A deposition taken under this subsection is admissible into evidence.

Sec. 5. (a) On the motion of the attorney representing the state or the attorney representing the defendant and on a finding by the court that the following requirements have been substantially satisfied, the recording of an oral statement of the child made before a complaint has been filed or an indictment returned is admissible into evidence if:

(1) no attorney or peace officer was present when the statement was made;

(2) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;

(3) the recording equipment was capable of making an accurate recording, the operator of the equipment was competent, the quality

of the recording is sufficient to allow the court and the finder of fact to assess the demeanor of the child and the interviewer, and the recording is accurate and has not been altered;

(4) the statement was not made in response to questioning calculated to lead the child to make a particular statement;

(5) every voice on the recording is identified;

(6) the person conducting the interview of the child in the recording is expert in the handling, treatment, and investigation of child abuse cases, present at the hearing or proceeding, called by the state, and subject to cross-examination;

(7) immediately after a complaint was filed or an indictment returned, the attorney representing the state notified the court, the defendant, and the attorney representing the defendant of the existence of the recording;

(8) the defendant, the attorney for the defendant, and the expert witnesses for the defendant were afforded an opportunity to view the recording before it is offered into evidence and, if a proceeding was requested as provided by Subsection (b) of this section, in a proceeding conducted before a district court judge but outside the presence of the jury were afforded an opportunity to cross-examine the child as provided by Subsection (b) of this section from any time immediately following the filing of the complaint or the returning of an indictment charging the defendant until the date the hearing or proceeding begins;

(9) the recording of the cross-examination, if there is one, is admissible under Subsection (b) of this section;

(10) before giving his testimony, the child was placed under oath or was otherwise admonished in a manner appropriate to the child's age and maturity to testify truthfully;

(11) the court finds from the recording or through an in camera examination of the child that the child was competent to testify at the time that the recording was made; and

(12) only one continuous recording of the child was made or the necessity for pauses in the recordings or for multiple recordings has been established at the hearing or proceeding.

(b) On the motion of the attorney representing the defendant, a district court may order that the cross-examination of the child

be taken and be recorded before the judge of that court at any time until a recording made in accordance with Subsection (a) of this section has been introduced into evidence at the hearing or proceeding. On a finding by the court that the following requirements were satisfied, the recording of the cross-examination of the child is admissible into evidence and shall be viewed by the finder of fact only after the finder of fact has viewed the recording authorized by Subsection (a) of this section if:

(1) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;

(2) the recording equipment was capable of making an accurate recording, the operator of the equipment was competent, the quality of the recording is sufficient to allow the court and the finder of fact to assess the demeanor of the child and the attorney representing the defendant, and the recording is accurate and has not been altered;

(3) every voice on the recording is identified;

(4) the defendant, the attorney representing the defendant, the attorney representing the state, and the expert witnesses for the defendant and the state were afforded an opportunity to view the recording before the hearing or proceeding began;

(5) the child was placed under oath before the cross-examination began or was otherwise admonished in a manner appropriate to the child's age and maturity to testify truthfully; and

(6) only one continuous recording of the child was made or the necessity for pauses in the recordings or for multiple recordings was established at the hearing or proceeding.

(c) During cross-examination under Subsection (b) of this section, to the extent practicable, only a district court judge, the attorney representing the defendant, the attorney representing the state, persons necessary to operate the equipment, and any other person whose presence would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony. Only the attorneys and the judge may question the child. To the extent practicable, the persons operating the

equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during his testimony but does not permit the child to see or hear them. The court shall permit the defendant to observe and hear the testimony of the child and to communicate contemporaneously with his attorney during periods of recess or by audio contact, but shall attempt to ensure that the child cannot hear or see the defendant.

(d) Under Subsection (b) of this section the district court may set any other conditions and limitations on the taking of the cross-examination of a child that it finds just and appropriate, taking into consideration the interests of the child, the rights of the defendant, and any other relevant factors.

Sec. 6. If the court orders the testimony of a child to be taken under Section 3 or 4 of this article or if the court finds the testimony of the child taken under Section 2 or 5 of this article is admissible into evidence, the child may not be required to testify in court at the proceeding for which the testimony was taken, unless the court finds there is good cause.

Sec. 7. In making any determination of good cause under this article, the court shall consider the rights of the defendant, the interests of the child, the relationship of the defendant to the child, the character and duration of the alleged offense, any court finding related to the availability of the child to testify, the age, maturity, and emotional stability of the child, the time elapsed since the alleged offense, and any other relevant factors.

Sec. 8. (a) In making a determination of unavailability under this article, the court shall consider relevant factors including the relationship of the defendant to the child, the character and duration of the alleged offense, the age, maturity, and emotional stability of the child, and the time elapsed since the alleged offense, and whether the child is more likely than not to be unavailable to testify because:

(1) of emotional or physical causes, including the confrontation with the defendant; or

(2) the child would suffer undue psychological or physical harm through his involvement at the hearing or proceeding.

(b) A determination of unavailability under this article can

be made after an earlier determination of availability. A determination of availability under this article can be made after an earlier determination of unavailability.

Sec. 9. If the court finds the testimony taken under Section 2 or 5 of this article is admissible into evidence or if the court orders the testimony to be taken under Section 3 or 4 of this article and if the identity of the perpetrator is a contested issue, the child additionally must make an in-person identification of the defendant either at or before the hearing or proceeding.

Sec. 10. In ordering a child to testify under this article, the court shall take all reasonable steps necessary and available to minimize undue psychological trauma to the child and to minimize the emotional and physical stress to the child caused by relevant factors, including the confrontation with the defendant and the ordinary participation of the witness in the courtroom.

Sec. 11. In a proceeding under Section 2, 3, or 4 or Subsection (b) of Section 5 of this article, if the defendant is not represented by counsel and the court finds that the defendant is not able to obtain counsel for the purposes of the proceeding, the court shall appoint counsel to represent the defendant at the proceeding.

Sec. 12. In this article, "cross-examination" has the same meaning as in other legal proceedings in the state.

Sec. 13. The attorney representing the state shall determine whether to use the procedure provided in Section 2 of this article or the procedure provided in Section 5 of this article.

Added by Acts 1983, 68th Leg., p. 3828, ch. 599, Sec. 1, eff. Aug. 29, 1983. Sec. 3 amended by Acts 1987, 70th Leg., ch. 998, Sec. 1, eff. Aug. 31, 1987. Amended by Acts 1987, 70th Leg., 2nd C.S., ch. 55, Sec. 1, eff. Oct. 20, 1987; Sec. 3(a) amended by Acts 1991, 72nd Leg., ch. 266, Sec. 1, eff. Sept. 1, 1991; Sec. 1 amended by Acts 1995, 74th Leg., ch. 76, Sec. 14.24, eff. Sept. 1, 1995; Sec. 1 amended by Acts 2001, 77th Leg., ch. 338, Sec. 1, eff. Sept. 1, 2001; Sec. 2(c) amended by Acts 2001, 77th Leg., ch. 338, Sec. 2, eff. Sept. 1, 2001; Sec. 3(a) amended by Acts 2001, 77th Leg., ch. 338, Sec. 3, eff. Sept. 1, 2001; Sec. 4(a), (b) amended by Acts 2001, 77th Leg., ch. 338, Sec. 4, eff. Sept. 1, 2001; Sec. 5(a), (b) amended by Acts 2001, 77th Leg., ch. 338, Sec. 5, eff. Sept. 1,

2001; Sec. 8(a) amended by Acts 2001, 77th Leg., ch. 338, Sec. 6, eff. Sept. 1, 2001; Sec. 9 amended by Acts 2001, 77th Leg., ch. 338, Sec. 7, eff. Sept. 1, 2001; Sec. 10 amended by Acts 2001, 77th Leg., ch. 338, Sec. 8, eff. Sept. 1, 2001.

Amended by:

Acts 2007, 80th Leg., R.S., Ch. 593, Sec. 3.16, eff. September 1, 2007.

Art. 38.072. HEARSAY STATEMENT OF CHILD ABUSE VICTIM.

Sec. 1. This article applies to a proceeding in the prosecution of an offense under any of the following provisions of the Penal Code, if committed against a child 12 years of age or younger:

(1) Chapter 21 (Sexual Offenses) or 22 (Assaultive Offenses);

(2) Section 25.02 (Prohibited Sexual Conduct); or

(3) Section 43.25 (Sexual Performance by a Child).

Sec. 2. (a) This article applies only to statements that describe the alleged offense that:

(1) were made by the child against whom the offense was allegedly committed; and

(2) were made to the first person, 18 years of age or older, other than the defendant, to whom the child made a statement about the offense.

(b) A statement that meets the requirements of Subsection (a) of this article is not inadmissible because of the hearsay rule if:

(1) on or before the 14th day before the date the proceeding begins, the party intending to offer the statement:

(A) notifies the adverse party of its intention to do so;

(B) provides the adverse party with the name of the witness through whom it intends to offer the statement; and

(C) provides the adverse party with a written summary of the statement;

(2) the trial court finds, in a hearing conducted outside the presence of the jury, that the statement is reliable based on the time, content, and circumstances of the statement; and

(3) the child testifies or is available to testify at the proceeding in court or in any other manner provided by law.

Added by Acts 1985, 69th Leg., ch. 590, Sec. 1, eff. Sept. 1, 1985. Sec. 1 amended by Acts 1995, 74th Leg., ch. 76, Sec. 14.25, eff. Sept. 1, 1995.

Art. 38.073. TESTIMONY OF INMATE WITNESSES. In a proceeding in the prosecution of a criminal offense in which an inmate in the custody of the Texas Department of Criminal Justice is required to testify as a witness, any deposition or testimony of the inmate witness may be conducted by electronic means, in the same manner as permitted in civil cases under Section 30.012, Civil Practice and Remedies Code.

Added by Acts 2001, 77th Leg., ch. 788, Sec. 2, eff. June 14, 2001.

Art. 38.08. DEFENDANT MAY TESTIFY. Any defendant in a criminal action shall be permitted to testify in his own behalf therein, but the failure of any defendant to so testify shall not be taken as a circumstance against him, nor shall the same be alluded to or commented on by counsel in the cause.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Art. 38.10. EXCEPTIONS TO THE SPOUSAL ADVERSE TESTIMONY PRIVILEGE. The privilege of a person's spouse not to be called as a witness for the state does not apply in any proceeding in which the person is charged with:

(1) a crime committed against the person's spouse, a minor child, or a member of the household of either spouse; or

(2) an offense under Section 25.01, Penal Code (Bigamy).

Added by Acts 1995, 74th Leg., ch. 67, Sec. 2, eff. Sept. 1, 1995.

Amended by:

Acts 2005, 79th Leg., Ch. 268, Sec. 4.01, eff. September 1, 2005.

Art. 38.101. COMMUNICATIONS BY DRUG ABUSERS. A communication to any person involved in the treatment or examination of drug abusers by a person being treated voluntarily or being examined for admission to voluntary treatment for drug

abuse is not admissible. However, information derived from the treatment or examination of drug abusers may be used for statistical and research purposes if the names of the patients are not revealed.
Added by Acts 1971, 62nd Leg., p. 2984, ch. 983, Sec. 2, eff. June 15, 1971.

Art. 38.12. RELIGIOUS OPINION. No person is incompetent to testify on account of his religious opinion or for the want of any religious belief.
Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Art. 38.14. TESTIMONY OF ACCOMPLICE. A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense.
Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Art. 38.141. TESTIMONY OF UNDERCOVER PEACE OFFICER OR SPECIAL INVESTIGATOR. (a) A defendant may not be convicted of an offense under Chapter 481, Health and Safety Code, on the testimony of a person who is not a licensed peace officer or a special investigator but who is acting covertly on behalf of a law enforcement agency or under the color of law enforcement unless the testimony is corroborated by other evidence tending to connect the defendant with the offense committed.

(b) Corroboration is not sufficient for the purposes of this article if the corroboration only shows the commission of the offense.

(c) In this article, "peace officer" means a person listed in Article 2.12, and "special investigator" means a person listed in Article 2.122.
Added by Acts 2001, 77th Leg., ch. 1102, Sec. 1, eff. Sept. 1, 2001.

Art. 38.15. TWO WITNESSES IN TREASON. No person can be convicted of treason except upon the testimony of at least two

witnesses to the same overt act, or upon his own confession in open court.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Art. 38.16. EVIDENCE IN TREASON. Evidence shall not be admitted in a prosecution for treason as to an overt act not expressly charged in the indictment; nor shall any person be convicted under an indictment for treason unless one or more overt acts are expressly charged therein.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Art. 38.17. TWO WITNESSES REQUIRED. In all cases where, by law, two witnesses, or one with corroborating circumstances, are required to authorize a conviction, if the requirement be not fulfilled, the court shall instruct the jury to render a verdict of acquittal, and they are bound by the instruction.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Art. 38.18. PERJURY AND AGGRAVATED PERJURY. (a) No person may be convicted of perjury or aggravated perjury if proof that his statement is false rests solely upon the testimony of one witness other than the defendant.

(b) Paragraph (a) of this article does not apply to prosecutions for perjury or aggravated perjury involving inconsistent statements.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722. Amended by Acts 1973, 63rd Leg., p. 973, ch. 399, Sec. 2(A), eff. Jan. 1, 1974.

Art. 38.19. INTENT TO DEFRAUD IN FORGERY. In trials of forgery, it need not be proved that the defendant committed the act with intent to defraud any particular person. It shall be sufficient to prove that the forgery was, in its nature, calculated to injure or defraud any of the sovereignties, bodies corporate or politic, officers or persons, named in the definition of forgery in the Penal Code.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Art. 38.21. STATEMENT. A statement of an accused may be used in evidence against him if it appears that the same was freely and voluntarily made without compulsion or persuasion, under the rules hereafter prescribed.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722. Amended by Acts 1977, 65th Leg., p. 935, ch. 348, Sec. 1, eff. Aug. 29, 1977.

Art. 38.22. WHEN STATEMENTS MAY BE USED.

Sec. 1. In this article, a written statement of an accused means a statement signed by the accused or a statement made by the accused in his own handwriting or, if the accused is unable to write, a statement bearing his mark, when the mark has been witnessed by a person other than a peace officer.

Sec. 2. No written statement made by an accused as a result of custodial interrogation is admissible as evidence against him in any criminal proceeding unless it is shown on the face of the statement that:

(a) the accused, prior to making the statement, either received from a magistrate the warning provided in Article 15.17 of this code or received from the person to whom the statement is made a warning that:

(1) he has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial;

(2) any statement he makes may be used as evidence against him in court;

(3) he has the right to have a lawyer present to advise him prior to and during any questioning;

(4) if he is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him prior to and during any questioning; and

(5) he has the right to terminate the interview at any time; and

(b) the accused, prior to and during the making of the statement, knowingly, intelligently, and voluntarily waived the rights set out in the warning prescribed by Subsection (a) of this section.

Sec. 3. (a) No oral or sign language statement of an accused made as a result of custodial interrogation shall be admissible against the accused in a criminal proceeding unless:

(1) an electronic recording, which may include motion picture, video tape, or other visual recording, is made of the statement;

(2) prior to the statement but during the recording the accused is given the warning in Subsection (a) of Section 2 above and the accused knowingly, intelligently, and voluntarily waives any rights set out in the warning;

(3) the recording device was capable of making an accurate recording, the operator was competent, and the recording is accurate and has not been altered;

(4) all voices on the recording are identified; and

(5) not later than the 20th day before the date of the proceeding, the attorney representing the defendant is provided with a true, complete, and accurate copy of all recordings of the defendant made under this article.

(b) Every electronic recording of any statement made by an accused during a custodial interrogation must be preserved until such time as the defendant's conviction for any offense relating thereto is final, all direct appeals therefrom are exhausted, or the prosecution of such offenses is barred by law.

(c) Subsection (a) of this section shall not apply to any statement which contains assertions of facts or circumstances that are found to be true and which conduce to establish the guilt of the accused, such as the finding of secreted or stolen property or the instrument with which he states the offense was committed.

(d) If the accused is a deaf person, the accused's statement under Section 2 or Section 3(a) of this article is not admissible against the accused unless the warning in Section 2 of this article is interpreted to the deaf person by an interpreter who is qualified and sworn as provided in Article 38.31 of this code.

(e) The courts of this state shall strictly construe Subsection (a) of this section and may not interpret Subsection (a) as making admissible a statement unless all requirements of the subsection have been satisfied by the state, except that:

(1) only voices that are material are identified; and

(2) the accused was given the warning in Subsection (a) of Section 2 above or its fully effective equivalent.

Sec. 4. When any statement, the admissibility of which is covered by this article, is sought to be used in connection with an official proceeding, any person who swears falsely to facts and circumstances which, if true, would render the statement admissible under this article is presumed to have acted with intent to deceive and with knowledge of the statement's meaning for the purpose of prosecution for aggravated perjury under Section 37.03 of the Penal Code. No person prosecuted under this subsection shall be eligible for probation.

Sec. 5. Nothing in this article precludes the admission of a statement made by the accused in open court at his trial, before a grand jury, or at an examining trial in compliance with Articles 16.03 and 16.04 of this code, or of a statement that is the res gestae of the arrest or of the offense, or of a statement that does not stem from custodial interrogation, or of a voluntary statement, whether or not the result of custodial interrogation, that has a bearing upon the credibility of the accused as a witness, or of any other statement that may be admissible under law.

Sec. 6. In all cases where a question is raised as to the voluntariness of a statement of an accused, the court must make an independent finding in the absence of the jury as to whether the statement was made under voluntary conditions. If the statement has been found to have been voluntarily made and held admissible as a matter of law and fact by the court in a hearing in the absence of the jury, the court must enter an order stating its conclusion as to whether or not the statement was voluntarily made, along with the specific finding of facts upon which the conclusion was based, which order shall be filed among the papers of the cause. Such order shall not be exhibited to the jury nor the finding thereof made known to the jury in any manner. Upon the finding by the judge as a matter of law and fact that the statement was voluntarily made, evidence pertaining to such matter may be submitted to the jury and it shall be instructed that unless the jury believes beyond a reasonable doubt that the statement was voluntarily made, the jury

shall not consider such statement for any purpose nor any evidence obtained as a result thereof. In any case where a motion to suppress the statement has been filed and evidence has been submitted to the court on this issue, the court within its discretion may reconsider such evidence in his finding that the statement was voluntarily made and the same evidence submitted to the court at the hearing on the motion to suppress shall be made a part of the record the same as if it were being presented at the time of trial. However, the state or the defendant shall be entitled to present any new evidence on the issue of the voluntariness of the statement prior to the court's final ruling and order stating its findings.

Sec. 7. When the issue is raised by the evidence, the trial judge shall appropriately instruct the jury, generally, on the law pertaining to such statement.

Sec. 8. Notwithstanding any other provision of this article, a written, oral, or sign language statement of an accused made as a result of a custodial interrogation is admissible against the accused in a criminal proceeding in this state if:

(1) the statement was obtained in another state and was obtained in compliance with the laws of that state or this state; or

(2) the statement was obtained by a federal law enforcement officer in this state or another state and was obtained in compliance with the laws of the United States.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722. Amended by Acts 1967, 60th Leg., p. 1740, ch. 659, Sec. 23, eff. Aug. 28, 1967; Acts 1977, 65th Leg., p. 935, ch. 348, Sec. 2, eff. Aug. 29, 1977.

Sec. 3(a) amended by Acts 1979, 66th Leg., p. 398, ch. 186, Sec. 4, eff. May 15, 1979; Sec. 3(d) added by Acts 1979, 66th Leg., p. 398, ch. 186, Sec. 5, eff. May 15, 1979; Sec. 3 amended by Acts 1981, 67th Leg., p. 711, ch. 271, Sec. 1, eff. Sept. 1, 1981; Sec. 3(a) amended by Acts 1989, 71st Leg., ch. 777, Sec. 1, eff. Sept. 1, 1989; Sec. 3(e) added by Acts 1989, 71st Leg., ch. 777, Sec. 2, eff. Sept. 1, 1989; Sec. 8 added by Acts 2001, 77th Leg., ch. 990, Sec. 1, eff. Sept. 1, 2001.

Art. 38.23. EVIDENCE NOT TO BE USED. (a) No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.

In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

(b) It is an exception to the provisions of Subsection (a) of this Article that the evidence was obtained by a law enforcement officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Amended by Acts 1987, 70th Leg., ch. 546, Sec. 1, eff. Sept. 1, 1987.

Art. 38.25. WRITTEN PART OF INSTRUMENT CONTROLS. When an instrument is partly written and partly printed, the written shall control the printed portion when the two are inconsistent.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Art. 38.27. EVIDENCE OF HANDWRITING. It is competent to give evidence of handwriting by comparison, made by experts or by the jury. Proof by comparison only shall not be sufficient to establish the handwriting of a witness who denies his signature under oath.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Art. 38.30. INTERPRETER. (a) When a motion for appointment of an interpreter is filed by any party or on motion of the court, in any criminal proceeding, it is determined that a person charged or a witness does not understand and speak the English language, an interpreter must be sworn to interpret for the person charged or the witness. Any person may be subpoenaed, attached or recognized in any criminal action or proceeding, to appear before the proper

judge or court to act as interpreter therein, under the same rules and penalties as are provided for witnesses. In the event that the only available interpreter is not considered to possess adequate interpreting skills for the particular situation or the interpreter is not familiar with use of slang, the person charged or witness may be permitted by the court to nominate another person to act as intermediary between the person charged or witness and the appointed interpreter during the proceedings.

(a-1) A qualified telephone interpreter may be sworn to interpret for the person in the trial of a Class C misdemeanor or a proceeding before a magistrate if an interpreter is not available to appear in person before the court or if the only available interpreter is not considered to possess adequate interpreting skills for the particular situation or is unfamiliar with the use of slang. In this subsection, "qualified telephone interpreter" means a telephone service that employs:

(1) licensed court interpreters as defined by Section 57.001, Government Code; or

(2) federally certified court interpreters.

(b) Except as provided by Subsection (c) of this article, interpreters appointed under the terms of this article will receive from the general fund of the county for their services a sum not to exceed $100 a day as follows: interpreters shall be paid not less than $15 nor more than $100 a day at the discretion of the judge presiding, and when travel of the interpreter is involved all the actual expenses of travel, lodging, and meals incurred by the interpreter pertaining to the case the interpreter is appointed to serve shall be paid at the same rate applicable to state employees.

(c) A county commissioners court may set a payment schedule and expend funds for the services of interpreters in excess of the daily amount of not less than $15 or more than $100 established by Subsection (b) of this article.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Amended by Acts 1979, 66th Leg., p. 453, ch. 209, Sec. 1, eff. Aug. 27, 1979; Acts 1991, 72nd Leg., ch. 700, Sec. 1, eff. June 16, 1991.

Amended by:

Acts 2005, 79th Leg., Ch. 956, Sec. 1, eff. September 1, 2005.

Art. 38.31. INTERPRETERS FOR DEAF PERSONS. (a) If the court is notified by a party that the defendant is deaf and will be present at an arraignment, hearing, examining trial, or trial, or that a witness is deaf and will be called at a hearing, examining trial, or trial, the court shall appoint a qualified interpreter to interpret the proceedings in any language that the deaf person can understand, including but not limited to sign language. On the court's motion or the motion of a party, the court may order testimony of a deaf witness and the interpretation of that testimony by the interpreter visually, electronically recorded for use in verification of the transcription of the reporter's notes. The clerk of the court shall include that recording in the appellate record if requested by a party under Article 40.09 of this Code.

(b) Following the filing of an indictment, information, or complaint against a deaf defendant, the court on the motion of the defendant shall appoint a qualified interpreter to interpret in a language that the defendant can understand, including but not limited to sign language, communications concerning the case between the defendant and defense counsel. The interpreter may not disclose a communication between the defendant and defense counsel or a fact that came to the attention of the interpreter while interpreting those communications if defense counsel may not disclose that communication or fact.

(c) In all cases where the mental condition of a person is being considered and where such person may be committed to a mental institution, and where such person is deaf, all of the court proceedings pertaining to him shall be interpreted by a qualified interpreter appointed by the court.

(d) A proceeding for which an interpreter is required to be appointed under this Article may not commence until the appointed interpreter is in a position not exceeding ten feet from and in full view of the deaf person.

(e) The interpreter appointed under the terms of this Article shall be required to take an oath that he will make a true interpretation to the person accused or being examined, which person is deaf, of all the proceedings of his case in a language

that he understands; and that he will repeat said deaf person's answer to questions to counsel, court, or jury, in the English language, in his best skill and judgment.

(f) Interpreters appointed under this Article are entitled to a reasonable fee determined by the court after considering the recommendations of the Texas Commission for the Deaf and Hard of Hearing. When travel of the interpreter is involved all the actual expenses of travel, lodging, and meals incurred by the interpreter pertaining to the case he is appointed to serve shall be paid at the same rate applicable to state employees.

(g) In this Code:

(1) "Deaf person" means a person who has a hearing impairment, regardless of whether the person also has a speech impairment, that inhibits the person's comprehension of the proceedings or communication with others.

(2) "Qualified interpreter" means an interpreter for the deaf who holds a current legal certificate issued by the National Registry of Interpreters for the Deaf or a current court interpreter certificate issued by the Board for Evaluation of Interpreters at the Department of Assistive or Rehabilitative Services.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722. Amended by Acts 1967, 60th Leg., p. 195, ch. 105, Sec. 2, eff. Aug. 28, 1967.

Amended by Acts 1979, 66th Leg., p. 396, ch. 186, Sec. 1, eff. May 15, 1979; Acts 1987, 70th Leg., ch. 434, Sec. 1, eff. June 17, 1987; Subsec. (f) amended by Acts 1995, 74th Leg., ch. 835, Sec. 14, eff. Sept. 1, 1995.

Amended by:

Acts 2005, 79th Leg., Ch. 614, Sec. 11, eff. September 1, 2006.

Art. 38.32. PRESUMPTION OF DEATH. (a) Upon introduction and admission into evidence of a valid certificate of death wherein the time of death of the decedent has been entered by a licensed physician, a presumption exists that death occurred at the time stated in the certificate of death.

(b) A presumption existing pursuant to Section (a) of this

Article is sufficient to support a finding as to time of death but may be rebutted through a showing by a preponderance of the evidence that death occurred at some other time.

Added by Acts 1969, 61st Leg., p. 1034, ch. 337, Sec. 1, eff. May 27, 1969.

Art. 38.33. PRESERVATION AND USE OF EVIDENCE OF CERTAIN MISDEMEANOR CONVICTIONS.

Sec. 1. The court shall order that a defendant who is convicted of a felony or a misdemeanor offense that is punishable by confinement in jail have a thumbprint of the defendant's right thumb rolled legibly on the judgment or the docket sheet in the case. The court shall order a defendant who is placed on probation under Section 5 of Article 42.12, Code of Criminal Procedure, for an offense described by this section to have a thumbprint of the defendant's right thumb rolled legibly on the order placing the defendant on probation. If the defendant does not have a right thumb, the defendant must have a thumbprint of the defendant's left thumb rolled legibly on the judgment, order, or docket sheet. The defendant must have a fingerprint of the defendant's index finger rolled legibly on the judgment, order, or docket sheet if the defendant does not have a right thumb or a left thumb. The judgment, order, or docket sheet must contain a statement that describes from which thumb or finger the print was taken, unless a rolled 10-finger print set was taken. A clerk or bailiff of the court or other person qualified to take fingerprints shall take the thumbprint or fingerprint, either by use of the ink-rolled print method or by use of a live-scanning device that prints the thumbprint or fingerprint image on the judgment, order, or docket sheet.

Sec. 2. This article does not prohibit a court from including in the records of the case additional information to identify the defendant.

Added by Acts 1979, 66th Leg., p. 1851, ch. 751, Sec. 1, eff. Sept. 1, 1979. Sec. 1 amended by Acts 1983, 68th Leg., p. 1586, ch. 303, Sec. 7, eff. Jan. 1, 1984. Amended by Acts 1987, 70th Leg., ch. 721, Sec. 1, eff. Sept. 1, 1987. Sec. 1 amended by Acts 1989, 71st Leg.,

ch. 603, Sec. 1, eff. Sept. 1, 1989; Acts 1991, 72nd Leg., 2nd C.S., ch. 10, Sec. 7.01, eff. Dec. 1, 1991.

Art. 38.34. PHOTOGRAPHIC EVIDENCE IN THEFT CASES. (a) As used herein, the term "property" means tangible personal property offered for sale or lease by a person engaged in the business of selling goods or services to buyers.

(b) A photograph of property which a person is alleged to have unlawfully appropriated with the intent to deprive the owner of such property is admissible into evidence under rules of law governing the admissibility of photographs and such photograph is as admissible in evidence as the property itself.

(c) The provisions of Article 18.16 of this code concerning the bringing of stolen property before a magistrate for examination are complied with if a photograph of the stolen property is brought before the magistrate.

(d) The defendant's rights of discovery and inspection of tangible physical evidence are satisfied if a photograph of the tangible property is made available to the defendant by the state upon order of any court having jurisdiction over the cause.
Added by Acts 1985, 69th Leg., ch. 144, Sec. 1, eff. Sept. 1, 1985.

Art. 38.35. FORENSIC ANALYSIS OF EVIDENCE; ADMISSIBILITY. (a) In this article:

(1) "Crime laboratory" includes a public or private laboratory or other entity that conducts a forensic analysis subject to this article.

(2) "Criminal action" includes an investigation, complaint, arrest, bail, bond, trial, appeal, punishment, or other matter related to conduct proscribed by a criminal offense.

(3) "Director" means the public safety director of the Department of Public Safety.

(4) "Forensic analysis" means a medical, chemical, toxicologic, ballistic, or other expert examination or test performed on physical evidence, including DNA evidence, for the purpose of determining the connection of the evidence to a criminal action. The term includes an examination or test requested by a

law enforcement agency, prosecutor, criminal suspect or defendant, or court. The term does not include:

(A) latent print examination;

(B) a test of a specimen of breath under Chapter 724, Transportation Code;

(C) digital evidence;

(D) an examination or test excluded by rule under Section 411.0205(c), Government Code;

(E) a presumptive test performed for the purpose of determining compliance with a term or condition of community supervision or parole and conducted by or under contract with a community supervision and corrections department, the parole division of the Texas Department of Criminal Justice, or the Board of Pardons and Paroles; or

(F) an expert examination or test conducted principally for the purpose of scientific research, medical practice, civil or administrative litigation, or other purpose unrelated to determining the connection of physical evidence to a criminal action.

(5) "Physical evidence" means any tangible object, thing, or substance relating to a criminal action.

(b) A law enforcement agency, prosecutor, or court may request a forensic analysis by a crime laboratory of physical evidence if the evidence was obtained in connection with the requesting entity's investigation or disposition of a criminal action and the requesting entity:

(1) controls the evidence;

(2) submits the evidence to the laboratory; or

(3) consents to the analysis.

(c) A law enforcement agency, other governmental agency, or private entity performing a forensic analysis of physical evidence may require the requesting law enforcement agency to pay a fee for such analysis.

(d)(1) Except as provided by Subsection (e), a forensic analysis of physical evidence under this article and expert testimony relating to the evidence are not admissible in a criminal action if, at the time of the analysis, the crime laboratory

conducting the analysis was not accredited by the director under Section 411.0205, Government Code.

(2) If before the date of the analysis the director issues a certificate of accreditation under Section 411.0205, Government Code, to a crime laboratory conducting the analysis, the certificate is prima facie evidence that the laboratory was accredited by the director at the time of the analysis.

(e) A forensic analysis of physical evidence under this article and expert testimony relating to the evidence are not inadmissible in a criminal action based solely on the accreditation status of the crime laboratory conducting the analysis if the laboratory:

(A) except for making proper application, was eligible for accreditation by the director at the time of the examination or test; and

(B) obtains accreditation from the director before the time of testimony about the examination or test.

(f) This article does not apply to the portion of an autopsy conducted by a medical examiner or other forensic pathologist who is a licensed physician.

Added by Acts 1991, 72nd Leg., ch. 298, Sec. 1, eff. Sept. 1, 1991; Art. heading amended by Acts 2003, 78th Leg., ch. 698, Sec. 1, eff. June 20, 2003; Subsec. (a)(1) amended by Acts 2003, 78th Leg., ch. 698, Sec. 2, eff. June 20, 2003; Subsecs. (d), (e) added by Acts 2003, 78th Leg., ch. 698, Sec. 3, eff. June 20, 2003.

Amended by:

Acts 2005, 79th Leg., Ch. 1224, Sec. 2, eff. September 1, 2005.

Art. 38.36. EVIDENCE IN PROSECUTIONS FOR MURDER. (a) In all prosecutions for murder, the state or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense.

(b) In a prosecution for murder, if a defendant raises as a

defense a justification provided by Section 9.31, 9.32, or 9.33, Penal Code, the defendant, in order to establish the defendant's reasonable belief that use of force or deadly force was immediately necessary, shall be permitted to offer:

(1) relevant evidence that the defendant had been the victim of acts of family violence committed by the deceased, as family violence is defined by Section 71.004, Family Code; and

(2) relevant expert testimony regarding the condition of the mind of the defendant at the time of the offense, including those relevant facts and circumstances relating to family violence that are the basis of the expert's opinion.

Added by Acts 1993, 73rd Leg., ch. 900, Sec. 7.03, eff. Sept. 1, 1994. Subsec. (b) amended by Acts 2003, 78th Leg., ch. 1276, Sec. 7.002(g), eff. Sept. 1, 2003.

Art. 38.37. EVIDENCE OF EXTRANEOUS OFFENSES OR ACTS.

Sec. 1. This article applies to a proceeding in the prosecution of a defendant for an offense under the following provisions of the Penal Code, if committed against a child under 17 years of age:

(1) Chapter 21 (Sexual Offenses);

(2) Chapter 22 (Assaultive Offenses);

(3) Section 25.02 (Prohibited Sexual Conduct);

(4) Section 43.25 (Sexual Performance by a Child); or

(5) an attempt or conspiracy to commit an offense listed in this section.

Sec. 2. Notwithstanding Rules 404 and 405, Texas Rules of Evidence, evidence of other crimes, wrongs, or acts committed by the defendant against the child who is the victim of the alleged offense shall be admitted for its bearing on relevant matters, including:

(1) the state of mind of the defendant and the child; and

(2) the previous and subsequent relationship between the defendant and the child.

Sec. 3. On timely request by the defendant, the state shall give the defendant notice of the state's intent to introduce in the

case in chief evidence described by Section 2 in the same manner as the state is required to give notice under Rule 404(b), Texas Rules of Evidence.

Sec. 4. This article does not limit the admissibility of evidence of extraneous crimes, wrongs, or acts under any other applicable law.

Added by Acts 1995, 74th Leg., ch. 318, Sec. 48(a), eff. Sept. 1, 1995.

Amended by:

Acts 2005, 79th Leg., Ch. 728, Sec. 4.004, eff. September 1, 2005.

Art. 38.38. EVIDENCE RELATING TO RETAINING ATTORNEY. Evidence that a person has contacted or retained an attorney is not admissible on the issue of whether the person committed a criminal offense. In a criminal case, neither the judge nor the attorney representing the state may comment on the fact that the defendant has contacted or retained an attorney in the case.

Added by Acts 1995, 74th Leg., ch. 318, Sec. 49, eff. Sept. 1, 1995.

Art. 38.39. EVIDENCE IN AN AGGREGATION PROSECUTION WITH NUMEROUS VICTIMS. In trials involving an allegation of a continuing scheme of fraud or theft alleged to have been committed against a large class of victims in an aggregate amount or value, it need not be proved by direct evidence that each alleged victim did not consent or did not effectively consent to the transaction in question. It shall be sufficient if the lack of consent or effective consent to a particular transaction or transactions is proven by either direct or circumstantial evidence.

Added by Acts 2001, 77th Leg., ch. 1411, Sec. 2, eff. Sept. 1, 2001.

Art. 38.40. EVIDENCE OF PREGNANCY. (a) In a prosecution for the death of or injury to an individual who is an unborn child, the prosecution shall provide medical or other evidence that the mother of the individual was pregnant at the time of the alleged offense.

(b) For the purpose of this section, "individual" has the meaning assigned by Section 1.07, Penal Code.

Added by Acts 2003, 78th Leg., ch. 822, Sec. 2.06, eff. Sept. 1, 2003.

Art. 38.41. CERTIFICATE OF ANALYSIS.

Sec. 1. A certificate of analysis that complies with this article is admissible in evidence on behalf of the state or the defendant to establish the results of a laboratory analysis of physical evidence conducted by or for a law enforcement agency without the necessity of the analyst personally appearing in court.

Sec. 2. This article does not limit the right of a party to summon a witness or to introduce admissible evidence relevant to the results of the analysis.

Sec. 3. A certificate of analysis under this article must contain the following information certified under oath:

(1) the names of the analyst and the laboratory employing the analyst;

(2) a statement that the laboratory employing the analyst is accredited by a nationally recognized board or association that accredits crime laboratories;

(3) a description of the analyst's educational background, training, and experience;

(4) a statement that the analyst's duties of employment included the analysis of physical evidence for one or more law enforcement agencies;

(5) a description of the tests or procedures conducted by the analyst;

(6) a statement that the tests or procedures used were reliable and approved by the laboratory employing the analyst; and

(7) the results of the analysis.

Sec. 4. Not later than the 20th day before the trial begins in a proceeding in which a certificate of analysis under this article is to be introduced, the certificate must be filed with the clerk of the court and a copy must be provided by fax, hand delivery, or certified mail, return receipt requested, to the opposing party. The certificate is not admissible under Section 1 if, not later than the 10th day before the trial begins, the opposing party files a written objection to the use of the certificate with the clerk of

the court and provides a copy of the objection by fax, hand delivery, or certified mail, return receipt requested, to the offering party.

Sec. 5. A certificate of analysis is sufficient for purposes of this article if it uses the following form or if it otherwise substantially complies with this article:

CERTIFICATE OF ANALYSIS

BEFORE ME, the undersigned authority, personally appeared _____, who being duly sworn, stated as follows:

My name is _____. I am of sound mind, over the age of 18 years, capable of making this affidavit, and personally acquainted with the facts stated in this affidavit.

I am employed by the _____, which was authorized to conduct the analysis referenced in this affidavit. Part of my duties for this laboratory involved the analysis of physical evidence for one or more law enforcement agencies. This laboratory is accredited by _____.

My educational background is as follows: (description of educational background)

My training and experience that qualify me to perform the tests or procedures referred to in this affidavit and determine the results of those tests or procedures are as follows: (description of training and experience)

I received the physical evidence listed on laboratory report no. _____ (attached) on the ___ day of _____, 20___. On the date indicated in the laboratory report, I conducted the following tests or procedures on the physical evidence: (description of tests and procedures)

The tests and procedures used were reliable and approved by the laboratory. The results are as indicated on the lab report.

_____

Affiant

SWORN TO AND SUBSCRIBED before me on the ___ day of _____, 20___.

_____

Notary Public, State of Texas

Added by Acts 2003, 78th Leg., ch. 923, Sec. 1, eff. Sept. 1, 2003.

Art. 38.42. CHAIN OF CUSTODY AFFIDAVIT.

Sec. 1. A chain of custody affidavit that complies with this article is admissible in evidence on behalf of the state or the defendant to establish the chain of custody of physical evidence without the necessity of any person in the chain of custody personally appearing in court.

Sec. 2. This article does not limit the right of a party to summon a witness or to introduce admissible evidence relevant to the chain of custody.

Sec. 3. A chain of custody affidavit under this article must contain the following information stated under oath:

(1) the affiant's name and address;

(2) a description of the item of evidence and its container, if any, obtained by the affiant;

(3) the name of the affiant's employer on the date the affiant obtained custody of the physical evidence;

(4) the date and method of receipt and the name of the person from whom or location from which the item of physical evidence was received;

(5) the date and method of transfer and the name of the person to whom or location to which the item of physical evidence was transferred; and

(6) a statement that the item of evidence was transferred in essentially the same condition as received except for any minor change resulting from field or laboratory testing procedures.

Sec. 4. Not later than the 20th day before the trial begins in a proceeding in which a chain of custody affidavit under this article is to be introduced, the affidavit must be filed with the clerk of the court and a copy must be provided by fax, hand delivery, or certified mail, return receipt requested, to the opposing party. The affidavit is not admissible under Section 1 if, not later than the 10th day before the trial begins, the opposing party files a written objection to the use of the affidavit with the clerk of the court and provides a copy of the objection by fax, hand delivery, or certified mail, return receipt requested, to the

offering party.

Sec. 5. A chain of custody affidavit is sufficient for purposes of this article if it uses the following form or if it otherwise substantially complies with this article:

CHAIN OF CUSTODY AFFIDAVIT

BEFORE ME, the undersigned authority, personally appeared _____, who being by me duly sworn, stated as follows:

My name is _____. I am of sound mind, over the age of 18 years, capable of making this affidavit, and personally acquainted with the facts stated in this affidavit.

My address is _____.

On the ___ day of _____, 20___, I was employed by _____.

On that date, I came into possession of the physical evidence described as follows: (description of evidence)

I received the physical evidence from _____ (name of person or description of location) on the ___ day of _____, 20___, by _____ (method of receipt).

This physical evidence was in a container described and marked as follows: (description of container)

I transferred the physical evidence to _____ (name of person or description of location) on the ___ day of _____, 20___, by _____ (method of delivery).

During the time that the physical evidence was in my custody, I did not make any changes or alterations to the condition of the physical evidence except for those resulting from field or laboratory testing procedures, and the physical evidence or a representative sample of the physical evidence was transferred in essentially the same condition as received.

_____

Affiant

SWORN TO AND SUBSCRIBED before me on the ___ day of _____, 20___.

_____

Notary Public, State of Texas

Added by Acts 2003, 78th Leg., ch. 923, Sec. 1, eff. Sept. 1, 2003.

Art. 38.43. PRESERVATION OF EVIDENCE CONTAINING BIOLOGICAL MATERIAL. (a) In a criminal case in which a defendant is convicted, the attorney representing the state, a clerk, or any other officer in possession of evidence described by Subsection (b) shall ensure the preservation of the evidence.

(b) This article applies to evidence that:

(1) was in the possession of the state during the prosecution of the case; and

(2) at the time of conviction was known to contain biological material that if subjected to scientific testing would more likely than not:

(A) establish the identity of the person committing the offense; or

(B) exclude a person from the group of persons who could have committed the offense.

(c) Except as provided by Subsection (d), material required to be preserved under this article must be preserved:

(1) until the inmate is executed, dies, or is released on parole, if the defendant was convicted of a capital felony; or

(2) until the defendant dies, completes the defendant's sentence, or is released on parole or mandatory supervision, if the defendant is sentenced to a term of confinement or imprisonment.

(d) The attorney representing the state, clerk, or other officer in possession of evidence described by Subsection (b) may destroy the evidence, but only if the attorney, clerk, or officer by mail notifies the defendant, the last attorney of record for the defendant, and the convicting court of the decision to destroy the evidence and a written objection is not received by the attorney, clerk, or officer from the defendant, attorney of record, or court before the 91st day after the later of the following dates:

(1) the date on which the attorney representing the state, clerk, or other officer receives proof that the defendant received notice of the planned destruction of evidence; or

(2) the date on which notice of the planned destruction of evidence is mailed to the last attorney of record for the defendant.

(e) To the extent of any conflict, this article controls over

Article 2.21.

Added by Acts 2001, 77th Leg., ch. 2, Sec. 1, eff. April 5, 2001.

Renumbered from Code of Criminal Procedure, Art/Sec 38.39 by Acts 2005, 79th Leg., Ch. 728, Sec. 23.001(8), eff. September 1, 2005.

Art. 38.44. ADMISSIBILITY OF ELECTRONICALLY PRESERVED DOCUMENT. An electronically preserved document has the same legal significance and admissibility as if the document had been maintained in hard-copy form. If a party opposes admission of the document on the grounds that the document has been materially altered, the proponent of the document must disprove the allegation by a preponderance of the evidence.

Added by Acts 2005, 79th Leg., Ch. 312, Sec. 5, eff. June 17, 2005.