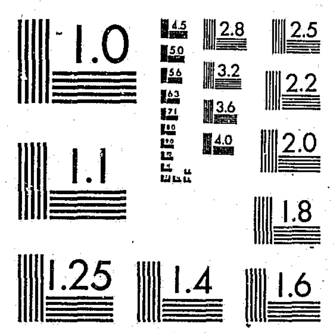

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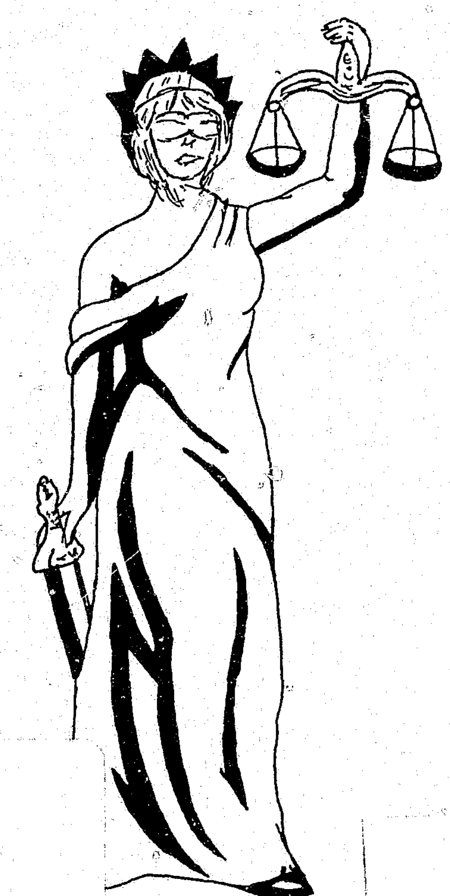
TEXAS ADULT PROBATION LAW MANUAL



A TEXT FOR PROBATION OFFICERS

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TEXAS ADULT PROBATION LAW MANUAL

A Text for Probation Officers

by

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for

Texas Adult Probation Commission

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October, 1981

Foreword

The Texas Adult Probation Commission is pleased to provide this manual to probation officers and other interested persons. It is intended to be a resource to meet the need expressed by many Judges, Chief probation officers, legislators and others. It is not intended and should not be used in lieu of legal counsel, but should provide the legal knowledge for day to day operations.

This manual was written by Robert O. Dawson, professor of law at the University of Texas School of Law. Dr. Dawson's knowledge of the administration of criminal justice has gained national recognition and respect. He has drawn from both Texas and United States statutes and has carefully researched and quoted decisions of the Texas Court of Criminal Appeals and opinions of the Attorney General of Texas. Appropriate United States District, Circuit and Supreme Court decisions have been considered and cited.

Probation officers are encouraged to use this manual in conjunction with the Texas Adult Probation Manual II and Records Confidentiality for Adult Probation Offices – A Guideline, published by the TAPC.

I would like to express my appreciation to Dr. Dawson and those who assisted him in this work, and to the individual members of our Commission whose support made this publication possible. The Honorable Joe R. Greenhill, Chief Justice of the Supreme Court of Texas and the Honorable John F. Onion, Jr., Presiding Judge of the Court of Criminal Appeals are to be commended for their selection and appointment of highly competent and dedicated members of our Commission.

Many years ago, Judge Onion wrote a similar publication which contributed greatly to the improvement of probation services in Texas and served to encourage and guide me as a young inexperienced probation officer. I hope this publication will be as meaningful in improving probation services.

The TAPC staff and Dr. Dawson will work together to update this manual annually in order that the knowledge of law under which probation officers serve will remain current. Readers are encouraged to submit suggestions concerning content and format to Malcolm MacDonald, Program Development Specialist. It is our desire that this manual and future additions be relevant to the duties of the probation officers of Texas.

Don R. Stiles
Executive Director
Texas Adult Probation Commission

AUTHOR'S PREFACE

This is a text about adult probation law in Texas. It is written expressly for probation officers and administrators. I have attempted to explain the law fully and accurately yet in language that can be understood readily by the professional probation officer who is not law-trained.

I have liberally quoted from statutes and judicial opinions on the theory that accuracy is increased by doing so. Whenever a statement of law is made I have backed up that statement by a legal citation to a statute, case or opinion of the attorney general. The full text of the statutes and judicial opinions should be available in almost any county law library. I have placed the legal citations in brackets [ ] for ready identifiability. I have used the following "shorthand" for legal citations:

U.S.	The first numbers are the volume number of the United States Reports and the second numbers are the page of that volume on which the opinion begins. All citations in this form are to opinions of the United States Supreme Court.
S.W. 2d	This citation is to be the volume and page number of the South Western Reporter, 2d Series. Virtually all opinions with that citation are from the Texas Court of Criminal Appeals, the highest court in Texas with criminal jurisdiction. I have occasionally cited an opinion of the Court of Criminal Appeals that has not yet appeared in the South Western Reporter, 2d Series. When doing so, I have cited the five digit cause number used by the Court of Criminal Appeals and the date the decision was announced.

The number in parentheses following the case citation is the year in which the opinion was announced. For opinions rendered after 1977, when the Court of Criminal Appeals was increased from 5 to 9 judges and was empowered to decide cases as a single court or in panels of 3 judges each, I have indicated whether the opinion is from the full court (En Banc) or from a panel of 3 judges (Panel).

Op. Atty. Gen. MW	This citation is to an opinion of the current Attorney General of Texas, Mark White. It is concluded with the number of the opinion and the exact date it was issued.

With respect to statutes, I have cited the Texas Penal Code as TPC. . Since most of the statutory citations are to the Texas Code of Criminal Procedure, I have simply cited it by Article number, thus: Art. , . I have cited Articles in the Civil Statutes as Civil Statutes Art.

* * *

I have been assisted in this undertaking by a number of very competent people. Among them I wish to thank Don Stiles, Jim McDonough, and, especially, Malcolm MacDonald, of the Texas Adult Probation Commission for their dedicated assistance in seeing this project through to its conclusion. Earlier drafts of this text were reviewed by a Readership Committee provided by the Adult Probation Commission. Members of the Committee were:

Dr. Rolando del Carmen of Sam Houston State University
Mr. Bill Edrington, Director of Adult Probation, Amarillo
Mr. Art Keinarth, Assistant Attorney General, now in private practice
Mr. Ron Roberts, Assistant Chief Adult Probation Officer, Corpus Christi

Each responded promptly to submissions of the manuscript and each made significant contributions to the text. They deserve our thanks.

I was assisted in this project by two very able research assistants. They were Ms. Leslie McCollom and Mr. Miguel Martinez.

* * *

The reader may notice some overlap of case discussion among Chapters 4, 5, and 6. To some extent, this repetition is a function of looking at the same phenomenon from different perspectives but it also represents a decision to make each chapter as complete as possible to enhance the usefulness of the text as a source for quick reference.

INTRODUCTION

Probation in Texas has its legal basis in the Texas Constitution. Article IV, Section 11A was added to the Constitution in 1935. It provides:

> The Courts of the State of Texas having original jurisdiction of criminal actions shall have the power after conviction, to suspend the imposition or execution of sentence and to place the defendant upon probation and to reimpose such sentence, under such conditions as the Legislature may prescribe.

The Legislature has enacted comprehensive statutes dealing with adult probation. Felony probation is provided for in Article 42.12, Secs. 1 through 11a of the Code of Criminal Procedure and misdemeanor probation in Article 42.13 of the Code. The felony statute was originally enacted in 1947 to supplement the Suspended Sentence Act of 1913. The misdemeanor statute was not enacted until 1965. Each has been amended in almost every session of the Legislature since enactment. In 1979, Article 42.13 underwent a comprehensive revision. Statutes outside of the Code of Criminal Procedure also form part of Texas probation law. An example is the provision for conditional discharge under the Controlled Substances Act [Civil Statutes Art. 4476-15, Sec. 4.12].

These statutory provisions frequently are the subject of litigation. When that occurs and the defendant appeals, an appellate court may publish an opinion deciding the dispute and declaring what the law is. In Texas that court is almost always the Court of Criminal Appeals. These opinions, no less than the statutes, form part of the law of probation in Texas. One of the major purposes of this text is to organize and explain the caselaw part of Texas probation law. In addition, certain public officials may request of the Texas Attorney General an opinion with regard to a question of law. Although an Attorney General's Opinion does not have the same force as a statute or appellate judicial opinion, it is entitled to and receives great weight in the legal community and is quite likely to be followed by trial and appellate courts when dealing with the same issue. For that reason, Attorney General's Opinions are included as part of the law of probation in Texas.

Finally, probationers, like other citizens, have Federal constitutional rights. Although the Supreme Court of the United States has refused to extend all the constitutional rights of one accused of crime to the granting of probation or to probation supervision and revocation [Gagnon v. Scarpelli, 411 U.S. 778 (1973) (no absolute right to counsel at probation revocation)] there is no doubt that practices and procedures dealing with probation are subject to overriding Federal due process restraints. The procedures employed must be fundamentally fair to the probationer and must provide a reasonably reliable means to determine relevant facts. Because Federal due process rights as articulated by the United States Supreme Court are also part of the Texas law of probation, they will be discussed in this text.

* * *

Two concepts are central to understanding Texas probation law. The first is the bifurcation of the Texas criminal trial into the guilt/innocence phase and the penalty phase. What that means is that the question of the accused's guilt or innocence is presented to the trier of fact (judge or jury) and only if

there is a finding of guilty is the question of penalty considered. Before bifurcation, a jury was given both the question of guilt/innocence and penalty and instructed if it found the accused guilty, it should assess the penalty, all as part of the same deliberative process. The second concept is the concept of assessment of punishment. When punishment is assessed in Texas it means simply that the proper authority (judge or jury) has selected a number of days or years of punishment within the range permitted by statute. Assessment of punishment itself does not determine whether the person will be sent to the jail or prison or will receive probation. Once punishment is assessed, the next question usually is whether the punishment will be imposed and the person incarcerated or whether imposition of punishment will be suspended and the person placed on probation. If probation is later revoked, the suspension of punishment is withdrawn and punishment is imposed. Finally, even if punishment is assessed and imposed, the execution of the punishment (actual incarceration) may be suspended if the defendant gives timely notice of appeal and posts appeal bond. The sequence of events of significance here is as follows: finding or verdict of guilty; judgment of guilty; assessment of punishment; imposition or suspension of imposition of punishment; suspension of execution of punishment pending appeal.

TABLE OF CONTENTS

The material contained in this publication dated September, 1981, reflects the changes in the Texas Code of Criminal Procedure relevant to probation law effectuated during the 67th Legislative Session (1981) of the Texas Legislature. All Attorney General Opinions promulgated and case law written prior to June 2, 1981, and relevant to adult probation, are included in the text.

CHAPTER 1.

SIX TYPES OF PROBATION: A SUMMARY

Although it is customary to refer to probation in Texas as if it were the same under all circumstances, with perhaps a distinction being made between felony and misdemeanor probation, that is not accurate. Under the law, there are really six types of probation, not one or two. Chapters 2 through 6 of this text deal with these probations in what might be viewed as a vertical fashion: Chapter 2 deals with questions of eligibility for each type of probation, Chapter 4 with probation conditions for each type of probation, and so on. The purpose of this Chapter is to view probations in a different way, what might be termed horizontal, and to compare all of the aspects of one type of probation with the others. This is a summary Chapter. Many of the details provided in later chapters are omitted and only the broad outlines of the different types of probations are provided. It is intended, in short, to provide background information for the Chapters that follow.

The six types of probation presently recognized by Texas law are (1) regular felony probation, (2) regular misdemeanor probation, (3) felony deferred adjudication probation, (4) misdemeanor deferred adjudication probation, (5) community service deferred adjudication probation, and (6) conditional discharge.

A. REGULAR FELONY AND MISDEMEANOR PROBATION

Before 1979 there were numerous differences between regular felony and misdemeanor probation. In 1979, the misdemeanor probation law was rewritten by the Legislature to eliminate almost all of those differences; however, a few remain and this section compares these two types of probation by identifying the places where they still differ.

A person is eligible to receive regular felony or misdemeanor probation from a jury if he or she has never been convicted of a felony. Any person may receive misdemeanor probation from the judge. With exceptions discussed in detail in Chapter 2, any person may receive felony probation from the judge. The term of felony probation may be as short as two years and as long as ten years, while the term of misdemeanor probation must be for the maximum jail term permitted by law for the offense of which the probationer was convicted. A probationer may be discharged from felony probation upon completing one-third of the term or two

years, whichever is less. One may be discharged from misdemeanor probation upon completing one-third of the term. Upon discharge from felony probation, the trial court may dismiss the case; upon discharge from misdemeanor probation the trial court must dismiss the case. A person who has successfully served either felony or misdemeanor probation, been discharged and had the case dismissed is still convicted for most purposes, however. These differences are discussed in detail in Chapter 7.

The permissible conditions of probation are now the same for regular felony and misdemeanor probation. Shock probation is available for either felonies or misdemeanors. The procedural requirements for revoking probation now appear to be identical. Prior to the 1979 change in the misdemeanor law, the courts had held that one charged with a violation of misdemeanor probation was entitled to have bail set pending a revocation hearing, while one charged with violation of felony probation was not. This resulted from language in the statutes that indicated that a person on felony probation had been convicted, while a person on misdemeanor probation had not been convicted. As a result of the revision of the misdemeanor law, it is now an open question whether there is a right to bail pending revocation of misdemeanor probation. Upon revocation of either felony or misdemeanor probation, the trial court in its discretion may reduce the sentence to prison or jail to any term that could have been given for the offense as an original matter.

B. FELONY AND MISDEMEANOR DEFERRED ADJUDICATION PROBATION

In 1975, the Legislature authorized deferred adjudication probation in felony cases and in 1979 that type of probation was made available in misdemeanor cases. One is eligible for deferred adjudication probation if he or she pleads guilty or no contest, but is not eligible if found guilty on a plea of not guilty. A jury cannot grant deferred adjudication probation.

There are a number of differences between deferred adjudication probation and regular probation. The most important difference is that one placed on regular probation has been convicted of an offense, whereas one placed on deferred adjudication probation has not been convicted. The processing of the case is halted and the defendant is placed on probation prior to conviction (adjudication), hence, the name "deferred adjudication". By contrast, in regular probation, the person is convicted and impostion of sentence is suspended. Regular probation could accurately be termed "deferred sentencing" probation. As Chapter 7 discusses in detail, it is often of great importance whether or not the person on probation is regarded by the law as having been convicted.

There are other differences as well. One placed on regular misdemeanor probation must be placed on probation initially for the maximum jail period permitted by the statute for the offense of which he or she was convicted. One placed on deferred adjudication misdemeanor probation may be placed on probation for any term up to that maximum. Upon successful completion of regular felony probation, the trial court "may" dismiss the case; upon successful completion of deferred adjudication felony probation, the trial court must dismiss the case.

The right to and scope of appeal are affected by the type of probation used. One placed on regular felony or misdemeanor probation has the right immediately to take an appeal to seek review of the proceedings leading to being placed on probation. The probation term does not begin until the appeal is decided. One placed on felony or misdemeanor deferred adjudication probation has no immediate right of appeal. One on regular felony or misdemeanor probation whose probation has been revoked may appeal but the appeal is limited to questions arising out of the revocation proceedings. He or she is not permitted ordinarily to obtain appellate review of questions arising out of the proceedings that led to being placed on probation in the first place, since there was the opportunity to take that appeal at the time of being placed on probation. When deferred adjudication felony or misdemeanor probation is revoked, however, one may appeal, and in that appeal, may question the proceedings that led to being placed on probation since there was no right of appeal as to those questions when being first placed on probation.

By Texas Constitution and statute, all prisoners, with some exceptions, have a right to bail before conviction. The right of bail after conviction is much more limited. In regular felony and possibly in regular misdemeanor probation (after the 1979 amendments), one arrested for probation violation does not have a right of bail. The trial court has discretion to set or deny bond because the probationer was convicted of an offense when placed on probation. By contrast, one on felony or misdemeanor deferred adjudication probation has not yet been convicted and if arrested for probation violation is entitled to have bond set.

Finally when regular felony or misdemeanor probation is revoked the trial court has discretion to impose the sentence assessed or to reduce it to any length that could have been assessed as an original matter. The trial court may not increase the sentence assessed. In contrast, with deferred adjudication felony or misdemeanor probation, no sentence was assessed when probation was granted and the trial court may impose any sentence that could have been imposed as an original matter, even if that means giving the maximum term permitted by the statute. In other words, the sentence may be "increased" upon revocation, as well as decreased.

Under a bill passed in 1981 the trial court is authorized in felony or misdemeanor deferred adjudication probation to impose any fine authorized for the offense of which the defendant was convicted and to require payment of the probation supervision fee authorized by statute. [Art. 42.12, Sec. 3d(a); Art. 42.13, Sec. 3d(a)]

C. COMMUNITY SERVICE DEFERRED ADJUDICATION PROBATION

In 1979, the Legislature authorized community service deferred adjudication probation in misdemeanor cases. This type of probation is identical to misdemeanor deferred adjudication probation except for the following differences. To be eligible for community service deferred adjudication probation the person must plead guilty to or no contest to a first offense misdemeanor that does not involve bodily injury or the threat of bodily injury to any person. Instead of placing the person on probation for a specified term, the person is placed on probation with a specified number of hours to work for a community service agency. For a Class A misdemeanor, the hours may not exceed 200 or be less than 80, and for a Class B misdemeanor, may not exceed 100 or be less than 24 hours. Finally, unlike all other types of probation in Texas, the trial court is required to impose the seven conditions of probation that are set out in the statute [Art. 42.13, Sec. 3B (e)]. Other conditions may be imposed as well.

In 1981, the Legislature authorized community service deferred adjudication probation in felony cases on virtually the same terms as in misdemeanor cases. The number of community service hours that may be ordered by the court is 320 to 1000 for a first degree felony, 240 to 800 for a second degree felony and 160-600 for a third degree felony. [Art. 42.12, Sec. 10A]

D. CONDITIONAL DISCHARGE

When the Texas Controlled Substances Act was enacted in 1973, the Legislature authorized a new procedure for probation called Conditional Discharge. It is very much like deferred adjudication felony or misdemeanor probation but there are some differences. It is available to one who pleads guilty or is found guilty of a violation of the Controlled Substances Act. It is not available if the person has a previous violation of the Act or of a similar federal or other state Act. Adjudication is deferred; no sentence is assessed; the term of probation under the Act may be up to two years. Revocation proceedings appear to be the same as for deferred adjudication. Upon successful completion of conditional

discharge probation the trial court is required to dismiss the case and a non-public record of the case is maintained solely to determine future eligibility for conditional discharge. A person is entitled to only one conditional discharge under the Act.

CHAPTER 2.

PROBATION ELIGIBILITY AND PROCEDURES FOR OBTAINING PROBATION

Not everyone is legally eligible to receive probation. The Legislature has made probation legally available only to some persons who are charged with criminal offenses. Conversely, just because one is eligible to receive probation does not mean one has a right to receive it; it does mean, however, that one has a legal right to have the judge or jury decide in their discretion whether to give probation. The statutes and caselaw also impose certain procedural requirements that must be fulfilled before the question of whether the offender should receive probation will be submitted to the jury or considered by the judge.

Texas law is settled that when the defendant seeks probation from the trial court, it has absolute discretion to grant or withhold probation. Among the many statements of this point is the following typical one:

> The question of whether an accused is entitled to probation, where the court assesses punishment, rests absolutely within the trial court's discretion under the guideposts of the statute and no authority exists for the accused to require such clemency.... The decision of the trial court refusing to grant probation is not reviewable by this Court.

[Rodriguez v. State, 502 S.W. 2d 13, 14 (1973)] Similarly, the Court of Criminal Appeals will not review a jury's decision denying probation although the trial court can grant probation even when the jury recommends against it. [Art.42.12, Sec.3c; Art. 42.13, Sec.3c]

A. FELONY PROBATION ELIGIBILITY

No person is eligible to receive probation for a felony unless assessed a sentence of 10 years or less by the judge or jury. [Art. 42.12, §3, 3a] A person convicted of capital murder is not eligible for probation since the law requires a sentence of death or life imprisonment for that offense. [T.P.C. §19.03 and 12.31 (a)] However, a person convicted of any other grade of homicide, including intentional murder, may receive probation if otherwise eligible because a punishment of 10 years or less may be assessed. In the case of intentional murder, for example, a punishment as short as five years may be assessed. [T.P.C. §19.02 and 12.32]

If the State proves prior felony convictions, that may make the offender ineligible for probation. Under the habitual offender statute, if the State proves two prior felony convictions, it is required that a punishment of life imprisonment be assessed [T.P.C. §12.42(d)] which, of course, precludes probation under the 10-year rule. If the offender is convicted of a first-degree felony and the State proves one prior felony conviction, the shortest punishment that can be assessed is 15 years [T.P.C. §12.42(c)] which also precludes probation under the 10-year rule.

Under Texas law, the defendant has the absolute right (except in capital murder cases) to elect whether the judge or the jury will assess punishment and decide whether to grant probation if convicted. Unless the defendant elects jury punishment at the time a plea is entered to the indictment or information in open court at the beginning of the trial, the law provides that punishment will be assessed and probation considered by the judge. [Art. 37.07(2)(b)] The rules governing legal eligibility for probation differ depending upon whether the defendant has elected judge or jury punishment.

If the defendant has elected jury punishment, he or she is eligible for probation only if it is proven that the defendant "has never before been convicted of a felony in this or any other State". [Art. 42.12, §3a] What constitutes a conviction? If one was previously found guilty of a felony, placed on probation and while still on probation, is convicted of a felony, one is not eligible for a second probation from the jury. [Baker v. State, 519 S.W.2d 437 (1975)] Apparently, even if the defendant receives felony probation and successfully serves it, obtaining a discharge from probation and dismissal of the proceedings, he or she is still regarded as having been convicted of a felony and, therefore, is not eligible to receive probation from the jury. [Watkins v. State, 572 S.W.2d 339 (En Banc 1978) (Presidential pardon for federal felony does not make defendant eligible to receive probation from the jury; Taylor v. State, 612 S.W.2d 566 (Panel 1981) (order of discharge and restoration of civil rights does not make defendant eligible for probation from the jury)] However, the prior conviction must have been based on a valid indictment or information; if the charging instrument in the prior case was fundamentally defective, then the conviction is void and does not preclude the defendant from seeking probation from the jury. [Thompson v. State, 604 S.W.2d 180 (Panel 1980)] If the defendant was placed on probation or was sentenced to prison and has taken an appeal, he or she is eligible for probation from the jury if the appeal is still pending at the time of the penalty hearing. [Baker v. State, 520 S.W.2d 782 (1975)] On the other hand, if one was placed on probation and probation was

revoked, one is not eligible for jury probation even if an appeal from the revocation is pending at the time of the penalty hearing. [Franklin v. State, 523 S.W.2d 947 (1975)]

If the jury recommends probation it may fix the probation term at any length authorized for a prison sentence but not longer than 10 years. [Art. 42.12 §3a] If the jury recommends probation, the judge is required to place the defendant on probation. [Art. 42.12, Sec.3a] However, under a recent amendment to the statute, if the jury recommends probation for one convicted of a second-degree felony or higher, and there is an affirmative finding that the defendant "used or exhibited a firearm during the commission of the offense" the judge, while still required to grant probation, may impose a sentence to the Texas Department of Corrections of not less than 60 nor more than 120 days as part of the probation term. [Art. 42.12, §3f(b)] Finally, even if the jury recommends against probation, the trial judge is authorized to place the defendant on probation. [Art. 42.12, §3c]

If the defendant has elected punishment assessed by the judge, different rules determine probation eligibility. The trial judge is empowered to grant probation whether or not the defendant has a prior felony conviction. [Art. 42.12, §3c] However, the trial judge is precluded from granting probation in certain situations when probation could be granted by the jury. The trial judge may not grant probation for aggravated kidnapping, aggravated rape, aggravated sexual abuse or aggravated robbery. [Art. 42.12, §3f(a)(1)] Also, the trial judge may not grant probation if it is shown that the defendant used a firearm or other deadly weapon during the commission of the offense or during immediate flight therefrom. [Art. 42.12, §3f(a)(2)] These restrictions do not apply to the jury.

In 1977, the Legislature authorized trial judges, but not juries, to grant "shock probation" under certain circumstances. If the defendant received a prison sentence of 10 years or less, was not convicted of criminal homicide, rape, or robbery and "has never been incarcerated in a penitentiary serving a sentence for a felony," he is eligibile for "shock probation". After the defendant has been at the Texas Department of Corrections for 60 days and before he has served 120 days, the trial judge, if of the opinion that "the defendant would not benefit from further incarceration in a penitentiary" may place the defendant on probation for the balance of his sentence. Shock probation may also be used for one sentenced to prison upon revocation of probation. The trial judge may request information from the Texas Department of Corrections to assist in making the decision whether to release the defendant on probation, and "upon receipt of such request, the Texas Department of Corrections shall forward to the court, as soon as possible, a full and complete copy of the defendant's record while incarcerated." [Art. 42.12,§3e] In 1981 the Legislature amended the felony shock probation statute to increase the time during which the inmate may be released from the TDC on probation from 120 to 180 days. Instead of precluding shock probation if the defendant is convicted of criminal homicide, rape or robbery, a defendant under the 1981 amendments may not be given shock probation if convicted of intentional murder, aggravated kidnapping, aggravated rape, aggravated sexual abuse, deadly assault on a peace officer or court participant, injury to a child except for mere bodily injury, aggravated robbery, bribery, escape, implements of escape (deadly weapons only) or engaging in organized criminal activity.

The Court of Criminal Appeals has indicated that the language in the shock probation statute giving the trial court 120 (now, 180) days "from the date the execution of the sentence actually begins" does not include prior jail time though under the law the inmate receives credit for that jail time on the sentence. The court has also held that prior service of a federal felony sentence makes one ineligible to receive shock probation on a Texas conviction. [State ex rel. Curry v. Gray, 599 S.W.2d 630 (En Banc 1980)]

In 1975, the Legislature authorized deferred adjudication probation in felony cases. A defendant is eligible for deferred adjudication only upon a plea of guilty or nolo contendere and is not eligible if found guilty upon a plea of not guilty. Deferred adjudication probation may be granted only by the judge, not the jury. After the trial court hears evidence upon the defendant's plea of guilty or nolo contendere, it may "defer further proceedings without entering an adjudication of guilt, and place the defendant on probation on reasonable terms and conditions as the court may require and for a period as the court may prescribe not to exceed 10 years." [Art. 42.12, §3d] Apparently, a defendant may be eligible for deferred adjudication probation even though he would not be eligible for "regular" probation from the trial judge under the restrictions discussed earlier. If the trial court revokes deferred adjudication probation ("proceeds with an adjudication of guilt" in the language of the statute) it may impose any prison sentence that could have been originally imposed for the offense and is not limited to the probation term previously selected. In McNew v State, the appellant was place on deferred adjudication probation for five years. It was revoked and he was sentenced to a term of 10 years in the TDC. On appeal, he contended that the deferred adjudication probation statute was unconstitutional under Article 4, Section 11A of the Texas Constitution (quoted in full in the Introduction to this text) because that provision authorizes probation only after conviction, while the deferred adjudication statute authorizes probation without conviction. The Court of Criminal Appeals upheld the constitutionality of the statute:

> "Probation", as used in Art. 42.12, §3d(a) [deferred adjudication] is a procedure which does not include an adjudication of guilt. Moreover, under Art. 42.12, §3d(a), no sentence is assessed and the imposition of a sentence is not suspended. The definition of "probation", as used in Art. 42.12, §2(b) ['Probation' shall mean the release of a convicted defendant by a court ..."] cannot be reconciled with the context in which the term "probation" is used in Art. 42.12, §3d(a). We therefore hold that "probation" as used in Art. 42.12, §3d(a), is not the equivalent of "probation" as defined by Art.42.12, §2(b), or Art. 4, §11A. Thus, since the procedure designated as "probation" in Art. 42.12, §3d is not the equivalent of "probation" as used in Art. 42.12, §2(b), or Art. 4, §11A, "probation" pursuant to Art. 42.12, §3d may be granted before a defendant is "convicted" without any violation of Art. 4, §11A.

[McNew v. State, 608 S.W.2d 166, 172 (Panel 1978)] In other words, deferred adjudication is constitutional but the probation that results is not the same as the probation that we normally think of. It remains to be seen what other differences will be found between "deferred adjudication probation" and "regular probation". For example, the Court of Criminal Appeals has concluded that when a motion to revoke deferred adjudication probation is filed the "probationer" has a right to bail because he has not yet been convicted, while one on regular felony probation has no right to bail pending revocation. [Ex parte Laday, 594 S.W.2d 102 (En Banc 1980)]

In 1981, the Legislature made deferred adjudication community service probation available in felony cases. One is eligible for that type of probation if he or she "pleads guilty or nolo contendere to a first offense felony that does not involve bodily injury or the threat of bodily injury to any person and for which the maximum punishment assessed against the defendant does not exceed 10 years imprisonment". The reference to punishment assessment is puzzling since elsewhere in the statute it is made clear that no punishment is to be assessed when one is placed on felony deferred adjudication community service probation. [Art. 42.12, Sec. 10A]

B. MISDEMEANOR PROBATION ELIGIBILITY

Prior to August 27, 1979, the effective date of the 1979 amendments in the statute, the rules governing eligibility for misdemeanor probation were quite different from those governing felony probation eligibility. In 1979, the misdemeanor probation statute, Article 42.13 of the Code of Criminal Procedure, was subjected to a comprehensive revision to make it in most respects exactly the same as the felony probation statute. Nevertheless, some differences remain and they are discussed here. In the absence of discussion on a specific point, it would be a safe assumption that the rules for misdemeanor probation eligibility are the same as for felony probation in light of the 1979 revision.

There is, of course, no 10-year rule with respect to misdemeanor probation eligibility. Not all misdemeanors may be probated, however. Article 42.13 applies only to courts of record. [Art. 42.13, §2(1)] Constitutional county courts, county courts-at-law and county criminal courts are courts of record as are Criminal District Courts, that also have misdemeanor jurisdiction. However, Justices of the Peace and most Municipal Courts are not courts of record and Article 42.13 does not apply to them. Article 42.13 authorizes either confinement in jail, a fine, or both to be probated. [Art. 42.13, §3 and 3a] The term of probation is fixed by law at the maximum term of incarceration for the offense of which the probationer was convicted [Art. 42.13, §3 and 3a] which is, of course, different from felony probation terms which may be selected by the judge or jury.

Misdemeanor probation may be granted by either the jury or the judge. The defendant has the right to elect jury or judge punishment in misdemeanor cases exactly as in felony cases. [Art. 37.07, §2(b)]. As in felony cases, the jury may grant probation only if the defendant shows that he or she "has never before been convicted of a felony in this or any other state." [Art. 42.13, §3a] If the jury in its punishment verdict recommends that probation be granted, the trial judge is required to give it. [Art. 42.13, §3a] However, as in felony cases, the trial judge is empowered to grant misdemeanor probation even if the defendant has a prior felony conviction and may grant misdemeanor probation even when the jury has not recommended it. [Art. 42.13, §3c]

In the 1979 revision of Article 42.13, the Legislature added a provision for deferred adjudication probation that is identical to felony deferred adjudication probation except that the probation term may be selected by the judge at any length not to exceed the maximum period of imprisonment for the offense of which the probationer was convicted. [Art. 42.13, §3d (a)]

In 1977, the Legislature added a shock probation feature to the misdemeanor probation law. It permits a trial judge to release a defendant incarcerated in a county jail on probation for the remainder of the jail sentence if the defendant has "never been incarcerated in a penitentiary or jail serving a sentence for a felony or misdemeanor". The release may not occur before the defendant has served 10 days and must occur, if at all, before service of 90 days. [Art. 42.13, §3e (a)] In other respects, it is identical to the felony shock probation law.

In 1979, the Legislature added a novel feature to the misdemeanor probation law authorizing deferred adjudication community service probation. Article 42.13, Section 3B(a) provides:

> A defendant who pleads guilty or nolo contendere to a first offense misdemeanor that does not involve bodily injury or the threat of

bodily injury to any person and for which the maximum permissible punishment is by confinement in jail or by a fine in excess of $200 or by both a fine and confinement is eligible for community-service probation.

The law authorizes deferring adjudication and placing the defendant on community service probation. The court orders the probationer to work a specified number of hours at a specified community-service project for a nonprofit organization "whose services are provided to the general public and are designed to enhance the social welfare, physical or mental stability, environmental quality, or general well-being of the community." [Art. 42.13, §3B(g)] For a Class B misdemeanor, the court may order not less than 24 nor more than 100 hours of community service work and for a Class A misdemeanor the court may order not less than 80 hours nor more than 200 hours of community service work. [Art. 42.13, §3B(d)] If the probationer completes the required hours of community service work and has not violated other conditions of probation "the court shall dismiss the proceedings against the defendant and discharge him". [Art. 42.13, §3B(j)] The law also provides:

> A dismissal and discharge under this section may not be deemed a conviction for the purposes of disqualifications or disabilities imposed by law for conviction of an offense, except that on conviction of a subsequent offense the fact that the defendant previously received community-service probation is admissible on the issue of penalty. [Art. 42.13, §3B(j)]

C. ELIGIBILITY FOR CONDITIONAL DISCHARGE

The Texas Controlled Substances Act [Civil Statutes Art. 4476-15] is an extensive statute regulating the manufacture, distribution, possession and use of drugs that have a potential for abuse. It contains a variety of criminal penalties for violation of these restrictions, ranging in seriousness from a Class C misdemeanor to a first-degree felony. Section 4.12 of the Act provides a unique procedure for "conditional discharge" of drug offenders that is similar to deferred adjudication probation for felony and misdemeanor offenders. A person is eligible for conditional discharge no matter how serious the violation of the Act; it reaches felonies as well as misdemeanors and hard drugs as well as marijuana and other such substances. The only restriction on eligibility is that the recipient must be a "person who has not previously been convicted of an offense under this Act, or, subsequent to the effective date of this Act, under any statute of the United States or of any state relating to a substance that is defined by this Act as a controlled substance." [Civil Statutes Art. 4476-15, §4.12(a)] Anyone not having a prior drug conviction after August 27, 1973, the effective date of the Act, is eligible for conditional discharge even though he or she may have a record of other criminal convictions or may have had a drug

conviction before that date. Of course, one convicted of a violation of the Controlled Substances Act is also eligible for probation under Articles 42.12 and 42.13, as the case may be.

The statute authorizes conditional discharge after either a trial or a plea of guilty. [Civil Statutes Art. 4476-15, §4.12(a)] In that respect, it is broader than the deferred adjudication probation for misdemeanors and felonies, which is limited to one who enters a plea of guilty or nolo contendere. (With respect to the criminal case, a plea of nolo contendere is the same as a plea of guilty. [Art. 27.02 (5)] The trial judge, not the jury, is authorized "without entering a judgment of guilt and with the consent of the defendant, [to] defer further proceedings and place him on probation on such reasonable conditions as it may require and or such period as the court may prescribe, except that the probationary period may not exceed two years." [Civil Statutes Art. 4476-15, §4.12(a)] The court may, at its discretion, discharge the probationer at any time before the end of the two-year period. If probation is violated, the court may proceed with the adjudication and sentence the defendant to any term the defendant could have received initially. [Civil Statutes Art. 4476-15, §4.12(b)] If the probationer completes the term of probation "the court shall discharge him and dismiss the proceedings against him." Section 4.12(b) further provides:

> Discharge and dismissal under this subsection shall be without an adjudication of guilt, but a nonpublic record of the proceedings shall be retained by the director [of the Texas Department of Public Safety] solely for use by the courts in determining whether or not, in subsequent proceedings, the person qualifies for conditional discharge under this section.

Finally, Section 4.12 (c) provides:

> A discharge or dismissal under this section shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law for conviction of a crime, including any provision for enhancement of punishment for repeat or habitual offenders. There may be only one discharge and dismissal under this section with respect to any person.

D. PROCEDURES FOR OBTAINING PROBATION

Texas law imposes no procedural formalities upon the defendant to obtain felony or misdemeanor probation from the trial judge. [Art. 42.12, §3; Art. 42.13, §3] Nor are there procedural formalities for obtaining felony [Art. 42.12, §3d] or misdemeanor [Art. 42.13, §3d] deferred adjudication probation, felony [Art. 42.12, §3e] or misdemeanor [Art. 42.13, §3e] shock probation, felony [Art. 42.12, §10A] or misdemeanor [Art. 42.13, §3B] community service probation or conditional discharge under the Controlled Substances Act [Civil Statutes Art. 4476-15, §4.12], all of which may be granted only by the trial judge. The only

requirement is the practical one that the defendant must ask for probation at the appropriate time in the proceedings and be prepared to comply with any requirements of the trial court, such as providing social data or submitting to a presentence investigation, to show suitability for probation. The trial court is authorized to grant probation during the penalty phase of the case. It may not, for example, grant probation after the defendant has appealed the case and the conviction has been affirmed by the Court of Criminal Appeals. [Walker v. State, 562 S.W.2d 864 (Panel 1978)]

The law is different when the defendant seeks probation from the jury. To obtain either felony [Art. 42.12, §3a] or misdemeanor [Art. 42.13, §3a] probation from the jury the defendant must prove and the jury must find that the defendant has never been convicted of a felony. Ordinarily, that is accomplished by the defendant taking the stand at the penalty stage of the trial and testifying that he or she has never been convicted of a felony. That fact can be proved by other means as well, such as having a parent, spouse or close friend of the defendant testify that the defendant has not been so convicted. [Trevino v. State, 557 S.W.2d 242 (Panel 1979)]

The defendant must also file a sworn written motion for probation to obtain felony or misdemeanor probation from the jury. For felony probation, the law provides that the motion must be "filed before the trial begins" and implies that the motion must state that the defendant has never before been convicted of a felony. [Art. 42.12, §3a] The new misdemeanor probation law is different. The statute provides:

> In no case shall probation be recommended by the jury except when the defendant, before the trial began, had filed a sworn statement that the defendant has never before been convicted of a felony, and after conviction and before the penalty stage of the trial began, the defendant shall have filed a sworn motion for probation and the proof shall show and the jury shall find in their verdict that the defendant has never before been convicted of a felony in this or any other state.

[Art. 42.13, §3a] There are no appellate cases construing these new provisions of the misdemeanor law. It is a reasonable reading of this language, however, that <u>two</u> documents must be filed in a misdemeanor case to obtain probation from the jury: a sworn <u>statement</u> of no felony convictions before the trial begins and a sworn <u>motion</u> for probation after conviction and before the penalty stage of the trial begins. Such a construction would be reasonable, since the prior law (and current felony law) requiring a defendant to ask for probation by filing a motion before trial even begins can be criticized for requiring a defendant to take action that could be regarded as an admission of guilt before that issue has been submitted to the jury.

Finally, Article 37.07, which creates the Texas system of bifurcation of the criminal trial into two phases, guilt/innocence and penalty, appears to require filing of a "sworn motion for probation before the trial began." [Art. 37.07, §2(b)] Whether that requirement of a sworn motion for probation being filed before the trial begins has been repealed by implication by the later and inconsistent provisions in the misdemeanor probation law is presently an open question.

In any event, although it is arguable that the earliest the defendant has to file a sworn motion for probation or, in the case of a misdemeanor, a sworn statement, is when he or she enters a plea of not guilty to the indictment or information, after the jury has been assembled, it is customary and, perhaps, legally required to file the motion before the jury selection even begins to enable both parties to ascertain that each member of the jury is capable of giving full consideration to placing the defendant on probation, should he or she be convicted. [Parker v. State, 457 S.W.2d 638, 640 (1970)]

CHAPTER 3.

THE PRESENTENCE INVESTIGATION REPORT

Texas law authorizes the trial court to order a pre-sentence investigation report:

> When directed by the court, a probation officer shall fully investigate and report to the court in writing the circumstances of the offense, criminal record, social history and present condition of the defendant. Whenever practicable, such investigation shall include a physical and mental examination of the defendant. Defendant, if not represented by counsel, counsel for defendant and counsel for the state shall be afforded an opportunity to see a copy of the report upon request. If a defendant is committed to any institution the probation officer shall send a report of such investigation to the institution at the time of commitment.

[Art. 42.12, §4] Pre-sentence investigation reports were not mentioned in the misdemeanor probation statute until 1979, when a provision identical to the above was added as part of a comprehensive revision of the misdemeanor statute. [Art. 42.13, §4] Unlike in some other jurisdictions, there is no legal requirement in Texas that a pre-sentence report be prepared in each felony case. The trial judge has discretion to order a pre-sentence investigation or to sentence without one. The purpose of the pre-sentence report is to assist the trial judge in sentencing and it is not used when the defendant has elected jury punishment.

A. FUNCTIONS OF THE PRESENTENCE INVESTIGATION REPORT

Until 1980, it was unclear whether a pre-sentence report could be utilized to assist the trial judge in assessing punishment or only in deciding whether to grant probation when punishment of 10 years or less had already been assessed. In McNeese v. State, the court suggested the pre-sentence had only the latter function:

> The question of whether an accused is entitled to probation in a trial before the court is a matter solely for the trial court's discretion.... The trial court in such cases should use the probation officer's report and take into consideration all of the pertinent information to more intelligently determine if the person convicted is entitled to probation.

[McNeese v. State, 468 S.W.2d 800, 801 (1971)] Later, Presiding Judge Onion, in a concurring opinion, explicitly took the position that the pre-sentence should be used only to assist the court in deciding on probation and not for assessment of punishment:

> The use of presentence investigation reports is to be commended.... The proper use of such reports is to enable the trial court to pass on the issue of probation, not to determine the punishment to be assessed. These reports frequently contain hearsay information concerning inadmissible extraneous offenses, and other matter that would not be admissible at trial.

[Bean v. State, 563 S.W.2d 819, 821 (Panel 1978)] Still later, a different panel of the Court rejected Judge Onion's position and approved of the use of a pre-sentence report in a case in which probation was not an issue but length of the prison sentence was:

> We are not convinced that a pre-sentence investigation and report are appropriate only when the issue of whether a trial judge should grant a defendant probation is raised. Rather, whenever an issue of the proper punishment is present a presentence investigation and report may be utilized to assist the trial judge in the exercise of his discretion.

[Angelle v. State, 571 S.W.2d 301, 302 (Panel 1978)] The issue was finally resolved in Mason v. State in which the defendant was convicted of two first-degree felonies, enhanced by proof of one prior felony, requiring a minimum sentence of 15 years and making him ineligible to receive probation. The trial court ordered a pre-sentence report to assist in assessing sentence, which the defendant claimed was error since he was not eligible for probation. By a five to four vote the court en banc rejected this contention and approved of the use of a pre-sentence report when the defendant is not eligible for probation. There was a dissent which took the position that punishment must be assessed on the basis of legally admissible evidence introduced at the guilt/innocence or penalty phase of the trial. [Mason v. State, 604 S.W.2d 83 (En Banc 1980)]

In 1981 the Legislature specifically authorized the trial judge to order and consider a pre-sentence report to assist in assessing punishment as well as in deciding upon probation. [Art. 37.07, §3(d)]

It is important to remember that a pre-sentence report may be considered by the trial court only for those purposes specifically authorized by statute. In all other circumstances, the report is hearsay and is inadmissible. [Burroughs v. State, 611 S.W.2d 106 (Panel 1981) (PSI may not be used over objection to deny bond on appeal because it is inadmissible hearsay.)]

B. THE CONTENTS OF THE REPORT

The dispute within the Court of Criminal Appeals as to the function of the pre-sentence report is really occasioned by the fact that a pre-sentence report is a shortcut through the normal rules of evidence that govern criminal trials.

As such, it does not provide the usual safeguards against the inclusion of inaccurate, incomplete or unfairly prejudicial statements that are provided by an adversarial hearing. Despite these dangers, the United States Supreme Court approved of the use of pre-sentence reports as long ago as 1949:

> Probation workers making reports of their investigations have not been trained to prosecute but to aid offenders. Their reports have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guess-work and inadequate information. To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation. We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination. And the modern probation report draws on information concerning every aspect of a defendant's life. The type and extent of this information make totally impractical, if not impossible, open court testimony with cross-examination. Such a procedure could endlessly delay criminal administration in a retrial of collateral issues.

[Williams v. New York, 337 U.S. 241, 249-50 (1949)]

To fully appreciate the freedom accorded by the law to the contents of a pre-sentence report, one should contrast the restrictions placed on the information that may be provided to a jury to assist it in deciding what punishment to assess and whether to grant probation.

In terms of the defendant's prior record, a jury may be told only of prior convictions of the defendant, not of prior arrests or of pending cases. [Mullins v. State, 492 S.W.2d 277 (1973)] And with respect to prior convictions, the State is not permitted to prove the details of the offenses but only their general nature. [Ramey v. State, 575 S.W.2d 535 (Panel 1978)] Finally, the State may prove only adult convictions, not the defendant's juvenile record. [Slaton v. State, 418 S.W.2d 508 (1967)] By contrast, when the defendant's prior record is included in a pre-sentence report for consideration by the judge it may include records of arrests that have not resulted in convictions [Valdez v. State, 491 S.W.2d 415 (1973)] and charges that are still pending in the courts against the defendant. [Clay v. State, 518 S.W.2d 550 (1975)] It may also include the defendant's juvenile court record. [Walker v. State, 493 S.W.2d 239 (1973)]

In a trial in which the defendant has elected jury punishment, the law requires that hearsay statements--reports of what others not in court have said--be kept from the jury. [Porter v State, 578 S.W.2d 742 (En Banc 1979)] By contrast, the entire pre-sentence report is hearsay (and, therefore, inadmissible before a jury on punishment) but it may be considered by the trial court. In the words of the court in Brown v. State, "to suggest that the judge should

not use the information in the probation report because it contains 'hearsay statements' is to deny the obvious purpose of the statute" authorizing pre-sentence reports. [Brown v. State, 478 S.W.2d 550, 551 (1972)]

One of the reasons such an extraordinary liberality is granted to the contents of pre-sentence reports is that the law presumes that the probation officer who conducts the investigation and prepares the report is not a partisan to the dispute between the State and the defendant. He or she is presumed to be neutral, calling the shots as they are seen. This point was underscored by the court in Nunez v. State, in which the defendant contended that his plea bargain with the State was breached when the probation officer recommended maximum imprisonment in the pre-sentence report. The court said:

> The assumption made by appellant that a probation officer is an agent of the prosecution is invalid. Probation officers are assigned or designated by the courts....The district attorney's office does not employ a probation officer nor do they have any authority over the probation officers.

[Nunez v. State, 565 S.W.2d 536, 537 (En Banc 1978)]

C. DISCLOSURE OF THE REPORT

Before 1977, Texas law gave the trial court discretion whether to disclose a pre-sentence report to the defendant or his attorney. In Rodriguez v. State, the court noted that "Nothing in Article 42.12...requires that the presentence report be disclosed to the accused. In fact the statute is silent in regard to this matter. It would thus appear to be within the discretion of the trial court whether to disclose such report." [Rodriguez v. State, 502 S.W.2d 13, 14-15 (1973)] The statute is no longer silent on the subject. In 1977 the Legislature added the following to the felony probation statute: "Defendant, if not represented by counsel, counsel for defendant and counsel for the state shall be afforded an opportunity to see a copy of the report upon request." [Art. 42.12, §4] In 1979, identical language was added to the misdemeanor probation statute. [Art. 42.13, §4] While the trial court doubtless has authority to provide the State and the defense with a copy of the pre-sentence report, the statute merely requires that they be given an opportunity "to see a copy of the report".

Texas law requiring disclosure of the report is much broader than federal law on disclosure of pre-sentence reports prepared for use by U.S. District Courts. Federal law excludes the sentence recommendation from disclosure and empowers a federal district judge to withhold portions of the report that contain "diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other

information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons". [Fed.R.Crim.P. 32(c) (3) (A)] The Texas statute contains no such exceptions or qualifications. Because of that, a Texas probation officer is in no position to assure a person contacted during the course of a pre-sentence investigation that the information provided can or will be kept from the defendant. Indeed, candor with the source would indicate that the officer should state that the defendant may well be apprised of the entire contents of the report because the law requires disclosure to the defendant or his attorney.

D. LITIGATING DISPUTES CONCERNING THE REPORT

Due process of law is violated when a criminal defendant is sentenced on the basis of false information when officials were careless in not learning the truth. In Townsend v. Burke, the United States Supreme Court reviewed the case of a defendant convicted in state court upon his pleas of guilty to burglary and robbery and sentenced to a term of 10 to 20 years in the penitentiary. At the sentencing, the trial court discussed the defendant's criminal record with him:

By the Court (addressing Townsend):
Q. Townsend, how old are you?
A. 29.
Q. You have been here before, haven't you?
A. Yes, sir.
Q. 1933, larceny of automobile. 1934, larceny of produce. 1930, larceny of bicycle. 1931, entering to steal and larceny. 1938, entering to steal and larceny in Doylestown. Were your tried up there? No, no. Arrested in Doylestown. That was up on Germantown Avenue, wasn't it? You robbed a paint store.
A. No. That was my brother.
Q. You were tried for it, weren't you?
A. Yes, but I was not guilty.
Q. And 1945, this. 1936, entering to steal and larceny, 1350 Ridge Avenue. Is that your brother, too?
A. No.
Q. 1937, receiving stolen goods, a saxophone. What did you want with a saxophone? Didn't hope to play in the prison band then, did you?

The Court: Ten to twenty in the penitentiary.

[Townsend v. Burke 334 U.S. 736, 739-40 (1948)]

The Supreme Court reversed Townsend's conviction. Although it placed weight upon the fact that Townsend did not have an attorney when he plead guilty and was sentenced, the decision also laid down due process standards regarding the accuracy of information upon which sentencing is based:

> The trial court's facetiousness casts a somewhat somber reflection on the fairness of the proceeding when we learn from the record that actually the charge of receiving the stolen saxophone had been dismissed and the prisoner discharged by the magistrate. But it savors of foul play or of carelessness when we find from the record that, on two other of the charges which the court recited against the defendant, he had also been found not guilty. Both the 1933 charge of larceny of an automobile, and the 1938 charge of entry to steal and larceny, resulted in his discharge after he was adjudged not guilty. We are not at liberty to assume that items given such emphasis by the sentencing court did not influence the sentence which the prisoner is now serving.
>
> We believe that on the record before us, it is evident that this uncounseled defendant was either overreached by the prosecution's submission of misinformation to the court or was prejudiced by the court's own misreading of the record. Counsel, had any been present, would have been under a duty to prevent the court from proceeding on such false assumptions and perhaps under a duty to seek remedy elsewhere if they persisted. Consequently, on this record we conclude that, while disadvantaged by lack of counsel, this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannnot stand.

[Townsend v. Burke, 334 U.S. 736, 740-41 (1948)] Although the case did not itself involve inaccuracies in a pre-sentence report, but rather the trial court's misinterpretation of defendant's rap sheet, the principle clearly applies to the accuracy of information contained in the pre-sentence report. Due process requires that reasonable care be taken in gathering the data, writing the report and utilization of the report by the trial judge.

In addition to the defendant's due process rights, there is a basis for the conclusion that the defendant has a Texas statutory right to present evidence and arguments to dispute what are believed to be inaccuracies in the pre-sentence report. A 1977 amendment to the felony probation statute requires disclosure of the pre-sentence report to the defendant's attorney. [Art. 42.12, §4] Since disclosure without the right to present the defendant's version of inaccuracies in the report would be meaningless, it is reasonable to conclude that the disclosure provision implies a right to present evidence and arguments to the trial court concerning inaccuracies in the report. The misdemeanor probation statute contains the same provision [Art. 42.13, §4] and the same arguments can be made concerning it.

CHAPTER 4.

PROBATION CONDITIONS

The Texas Constitution grants the Legislature the power to prescribe the conditions under which courts may place a defendant on probation. [See Article IV, §IIA of the Texas Constitution, quoted in the INTRODUCTION.] But, it is to be noted, beyond establishing the procedural scheme to grant and revoke probation, the Legislature has delegated the prescription of specific probation conditions to the courts. One of the explicit purposes of the felony and misdemeanor probation law is "to place wholly within the state courts of appropriate jurisdiction the responsibility for determining ... the conditions of probation." [Art. 42.12, §1; Art. 42.13, §1] The rationale for delegating to the courts the authority to determine probation conditions is that it is unsound for the Legislature to prescribe mandatory conditions which would bind a court in every case. The Legislature is far removed from the circumstances of a case and it cannot anticipate every case that may arise. On the other hand, the court, aided by the probation officer, is close to the case and, once probation eligibility has been determined and the public interest protected, the court can dispense individualized justice by choosing conditions of probation that meet the specific needs of the accused and of the community.

When a trial court grants probation without the recommendation of a jury for a felony pursuant to Article 42.12, Sections 3, 3c, 3d or 3e, or for a misdemeanor pursuant to Article 42.13, Sections 3, 3c, 3d, or 3e, the Court of Criminal Appeals has recognized the trial court's "wide discretion" in selecting the terms and conditions of probation; trial courts are not limited to the suggested statutory conditions listed in Article 42.12, Section 6 and Article 42.13, Section 6. [Tamez v. State, 534 S.W.2d 686, 691 (1976)] This affirmation by the Court of Criminal Appeals follows from the explicit grant of authority to trial courts in Article 42.12, Section 6 and Article 42.13, Section 6 to determine the terms and conditions of probation beyond those conditions enumerated in the statute. The discretionary power in the courts to select conditions is not unlimited; it is guided by the requirement that there be a reasonable relation to the treatment of the accused and the protection of the public. [Tamez v. State, 534 S.W.2d 686, 691 (1976)]

When a defendant elects to be sentenced by a jury and the jury recommends probation, the discretion of the trial court to determine probation conditions is circumscribed; the court may impose only those conditions set out in Article

42.12, Section 6 and Article 42.13, Section 6. [Art. 42.12, §3a; Art. 42.13, §3a] However, following a jury recommendation for probation, the court does not have to include all statutory conditions; it may also "flesh out" any statutory conditions it imposes to make them more specific and definite. [Flores v. State, 513 S.W.2d 66 (1974)] In 1981 the Legislature amended the felony, but not the misdemeanor, probation statute to eliminate the language limiting the court to statutory conditions when probation is recommended by the jury. Presumably, the limitation and the associated privilege to "flesh out" the statutory conditions still applies in misdemeanor cases.

Finally, it should be noted that when a court chooses to place a defendant on misdemeanor deferred adjudication community service probation it is required by statute to impose a specified number of community service hours [Art. 42.13, §3B(c)] and to impose the seven conditions of probation specified in the community service probation statute. [Art. 42.13, §3B(e)] It may, however, impose other conditions as well. There is a similar requirement in the felony community service probation statute enacted in 1981. [Art. 42.12, §10A)]

A. STATUTORY CONDITIONS

When the trial court places a defendant on deferred adjudication probation for a felony [Art. 42.12, §3d] or a misdemeanor [Art. 42.13, §3d] it is authorized to impose "reasonable terms and conditions as the court may require". When a trial court places a defendant on conditional discharge for a drug violation it is authorized to impose "such conditions as it may require". [Civil Statutes Art. 4476-15, §4.12 (a)]

Article 42.12, Section 6 and Article 42.13, Section 6 enumerate a number of conditions of probation. Although the trial court is not required to impose all or any of the enumerated conditions and although it may impose any other reasonable conditions, it is nevertheless useful to consider the statutory conditions and the caselaw under them, since they form a legal framework for probation conditions in Texas.

(1) Commit no offense against the laws of this State or of any other State or of the United States.

Since the very purpose of probation is the rehabilitation of the probationer to a law-abiding life while protecting the community, it follows that probation is virtually always granted upon condition that the probationer does not commit a penal offense. This condition is widely litigated and most revocations occur because the probationer is found to have committed a penal offense.

When a motion to revoke probation is filed which alleges that the probationer has committed an offense in violation of probation conditions, the fact of an arrest or a complaint, standing alone, is not sufficient to support a revocation. [Wester v. State, 542 S.W.2d 403, 405 (1976)] However, the court need not wait for a conviction in the alleged offense; it may hold its own hearing on the motion to revoke and find that the probationer violated a condition of probation as grounds for revocation. [Beck v. State, 492 S.W.2d 536, 537 (1973)] In Rosaschi v. State, the probationer challenged a trial court's refusal to stay a hearing on a motion to revoke probation pending his trial on an indictment charging the same offense as charged in the motion to revoke. He argued that due process and equal protection entitled him to a trial on the charge. Overruling his contentions, the Court of Criminal Appeals explained that he is not entitled to a trial because when probation is revoked the probationer does not go to the penitentiary for the offense committed; rather, the probationer is sentenced because of his or her original offense and because of the failure to rehabilitate in accordance with the conditions of probation. [Rosaschi v. State, 471 S.W.2d 840 (1971)] The fact that the indictment is later dismissed on motion of the state does not reflect an abuse of discretion in revoking probation for violation of this condition [Beck v. State, 492 S.W.2d 536, 537 (1973)]

A trial court that revokes probation on the ground that the probationer committed an offense is required to make a finding, supported by a preponerance of the evidence, that the probationer did commit an offense. [Bradley v. State, 564 S.W.2d 727, 729 (En Banc 1978)] Thus, review of probation revocation based on a finding by the trial court that an offense has been committed by the probationer entails an examination by the Court of Criminal Appeals to determine whether the trial court abused its discretion. [Aguilar v. State, 471 S.W.2d 58 (1971)] In Rutledge v. State, the defendant was placed on probation upon condition that he commit "no offense against the laws of this state ..." The state alleged in its motion to revoke that the probationer was arrested for being intoxicated. Evidence was introduced that showed he had been found intoxicated lying in the grass in a field near his home. The trial court made the finding that the appellant had "been arrested for being intoxicated". The Court of Criminal Appeals reversed this finding (it upheld the revocation on different grounds.) The Court reasoned that since appellant was not proved to be in a public place he was not shown to have violated any law. [Rutledge v. State, 468 S.W.2d 802 (1971)]

In Hall v. State, appellant was convicted in a municipal court for disturbing the peace and his probation subsequently revoked for committing an offense. On appeal he contended that at the time of his conviction he was indigent, was not informed of his right to counsel, and did not waive this right.

The Court of Criminal Appeals held that it did not have to pass on the question of the validity of the conviction because it found that sufficient evidence was introduced at the probation revocation hearing to sustain the trial court's determination. In reviewing the evidence the court noted that a constable testified to having seen the probationer engaged in a public affray. A police officer testified that he investigated the disturbance and transported a witness to the police station where that witness filed a complaint against the probationer. The probationer testified to his presence at the affray and to entering a plea of guilty the same night the complaint was filed. He contended, however, that during the affray he had only tried to separate the complaining witness from a third person. The Court of Criminal Appeals concluded: "We think the evidence is sufficient to have justified the court's finding that appellant violated his probation by committing a penal offense and upon this ground alone the revocation of probation was not an abuse of discretion." [Hall v. State, 452 S.W.2d 490, 494 (1970)] But in Biddy v. State a probationer, while incarcerated, admitted to the commission of a crime as the sheriff later testified at the revocation hearing. The Court of Criminal Appeals held that an alleged oral confession is not sufficent evidence when it does not produce any additional evidence or corroborative circumstances indicative of probationer's violation of a penal statute. [Biddy v. State, 501 S.W.2d 104, 105 (1973)]

A judgment of conviction in a criminal case is sufficient evidence upon which to base a revocation of probation, even if conviction is from another state; under Article IV, Section 1 of the United States Constitution such judgments are given full faith and credit. [Bennett v. State, 476 S.W.2d 281, 283 (1972)] The Court of Criminal Appeals, however, does not favor this approach to revocation:

> The practice of relying solely on a conviction to establish the commission of an offense for revocation purposes has been critized many times by this Court (citation omitted). We have continuously reiterated our caution to trial judges, prosecutors, and probation officers as to the inadvisability of relying exclusively upon evidence of a conviction to support a violation of a probationary condition prohibiting the commission of a penal offense.

[Long v. State, 590 S.W.2d 138, 139 (Panel 1979)] The Court continued to point out that there are some inherent problems in relying solely upon proof of a conviction to reflect the commission of an offense. In Long, the state introduced a certified copy of the judgment and sentence but failed to prove through competent evidence that the probationer was the same person named in the judgment.

(2) Avoid injurious or vicious habits.

Reported cases dealing with this condition generally turn on the question of what constitutes a habit. In Campbell v. State [456 S.W.2d 918 (1970)] the

probationer admitted to his probation officer that he had taken a barbiturate. In Morales v. State [538 S.W.2d 629 (1976)] the probationer was intoxicated on only one occasion. In Marshall v. State [466 S.W.2d 582 (1971)] the probationer was found to have been intoxicated on two different occasions nearly three months apart. Upon appeal, the Court held in each case that such evidence was insufficient to prove a habit. In Kubat v. State [503 S.W.2d 258 (1974)] the probationer's mother-in-law testified that she had observed the probationer drink "a few beers but not to excess around the house". She also testified that the probationer had become intoxicated on his birthday. The Court held this evidence insufficient to prove a habit. In Beckworth v. State [551 S.W.2d 414 (1977)] a single act of drinking was sufficient to revoke probation but in this case the trial court had required probationer to "avoid the use of narcotics, barbiturates, or habit forming drugs and alcoholic beverages".

In criminal law, when an individual's freedom is always at stake, strict construction or interpretation of statutes is a guiding principle. The Court of Criminal Appeals extends this principle to probation conditions; the state must prove every element of the alleged violation of the imposed probation condition. In Allen v. State, one of the terms and conditions of probation was to avoid "injurious or vicious habits; specifically alcoholic beverages, harmful drugs or narcotics". A motion to revoke was filed alleging a violation of this condition in that the probationer sniffed paint funes and drove a vehicle while under the influence of paint fumes. The trial court revoked probation. The Court of Criminal Appeals reversed, noting: "The record reveals some kind of use of aluminum paint, but it is absolutely devoid of any evidence of any drug contained therein, or of the harmful or narcotic character of any element of the aluminum paint. We are unable to say as a matter of law that aluminum paint is a harmful drug or narcotic." [Allen v. State, 509 S.W.2d 348, 349 (1974)] In Garcia v. State, one of the conditions was that probationer avoid injurious or vicious habits, including any use of narcotic or habit-forming drugs and alcoholic beverages. In its motion to revoke, the state alleged, as one of its grounds, that the probationer had failed to avoid injurious or vicious habits because her urine specimen was found to contain opiates. Among other findings, the trial court revoked probation on this violation; the Court of Criminal Appeals reversed: no evidence of the urine test results was introduced by the state and proof of a single instance of the use of a drug does not constitute a "habit". The Court of Criminal Appeals, in a footnote, directed the state to the point that its revocation motion should have at least alleged that the appellant had used narcotics or habit-forming drugs, which was included among the probation conditions. [Garcia v. State, 571 S.W.2d 896, 900 (Panel 1978)]

(3) Avoid persons or places of disreputable or harmful character.

In order for a court to revoke probation on the basis of a violation of this condition, the state must show that the probationer had knowledge that the persons with whom he or she associated or that the places he or she frequented have a disreputable or harmful character. [Gill v. State, 593 S.W.2d 697 (Panel 1980)] In Shortnacy v. State, the state offered evidence that the person with whom the probationer had been seen had a felonious reputation and was a user of narcotics. The Court of Criminal Appeals reversed since the record did not show any evidence to prove that the probationer knew of his companion's reputation. [Shortnacy v. State, 474 S.W.2d 713 (1972)] Evidence that probationer was seen twice in the company of a person with a police record, where no knowledge of that record is shown, will not support revocation of probation for failure to avoid persons of disreputable or harmful character. [Steed v. State, 467 S.W.2d 460, 461 (1971); Prince v. State, 477 S.W.2d 542 (1972)] In Whitt v. State, the Court of Criminal Appeals reversed a probation revocation where the state had not shown that the place of business where beer was lawfully sold, and where probationer worked as a waitress, had a disreputable or harmful character. [Whitt v. State, 395 S.W. 2d 39 (1965)]

(4) Report to the probation officer as directed by the Court or the probation officer and obey all rules and regulations of the probation department.

Success of the rehabilitative purpose of probation and the protection of the public interest hinges on effective supervision. When the probationer discontinues reporting to the probation officer, monitoring of the probationer's progress collapses. Courts are not quick to grant excuses for failure to report. [Szczeck v. State, 490 S.W.2d 576 (1973)] In Espinoza v. State, the appellant did not report because, he claimed, he was afraid to do so without the money to pay his supervisory fee, admitting, however that he knew he could report without the money if he had a good excuse. He argued that the trial court's probation revocation was an abuse of discretion, grossly unfair and a violation of due process. The Court of Criminal Appeals, pointing to the contractual nature of probation, explained that since appellant had admitted breaking the contract, the revocation was not an abuse of discretion. [Espinoza v. State, 486 S.W.2d 315 (1972)] In Ross v. State, the probationer had been given a travel permit to work on a shrimp boat off the Florida coast. The probation officer gave the appellant some blank forms on which he was to report each month through the mail. The probationer claimed that during the voyage a twelve-foot wave hit the boat and the report forms were washed overboard. The Court of Criminal Appeals agreed with the trial court and concluded that the probationer's excuse did not relieve him from the duty to report each month. [Ross v. State, 523 S.W.2d 402 (1975)]

There are two theories upon which the Court of Criminal Appeals invalidates reporting conditions: (1) improper delegation of judicial authority; and (2) vagueness or indefiniteness that renders a probation condition unenforceable. Contrary to the express language of the statute, "Report to the probation officer as directed by the court or probation officer...", the law is settled that only the court may determine conditions of probation and the probation officer does not have the power to alter or modify conditions. In Herrington v. State, the court imposed the condition that probationer "report as directed by probation officer, at least once a month". The probation officer ordered weekly reports. The Court of Criminal Appeals held that the requirement that the probationer report weekly was without legal authority. Reviewing the evidence offered to revoke probation for failure to report, the Court concluded: "The bare conclusory statement of the witness 'He failed to report as directed by the probation officer at least once per month', in the absence of further facts concerning such failure was too vague, indefinite and ambiguous to reflect that appellant failed to report as directed by the court." [Herrington v. State, 534 S.W.2d 331 (1976)] The authority of the probation officer with respect to probation conditions is discussed more fully in Chapter 5.

The Court of Criminal Appeals requires the proof offered for a violation of failure to report to conform to the terms of reporting as imposed by the court. In Whitehead v. State, the order from the court directed the probationer to report "at least once a month". The motion to revoke alleged and was supported by evidence that the probationer had failed to report on a specific date. The court held that such evidence could not sustain the finding by the trial court that the probationer had violated his probation condition absent an allegation and proof that appellant had failed to report "at least once a month". It emphasized the holding in Herrington: "We held [in Herrington] that the probation condition by the court sufficiently required appellant to report no less than once per month ... However, it did not delegate authority to the probation officer to require weekly reports, and any such instructions given by the officer were beyond his legal authority and of no force." [Whitehead v. State, 556 S.W.2d 802, 804 (1977)] A better practice is to require the probationer to report on a specific date each month. [Espinoza v. State, 486 S.W.2d 315, 316 (1972)]

Proving that a probationer failed to report may require more than the probation officer's testimony that probationer failed to report contrary to a valid probation condition. In Davis v. State, the trial court revoked appellant's probation for failing to report to a designated adult probation officer on designated dates. The designated probation officer testified at the hearing that the

appellant failed to report to him on the designated dates. The record, however, reflected that the probation department had a procedure which allowed the probationer to report to another probation officer when the probationer's designated probation officer was not available. The Court of Criminal Appeals held that since the record was devoid of any evidence to prove that appellant failed to report to any officer other than the designated officer, the trial court abused its discretion in revoking appellant's probation for failure to report. The court noted that properly authenticated records of a probation department may be introduced into evidence to establish whether the probationer had failed to report to any other officer. [Davis v. State, 563 S.W.2d 264 (En Banc 1978)]

Brewer v. State presents related considerations. The probationer contended that the trial court had abused its discretion in basing its revocation on the finding that the probationer had failed to report to his probation officer in violation of an order which required him to "report to his probation officer on the 10th day of September 1976 and weekly thereafter unless directed by the court to the contrary". The probation condition order was dated September 10, 1976. A supplemental order entitled "Probation Report Dates", also dated September 10, 1976, directed probationer to report to a specific probation officer at a specific address. During the revocation hearing, a different probation officer testified that he had been the supervising probation officer since April, 1977. The state proved that the probationer had not reported to the testifying probation officer since October 1977. The Court of Criminal Appeals reversed the trial court's revocation because the trial court had required the probationer to report to a specific address on September 10, 1976, "and weekly thereafter unless directed by the court to the contrary". There was no evidence that the trial court, at a subsequent time, directed the probationer to report to a different officer at a different place. [Brewer v. State, 572 S.W.2d 719 (Panel 1978)]

Hartsfield v. State covers the same subject matter as Davis and Brewer but it is also of particular interest in that the Court of Criminal Appeals spoke directly to those probation officers who perform "courtesy supervision". The evidence in Hartsfield v. State showed that Hartsfield, a probationer from Smith County, was under "courtesy supervison" of the Adult Probation Department in Bexar County. He was to report to a named Bexar County probation officer if he were in the office, otherwise, to any of the other felony probation officers. The evidence failed to show that he did not report to another officer and therefore it was insufficient. But in a footnote, the Court counseled: "Probation officers who extend courtesy supervising authority are cautioned to read Art. 42.12 ..., Secs. 5, 6", [Hartsfield v. State, 523 S.W.2d 683, 684 n.2 (1975)] Article 42.12, Section 5 provides: "Only the court in which the defendant was

tried may grant probation, fix or alter conditions, revoke the probation or discharge the defendant, unless the court has transferred jurisdiction to another court with the latter's consent ..." Article 42.12, Section 6 provides: "The court having jurisdiction of the case shall determine the terms and conditions of probation ...". Hartsfield v. State could have added that Article 42.12, Section 3 mandates that where a court has jurisdiction and grants probation, "such person placed on probation, whether in a trial by jury or before the court, shall be under the supervision of such court". A motion to revoke based on a violation of courtesy supervision may not withstand the challenge that a probation officer in a court that does not have jurisdiction of the probationer cannot supervise unless there is compliance with the formal transfer procedures of Article 42.12, Section 5.

(5) Permit the probation officer to visit him at his home or elsewhere.

This condition has not been recently litigated and only once indirectly passed upon by the Court of Criminal Appeals. The Court of Criminal Appeals has, however, recognized the right of a probationer under the United States and State constitutions to enjoy a significant degree of privacy. [Basaldua v. State, 558 S.W.2d 2, 7 (1977)]

In Tamez v. State, the trial court imposed the condition that probationer: "Submit his person, place of residence and vehicle to search and seizure at any time of the day or night, with or without a search warrant, whenever requested to do so by the Probation Officer or any law enforcement officer." The state defended this condition on a theory of consent. The Court of Criminal Appeals answered that:

> A diminution of Fourth Amendment protection and protection afforded by Article I, Section 9, Texas Constitution, can be justified only to the extent actually necessitated by the legitimate demands of the probation process. A probationer may be entitled to a diminished expectation of privacy because of the necessities of the correctional system, but his expectations may be diminished only to the extent necessary for his reformation and rehabilitation...
>
> ... in accepting the condition of probation the appellant's "consent" was not in fact freely and voluntarily given. The choice to reject probation and go to prison or accept the probationary condition was really no choice at all. It was in legal effect coerced.

[Tamez v. State, 534 S.W.2d 686, 692 (1976)] Tamez means that an unreasonable intrusion by the state into a probationer's home or any other place where a probationer has a reasonable expectation of privacy will not be sanctioned by the courts, but it does not mean this statutory probation condition is unconstitutional. Fourth and Fifth Amendment rights of probationers are discussed more fully in Chapter 5.

(6) Work faithfully at suitable employment as far as possible.

The rehabilitative purposes of probation and the public interest would seem to make this condition a vital part of probation supervision so as to rehabilitate offenders into productive members of society. This condition, however, is seldom litigated. "Work faithfully" seems to be a standard too vague to enforce. In Kubat v. State, probationer had reported fourteen times in eighteen months and on ten of those fourteen occasions had notified his probation officer of a change of employment. The appellant admitted that twice he had changed jobs to obtain a higher pay. He also testified that he had two part-time jobs at night when he finished his regular day time employment. The court concluded that the record, while indicating that appellant was not a model employee, failed to show that appellant did not work faithfully. [Kubat v. State, 503 S.W.2d 258, 260 (1974)]

Gormany v. State [486 S.W.2d 324 (1972)] is another example of the cases in this area. The probationer was a nineteen year-old without a high school education. He was granted probation on April 13th and did not obtain employment until June 20th of that year. For the next two months Gormany worked at four different jobs. He was on his way to work the day he was arrested. The court concluded that the evidence offered was insufficient to sustain the charge that he had failed to work faithfully. For other examples entailing the same review and conclusions, see Waff v. State [571 S.W.2d 915 (Panel 1978)] and Butler v. State [486 S.W.2d 331 (1972)].

Morales v. State [541 S.W.2d 443 (1976)] is the only instance in which a revocation for failure to "work faithfully" has been upheld. The trial court in Morales fleshed out the statutory condition "Work faithfully at suitable employment as far as possible" and made it more specific. It added the place of work and that probationer should not be unemployed longer than two months.

(7) Remain within a specified place.

The Court of Criminal Appeals views this condition as a firm restriction on personal freedom and the right to travel. When this condition constitutes an unauthorized delegation of judicial authority or when it is drafted ambiguously, a violation of this condition will not support revocation.

The probation condition, "...remain within the confines specified by the probation officer..." was found to be an unauthorized delegation of judicial authority. [McDonald v. State, 442 S.W.2d 386 (1969)] In Whitney v. State, the trial court imposed the condition: "Remain within the limits of Harris County and change place of residence only with permission from the probation officer."

In its review of this condition, the Court of Criminal Appeals considered it to be ambiguous:

> It can be read as (1) requiring that the probationer remain within Harris County, Texas, and secure permission for any change of residence, such change being limited to Harris County, Texas, or (2) it can be read as the trial court has apparently construed it, that is, as requiring permission of the trial court for any change of residence, or (3) it can be read as requiring permission of the probation officer before leaving Harris County...The court would do well to clarify its future probation orders so as to avoid ambiguity, keeping in mind the limits within which the court may delegate its authority to the probation officer.
>
> [472 S.W.2d 524, 526 (1971)]

The condition that a probationer remain within a specified place is often coupled with the condition that probationer report any change of address to the probation officer. The adult probation statutes provide that: "If for good and sufficient reason, probationers desire to change their residence within the State, such transfer may be effected by application to their supervising probation officer, which transfer shall be subject to the court's consent and subject to such regulations as the court may require in the absence of a probation officer in the locality to which the probationer is transferred". [Art. 42.12, §9; Art. 42.13, §9] The statutes also provide for a change of residence outside the state under the Uniform Act for Out-of-State Parolee Supervision [Art. 42.11], which also applies to probationers.

In Whitney v State, supra, the Court of Criminal Appeals reviewed a probation revocation based on a motion which charged failure to report a change of residence. The appellant had traveled to Florida and stayed about three nights in motels. A companion testified at the revocation hearing that appellant had mentioned he was seeking employment. The Court of Criminal Appeals reversed the judgement and stated:

> Residence is an elastic term. The meaning that must be given to it depends upon the circumstances surrounding the person involved and largely depends upon the present intention of the individual. Neither bodily presence alone nor intention alone will suffice to create the residence, but when the two coincide, at that moment the residence is fixed and determined... We simply cannot hold that a showing, without more, that a person has traveled to a distant city, spent one or two nights in a motel there, and expressed an intent to seek employment is sufficient to establish the fact that the person had made that locale his residence. Something further must be shown. Here, there was no showing of an intent to remain (the intent may, in fact, have been conditioned on finding employment), nor a showing that a former residence had been abandoned (such a showing is not mandatory, because one may have more than one residence, but it is of evidentiary value), nor a showing that appellant had established a place of abode in Florida.

[472 S.W.2d 524, 525-526 (1971)] In Walkovak v. State probation was revoked for failure to report a change of residence. The record showed that when defendant

was granted probation, he was a resident of Falls County, Texas. The sheriff testified at the revocation proceeding that he had received information through both the state and national crime information centers that defendant had been in Colorado, Maryland, Nevada, Kentucky and California and that the sheriff had brought him as a prisoner from California to Falls County. The Court of Criminal Appeals concluded that "Although it would appear that there was ample evidence available to prove that appellant had violated conditions of probation, there is no evidence to prove that he breached the condition which the court found had been breached". [576 S.W.2d 643, 644 (Panel 1979)]

(8) Pay his fine if one be assessed, and all court costs, whether a fine be assessed or not in one or several sums.

When a jury recommends that a fine be probated the court is bound by that recommendation and may not order its payment; when a jury recommends probation and the punishment assessed is imprisonment and a fine, the court must probate both irrespective of the court's charge to the jury regarding the conditions the court may impose should the jury recommend probation. [Shappley v. State, 520 S.W.2d 766, 774-776 (1975)] Unlike fines, supervisory fees may be imposed by the trial court whether probation is granted by the court or recommended by a jury. [White v. State, 511 S.W.2d 528 (1974)] Either a failure to pay court costs or a failure to pay supervisory fees is sufficient ground for revocation. [Jimenez v. State, 552 S.W.2d 469 (1977); Gardner v. State, 542 S.W.2d 127 (1976)] In a probation revocation hearing in which it is alleged only that the probationer violated the condition of probation by failing to pay court costs or probation fees, the inability of the probationer to pay is a defense to revocation which probationer must prove by a preponderance of the evidence. [Art. 42.12, §8(c); Art. 42.13, §8(c)]

(9) Support his dependents.

This condition of probation, like the condition that probationer "work faithfully" is seldom litigated and is seldom the basis for a valid revocation. The state must show that the probationer willfully violated this condition, a difficult standard of proof for the state. [Steed v. State, 467 S.W.2d 460 (1971)] "Proof merely of the failure to support is not sufficient; it must be shown that the accused could have contributed more to the support of his children and that his failure to do so was willful." [Pool v. State, 471 S.W.2d 863, 864 (1971)]

Not only does the state have a heavy burden of proof but the standard itself is an ambiguous term to enforce; it is difficult for a court to determine how much support is sufficient or insufficient. In Morales v. State, the trial court

solved this problem by fleshing out the statutory condition with a formula; it ordered one-fourth of the probationer's wages to go to the probationer's dependents. The Court of Criminal Appeals upheld a revocation for the violation of this condition. [541 S.W.2d 443 (1976)]

> (10) Reimburse the county in which the prosecution was instituted for compensation paid to appointed counsel for defending him in the case, if counsel was appointed, or if he was represented by a county-paid public defender, in an amount that would have been paid to an appointed attorney had the county not had a public defender.

In Basaldua v State, the appellant challenged the constitutionality of this condition. He argued that the conditon violated the due process clauses of the United States and Texas Constitutions; that it violated the equal protection clauses of the United States and Texas Constitutions by imposing harsher sanctions on appellant for not paying for his appointed counsel than are imposed on those persons who fail to pay their private attorneys; and finally, that the condition interfered with an indigent defendant's exercise of his right to counsel. The Court of Criminal Appeals upheld the constitutionality of the condition, basically because Article 42.12, Section 8(c) permits anyone financially unable to make payment to establish this financial inability as a defense to revocation. [558 S.W.2d 2, 6-7 (1977)]

> (11) Remain under custodial supervision in a community-based facility, obey all rules and regulations of such facility, and pay a percentage of his income to the facility for room and board.

In Salmons v. State, the probationer challenged the imposition of this condition as an improper delegation of judicial authority. The probationer had plead guilty to possession of a controlled substance and burglary of a building. The trial court granted probation and imposed the condition that Salmons:

> ... attend the Cenikor Foundation, Houston, Texas, for the purpose of participating in the rehabilitation (of) drug addicts, alcoholics, and those with criminal behavior. The defendant is to attend the clinic and counseling programs prescribed by such authority and to obtain a monthly report as necessary from such authority for the probation office and not discontinue cooperating with such authority until he is dismissed from the foundation by competent staff personnel.

Salmons left the program without authorization and the trial court revoked his probation. Overruling his contention that this condition constituted an improper delegation, the Court of Criminal Appeals concluded:

> Although such a condition of probation vests in the treatment facility a certain degree of discretion with regard to the conduct of the probationer while a resident therein, such discretion is necessary if the facility is to be successful in its rehabilitative efforts. Furthermore, there is a clear distinction between rules imposed by a custodial treatment facility in furtherance of its rehabilitative function and the conditions of probation. We hold that in ordering a

> probationer to obey the rules and regulations of the community-based facility in which he is placed, a trial court does not thereby improperly delegate to the facility the authority to specify the terms of probation. [571 S.W.2d 29, 30 (Panel 1978)]

B. NON-STATUTORY CONDITIONS

When a trial court grants probation with or without the recommendation of a jury, it is not limited to "fleshing out" the statutory conditions and by its own resourcefulness can provide for the specific needs of the defendant and the community. Unfortunately, there has not been much inclincation to experiment under the pressure of crowded dockets; probation conditions are very much standardized.

In Salinas v. State, the court imposed a 9:00 p.m. curfew as a condition of probation. It later revoked probation for a violation of this curfew. Salinas challenged the revocation as an abuse of discretion. The Court of Criminal Appeals stated that, "In appropriate cases the imposition of a curfew is a reasonable condition of probation. Based on the probationer's background in this case, the curfew imposed appears to be an attempt by the judge to prevent unproductive activities and potentially deleterious associations. The trial court has wide discretion in selecting the terms and conditions of probation." [514 S.W.2d 754, 755 (1974)] In Franks v. State, the trial court imposed as a condition of probation enrollment in the Job Corps. The state filed a motion to revoke alleging a violation of this condition. The trial court revoked probation. The Court of Criminal Appeals reversed because the finding of revocation was not supported by the evidence. The court did not seem to consider enrollment in the Job Corps as an extraordinary condition. [516 S.W.2d 185 (1974)]

A common court-created condition is total abstinence from liquor or drugs. [Garcia v. State, 571 S.W.2d 896 (Panel 1978); Telfair v. State, 565 S.W.2d 522 (1977); Pearson v. State, 486 S.W.2d 576 (1972)] In Hall v. State, the trial court imposed the condition that probationer stay away "from lounges where liquor is sold except bona fide eating places". It revoked probation on the testimony of an officer who saw the probationer at an icehouse which sold beer and groceries. The Court of Criminal Appeals reversed, stating the the officer's testimony "certainly is not sufficient to sustain a finding that appellant failed to stay away from lounges, where liquor is sold, except bona fide eating places." [452 S.W.2d 490, 493 (1970)]

In Aldana v. State, the probationer challenged the validity of a condition which required him to not reenter the United States without prior written consent from the trial court. He relied on Article 1.18 of the Code of Criminal Proce-

dure and Article I, Section 20 of the Texas Constitution, both of which provide that "No citizen shall be outlawed nor shall any person be transported out of the State for any offense committed within the same." It was the state's position that, "It is a matter of common knowledge that the term of probation in this case is used only in cases involving illegal aliens who cross the border and commit offenses in Texas". The Court acknowledged the desire of the parties to have the issue resolved but ruled that it did not have to address the issue since the state had not proved a violation of the probation condition. There was no evidence that the probationer had ever left and reentered the United States. [523 S.W.2d 951 (1975)]

In Williams v. State, the trial court imposed the condition that probationer, "must not reenter without written permission from this court." The Court of Criminal Appeals noted that the parties had briefed the consitutionality of the condition; it expressed its sympathy for the social problems and frustrations of the state noting that there was no proof in the record that the probationer was an alien. The court did not find it necessary to reach the constitutional issue finding the condition as stated unenforceably vague. [523 S.W.2d 953 (1975)]

In Hernandez v. State, the Court was able partially to resolve the issue. The condition imposed by the trial court was that the probationer "shall return to the Republic of Mexico and not return to the United States illegally during the period of his probation." The Court concluded that it did not have to answer the question concerning the validity of that portion of the probation condition requiring the appellant to return to Mexico. It upheld the revocation because appellant had reentered the United States illegally after having been formally deported by federal authorities. The court noted that illegal entry constituted a violation of the probation condition requiring that the probationer not violate the laws of the United States. [556 S.W.2d 337, 343 (1977)]

In Hernandez v. State, 613 S.W.2d 287 (En Banc 1981) the appellant was placed on probation on the condition that he return to the Republic of Mexico and "not re-enter the U.S.A. legally or illegally without the prior written permission of this court". Probation was revoked for violation of that condition. The Court of Criminal Appeals held that the probation condition was void because the matter of immigration into the country was pre-empted by federal law and could not be regulated by a probation condition. Presumably, had the probation condition prohibited only illegal re-entry, it would have been valid.

A jail sentence cannot constitute a condition of probation where it is not specifically provided in the statute. In Milligan v. State, the appellant had been convicted of unlawfully carrying a weapon. Punishment for this offense was

imprisonment in the state prison for not less than two years and not more than five years. The trial court granted probation and imposed jail confinement as an additional condition. Overruling jail confinement as a condition of probation the Court of Criminal Appeals observed: "While trial judges should have wide latitude in probation matters ... the object of probation is to allow the convicted person to remain out of confinement." [465 S.W.2d 157, 158-159 (1971)] Note, however, that Article 42.12, Section 6b and Article 42.13, Section 6b now specifically authorize jail detention as a condition of probation.

C. DETERMINING THE AMOUNT OF RESTITUTION TO BE ORDERED

A court, in determining the conditions of probation, may properly require the probationer to make restitution or reparation. [Art. 42.12, §6, (h); Art. 42.13, § 6 (8)] Unlike some jurisdictions which draw a distinction between restitution and reparation, Texas courts do not seem to distinguish between them. Those jurisdictions that attempt to distinguish between restitution and reparation generally define restitution as the return of a sum of money, or the return of an object or its value; they define reparation as repairing or restoring damages and injuries to a victim's person or property. In Thompson v. State, the Court of Criminal Appeals defined restitution as the act of "restoring ... anything to its rightful owner; the act of making good or giving equivalent for any loss, damage or injury; (the act of) indemnification". [557 S.W.2d 521,525 (1977)] Thompson v. State involved an order directing payment in the amount of $12,000 to the victim of the defendant's failure to stop and render aid following an automobile accident. By defining this payment of reparation as restitution, the court merged the two concepts of reparation and restitution and obliterated any distinction that can be drawn in this jurisdiction between the concepts.

Restitution is generally a favored probation condition when the defendant has the ability to pay. In 1977, the Legislature amended Article 42.12, Section 6 to include as a condition of probation the payment of a portion of defendant's income to the victim of his offense "to compensate ... for any property damage or medical expenses sustained by the victim as a direct result of the commission of the offense". [Art. 42.12, §6, (n)] This provision was extended to misdemeanor probation conditions in 1979 when the Legislature revised the misdemeanor probation statute. [Art. 42.13, §6 (14)] During this revision the Legislature also removed the $1,000 ceiling on restitution under misdemeanor probation. [Art. 42.13, §6 (8); formerly Art. 42.13, §5(a),(8)] There is an increased interest in victims of crimes. Texas in 1979 enacted the Crime Victims Compensation Act. [Civil Statutes Art. 8309-1] The Act establishes a fund to compensate victims of certain crimes. It would seem that whenever the defendant directly indemnifies his victims, this fund would be spared.

The Court of Criminal Appeals has upheld the constitutionality of restitution against repeated challenges. In Taylor v. State, defendant pleaded guilty to driving while intoxicated and he was ordered to make restitution to a victim in the amount of $1,000. On appeal the defendant contended that the pre-1979 Article 42.13, Sections 5(a), (8) which permitted the court to impose $1,000 restitution divested him of property without due process of law. The court upheld the imposition of restitution because of the facts adduced at the hearing in which defendant pled guilty, showing that a person suffered damages in excess of $1,000. Also, at the hearing, defendant had stated that he had talked to the adult probation officer concerning the terms and conditions of probation and stated that if granted probation he could abide by the terms imposed. [419 S.W.2d 647 (1967)] In Thompson v. State, the defendant pled guilty to a charge of failure to stop and render aid following an automobile accident. The trial court imposed $12,000 restitution as a condition of probation. On appeal, the defendant contended that restitution constituted an award of civil damages and that conditioning probation on its payment violated Article I, Section 18 of the Texas Constitution, which prohibits imprisonment for debts. The Court rejected defendant's contention and held that Article I, Section 18 has no application to criminal proceedings. [557 S.W.2d 521,525 (1977)]

In theory, the scope of restitution ranges from a position which could limit restitution to the return of specific property or its value with restoration to only victims of the crime, to restitution where loss of value cannot be determined with certainty and permitting compensation for losses and injuries to others beside victims. The Court of Criminal Appeals is engaged in the process of delineating the scope and the standards to be used in determining restitution. It has held that only the court which determines conditions of probation may prescribe the specific amount of restitution and the method of payment. In Cox v. State, the trial court imposed restitution as a condition of probation "as and when directed by the probation officer". The Court of Criminal Appeals held this to be an unauthorized delegation of authority because it permitted the probation officer to determine the terms of probation. Failure to comply with a condition imposed by the probation officer could not be used to revoke probation. [445 S.W.2d 200, 202 (1969)]

The record on appeal must contain formal evidence on which the trial court relied to determine the amount of restitution. In Thompson v. State, supra the Court of Criminal Appeals stated: "We find no evidence that $12,000 is just restitution for the damages and injuries suffered..." The Court further explained the record on appeal in a footnote:

> In an informal discussion at the bench, after the probation conditions had been imposed, appellant's counsel, in arguing that the restitution payments were too onerous for appellant, stated, 'I understand fully that his damages are probably more than that.' This was not evidence, nor was it a stipulation, nor was it even an unequivocal statement of counsel's personal opinion. It no more supports the setting of restitution of $12,000 than does the fact that the victim was present in the courtroom and viewed by the court.

[557 S.W.2d 521, 525-526, (1977)] The Court of Criminal Appeals remanded the case to the trial court for a hearing on the issue of damages.

The requirement of formal evidence on the amount of restitution may pose problems to a court. A judge is placed in the position of determining damages when they are not easily ascertainable. That is a problem usually left to civil trials where civil pleadings frame the issue of damages. On the other hand, the requirement of formal evidence will prevent a result such as the one in Flores v. State. In Flores, the defendant asked, on appeal, that the court reform an order of the lower court awarding restitution to two witnesses in the amount of $5,000. The Court refused to review the order on grounds that the record did not sufficiently preserve error: "We are unable to determine if the individuals named were in fact witnesses or just what their connection with the alleged crime was". [513 S.W.2d 66,70 (1974)] In a footnote the court explained that during the examination of several reputation witnesses the state asked whether the witnesses had heard of two San Antonio firemen, not otherwise identified, who had been swindled out of $5,000 by the defendant. Judge Roberts wrote a vigorous dissent from the court's refusal to review the restitution order. He pointed out the efforts by defendant's counsel to preserve error and the fact that the indictment charged assault with intent to murder naming a certain Felan as the complaining witness and it named no other party. Therefore, defendant could not have been convicted of any offense involving witnesses Estrada and Gonzalez, to whom restitution was awarded in the amount of $5,000. He concluded that the record sufficiently showed that the restitution related to the reimbursement of two witnesses. [513 S.W.2d 66, 70 (1974)]

There is some suggestion that there must be a factual basis for determining the restitution amount in evidence that is presented in open court that determining the amount in a presentence report is not sufficient. In Cartwright v. State, the officer in the presentence report noted that there "might be some question as to the proper amounts of restitution that should be paid". The trial court ordered $36,000 restitution without taking evidence on the amount of the victim's loss. The Court of Criminal Appeals remanded the case for a hearing on that issue:

> Certainly whether to order restitution as a conditon of probation is within the sound discretion of the trial court. But the dollar amount is a matter that the court 'shall determine' [Art. 42.12 §6h, C.C.P.] Due process considerations thus implicated require that there must be evidence in the record to show that the amount set by the court has a factual basis ... In the case at bar, we have nothing more to review

than a presentence investigation report which, aside from being hearsay, does not constitute such evidence that a just determination may be made from it. [605 S.W.2d 287 (Panel 1980)]

When a court adduces facts that justify a specific amount of restitution, that court is granted broad discretion as to schedule of payments. In Thompson v. State, the probationer challenged restitution on the additional ground that it was an abuse of discretion in that it took over half of his gross income. The Court held such imposition not unreasonable since probation cannot be revoked for failure to pay restitution where a probationer can prove financial inablility under Article 42.12, Section 8(c). Also, under Article 42.12, Section 6, a court can modify conditions of probation on its own motion or that of probationer. The Court in Thompson expressed its willingness to adjust the terms of restitution should the terms become impossible. [557 S.W.2d 521, 525 (1977)]

Bradley v. State addressed the issue whether the scope of restitution is broad enough to include restitution to parties other than the victim of the crime for which a defendant is convicted. In Bradley, the owner of a liquor store was assaulted, tied up, placed in a back room and robbed by appellant. Before the defendant left, a customer came into the store and was also assaulted. Under an indictment which did not name the customer, a jury found defendant guilty and recommended probation. The court granted probation imposing restitution to the owner of the liquor store and the customer as a condition of probation. Under a separate indictment defendant was convicted for the robbery of the customer. Before the verdict, the court deleted from the prior judgment the provision requiring that restitution be made to the customer. Defendant challenged the authority of the trial court to delete the condition of restitution in the prior judgment. The Court rejected defendant's contention. Judge Roberts, concurring in the opinion, expressed an additional ground for denial of defendant's claim: "Although I find no authority directly on point, I am of the opinion that the restitution or reparation contemplated in [Art. 42.12] Section 6 does not include restitution to a party other than the victim of the crime for which the defendant was convicted." He added a footnote explaining that in a non-jury trial, "I do not necessarily conclude that the court could not order that restitution be made to a person other than the victim. The provision of Sec. 3a, limiting conditions of probation to those enumerated in Section 6, applies only when probation is granted by the jury." [478 S.W.2d 527, 531 (1972)]

Whether the scope of restitution in this jurisdiction is broad enough to permit restitution for loss or injuries not related to the offense for which a defendant is convicted is an issue which has not been resolved. In Thompson v.State, the appellant argued that restitution was ordered for injuries that the

victim suffered before the offense occurred for which he was convicted (failure to stop and render aid) and that the trial court did not have the power to order such restitution. The Court of Criminal Appeals stated that whether a court has this power is an issue which it has not yet reached, citing Flores v. State, supra for supporting authority. Flores, as above discussed, refused to review an order granting restitution to parties not named in the indictment on the ground that error was not sufficiently preserved by the record.

D. MODIFYING PROBATION CONDITIONS

Both Article 42.12, Section 6 and Article 42.13, Section 6 provide that a court which has jurisdiction of a case "may, at any time, during the period of probation alter or modify the conditions of probation". Modification of probation conditions contributes flexibility to the statutory scheme of felony and misdemeanor probation presenting the court with an alternative to revocation of probation and presenting the probationer with an avenue for relief when the terms of the original pact become oppressive due to changes in the circumstances of the probationer.

Only the court in which the probationer was tried may modify the probation conditions, except where a case has been transferred to another court. [Art. 42.12, §5; Art. 42.13, §5] The power of the trial court to modify conditions has been broadly interpreted. In Flournoy v. State, the Court of Criminal Appeals characterized the relationship between the probationer and the trial court as a contract, and added that, "Unlike most contracts, however, terms and conditions of a probation pact are subject to unilateral modification by the trial court." [589 S.W.2d 705, 707 (Panel 1979)]

Most modifications are the result of a trial court's own initiative during a hearing on a motion to revoke. Article 42.12, Section 8(a) and Article 42.13, Section 8(a) provide that: "At any time during the period of probation the court may issue a warrant for violation of any of the conditions of probation and cause the defendant to be arrested... and after a hearing without a jury, may either continue, modify or revoke the probation". Where the state proves a violation of conditions, the Court of Criminal Appeals has ruled that a trial court's discretion to modify or to revoke is absolute. [Wallace v. State, 575 S.W.2d 512 (Panel 1979)] The rationale for the court's position is that the Legislature provided "not the slightest suggestion of standards or guidelines to inform the discretion of the trial court". [Flournoy v. State, supra]

Modification allows the court to continue probation on a modified basis where revocation could end an effort at rehabilitation and where continuation of

probation would not serve the interest of the community. Although the court has absolute discretion to modify or revoke after a hearing where grounds for revocation are shown, the law is settled that if a judge decides to modify and continue probation, subsequent revocation of probation without further finding of violations constitutes a denial of due process and fundamental fairness. [Wallace v. State, 575 S.W.2d 512 (Panel 1979)]

The Court in Basaldua v. State, recognized a right in the probationer to move the trial court to modify the conditions of probation. It viewed the probationer's right to petition the court as an opportunity for the probationer who is financially unable to make payments to call his or her financial hardship to the court's attention and to have this condition modified or eliminated. However, the Court held that from an order modifying or refusing to modify probation there is no direct appeal, pursuant to Article 42.12, Section 6. The Court of Criminal Appeals lacked jurisdictional authority to entertain such an appeal. [558 S.W. 2d 2 (1977)] While the Court in Basaldua expressly distinguished the right to appeal from an order following a revocation hearing under Article 42.12, Section 8(a), in Flournoy v. State, the Court held that in the absence of evidentiary and procedural shortcomings "the discretion of the trial court to choose revocation [or modification] is at least substantially absolute" and that appeals challenging the trial court's discretion are "practically an exercise in futility". [589 S.W.2d 705, 708, 709 (Panel 1979)

This expansive Article 42.12, Section 6 authority to modify conditions was challenged in Sanchez v. State [603 S.W.2d 869 (Panel 1980)] Defendant's probation terms had been modified without a hearing four times before final revocation. Defendant contended that modifications without a hearing constituted a violation of due process of law. The Court of Criminal Appeals held that the terms as modified were not unreasonable and did not constitute a violation of due process since the term as modified could have been made part of the original probation and defendant had been given notice of the changes. There is no requirement of proof of a probation violation before the trial court is authorized to modify probation conditions.

CHAPTER 5.

PROBATION SUPERVISION

Supervision is the essence of probation. Supervision of probationers has several different facets. The observations of the author in an earlier publication seem appropriate:

> It is convenient to think in terms of three major objectives of probation supervision. One major purpose is to control the probationer--to make him conform his behavior to the requirements of the law and the probation conditions during the time he is under supervision. This objective is achieved if the probationer makes it through the supervision period without a serious violation of the criminal law or the probation conditions. A second major objective of probation supervision is treatment--to attempt to achieve through counselling or referral to other resources a permanent change in the probationer's antisocial behavior. This objective is accomplished if the probationer is discharged from supervision with an improvement in his willingness and ability to live a law-abiding existence in the free community. A third objective is service to the probationer and his family to overcome problems, such as obtaining and keeping employment. This objective is accomplished if the probation officer is able to solve the problems presented by the probationer.

[R. Dawson, Sentencing: The Decision as to Type, Length, and Conditions of Sentence 122-23 (1969)] Our concern in this chapter is with the legal aspects of this multifaceted probation supervision process.

Does the law permit there to be probation without supervision? The definition of probation in the Code of Criminal Procedures does not include the notion of supervision: " 'Probation' shall mean the release of a convicted defendant by a court under conditions imposed by the court for a specified period during which the imposition of sentence is suspended." [Art. 42.12, §2b; Art. 42.13, §2(2)] However, elsewhere in the Code there does appear to be a requirement that one placed on probation be supervised: "Any such person placed on probation, whether in a trial by jury or before the court, shall be under the supervision of such court." [Art. 42.12, §3; Art. 42.13, §3] Thus, there is ground for concluding that under the Adult Probation Law, unlike the old Suspended Sentence Law, the Legislature contemplated that one placed on probation will be supervised. Of course, supervision is an extremely elastic concept and may be varied to meet individual needs. Not only can the intensity of supervision vary from maximum to minimum but supervision need not involve direct personal contact between probation officer and probationer but could involve, for example, periodic reports by mail.

Nevertheless, at a minimum some reporting requirement appears necessary to constitute supervision.

The following aspects of probation supervision are discussed in this Chapter: (1) the allocation of authority between court and probation officer; (2) privacy and confidentiality in probation supervision; (3) the probation term, when it begins and when it ends; and (4) investigating probation violations.

A. THE ALLOCATION OF AUTHORITY BETWEEN COURT AND PROBATION OFFICER

Who has legal responsibility for supervising the probationer? The trial court? The probation officer? There is language in the Code of Criminal Procedure that suggests the trial court has legal responsibility for supervision: "Any such person placed on probation, whether in a trial by jury or before the court, shall be under the supervision of such court." [Art. 42.12, §3; Art. 42.13, §3] But the definition of probation officer in the Code of Criminal Procedure suggests supervision is the legal responsibility of that person: "'Probation Officer' shall mean ... a person duly appointed by one or more courts of record having original criminal jurisdiction, to supervise defendants place on probation..." [Art. 42.12, §2(e); Art. 42.13, §2 (4)] Finally, the section of the Code of Criminal Procedure setting out the purpose of the Adult Probation Law fixes responsibility upon the trial court: "It is the purpose of the Article to place wholly within the State courts of appropriate jurisdiction the responsibility for determining when the imposition of sentence in certain cases shall be suspended, the conditions of probation, and the supervision of probationers, in consonance with the powers assigned to the judicial branch of this government by the Constitution of Texas." [Art. 42.12, §1; Art. 42.13, §1]

The caselaw places responsibility for supervision upon the trial court and makes it clear that the court cannot shift that authority to the probation officer.

The trial court has responsibility to fix the conditions of probation with reasonable precision and cannot delegate that responsiblity to the probation officer. One of the conditions of probation set out in the statute is that the probationer "report to the probation officer as directed by the judge or probation officer and obey all rules and regulations of the probation department." [Art. 42.12, §6(d); Art. 42.13, §6(4)] The caselaw is clear, however, that the trial court must specify the frequency of reporting and cannot delegate that responsibility to the probation officer. In Brown v. State the trial court imposed a condition of probation that the defendant "report to the probation

officer as directed". The Court of Criminal Appeals, following a long line of similar cases, held that "such requirement standing alone constitutes an improper delegation of the setting of terms of probation to the probation officer." [508 S.W.2d 366, 368 (1974)] Similarly, the statute provides that a condition of probation may be that the probationer "remain within a specified place". [Art. 42.12, §6(g); Art. 42.13, §6 (7)] In McDonald v. State the trial court imposed the probation condition that "said defendant remain within the confines specified by the probation officer." Although the proof was that the probationer was discovered in a New Mexico jail, the Court of Criminal Appeals reversed the revocation of probation:

> A court in granting probation may as a condition or term thereof require that the probationer "remain within a specified place."... But only the court having jurisdiction of the case shall determine and fix the terms and conditions ... The court may not delegate this authority to a probation officer or anyone else.
>
> In the case at bar the court required the probationer "to remain within the confines specified by the probation officer" This was an unauthorized delegation of authority and permitted the probation officer not only to determine a condition of probation but also authorized him to alter or modify the condition from time to time as he deemed desirable without the approval of the court. This the court had no power to do.
>
> This Court has consistently held that where the trial court grants probation, the relationship between the court and the probationer is contractual in nature ... and that conditions of probation should be clearly set forth in the judgments and orders granting probation so the probationer and the authorities may know with certainty what the conditions are.

[442 S.W.2d 386, 387 (1969)] Similarly, in Cox v. State [445 S.W.2d, 200 (1969)] a condition of probation that the probationer "make restitution as and when directed by the probation officer" was declared void by the Court of Criminal Appeals as being both impermissibly vague and an unlawful delegation of authority to the probation officer.

One should contrast with these cases the position of the Court of Criminal Appeals when the probationer is required to attend a community-based correctional program. The statutes provide that one condition of probation may be to "participate in any community-based program" [Art. 42.12, §6(j); Art. 42.13, §6(10)] or to live in an halfway house: "remain under custodial supervision in a community-based facility, obey all rules and regulation of such facility, and pay a percentage of his income to the facility for room and board". [Art. 42.12, §6(l); §42.13, §6 (12)] In Salmons v. State, the probationer was required to attend the program of the Cenikor Foundation and "not discontinue cooperating with such authority until he is dismissed from the foundation by competent staff personnel". The proof at revocation was that he had left the foundation without

the required discharge and the probationer defended on the ground that the probation condition was an unauthorized delegation of authority to the staff of the Cenikor Foundation. The Court of Criminal Appeals disagreed in a passage that indicated it was approving of the two statutory probation conditions quoted above:

> Although such a condition of probation [as quoted above] vests in the treatment facility a certain degree of discretion with regard to the conduct of the probationer while a resident therein, such discretion is necessary if the facility is to be successful in its rehabilitative efforts. Furthermore, there is a clear distinction between rules imposed by a custodial treatment facility in furtherance of its rehabilitative function and the conditions of probation. We hold that in ordering a probationer to obey the rules and regulations of the community-based facility in which he is placed, a trial court does not thereby improperly delegate to the facility the authority to specify the terms of probation.

[571 S.W.2d 29, 30 (Panel 1978)] The only way this case can be reconciled with the earlier cases on delegation of authority is frankly to recognize that it would be impracticable to require the trial court to set out all the rules and regulations of a community-based facility in the conditions of probation, whereas it is practicable to require the court to specify the frequency of reporting, the geographic limits within which the probationer must remain, and the amount of restitution to be paid.

Under the caselaw, a probation officer has no authority to impose restrictions upon the probationer beyond those specified in the conditions of probation or to excuse noncompliance with those conditions. In Herrington v. State the court ordered the probationer to "report as directed by probation officer, at least once a month". The probation officer testified that the probationer had failed to report on a weekly basis as he had directed. The Court of Criminal Appeals held this requirement was not authorized:

> The order of the court requiring the probationer to report as directed by the probation officer at least once a month sufficiently required appellant to report not less than once per month ... However, it did not delegate authority to the probation officer to require weekly reports, and any such instructions given by the officer were beyond his legal authority and of no force.

[534 S.W.2d 331,334 (1976)]

However, the probation officer may preclude revocation of probation by leading the probationer to believe that a proposed course of conduct would be permissible when in fact it would violate a condition of probation. In Aguilar v. State, a condition of probation was that the probationer not leave the county without the permission of the court. The probationer obtained permission from her probation officer to travel to California to seek employment. When she did not return on schedule the State filed a motion to revoke on the ground she had not received the permission of the court before leaving the county. The Court of Criminal Appeals said:

> We find it to be an abuse of discretion to revoke probation on the basis of appellant's failure to obtain the court's permission to leave town when appellant had received a permit authorizing such a trip from her probation officer and had been admonished to obey the orders of her probation officer in the judgment of probation.

[542 S.W.2d 871, 873 (1976)]

Finally, there is some suggestion in opinions of the Court of Criminal Appeals that if the probationer accepts an unauthorized delegation of authority for a period of time he may not be able to use that as a defense to revocation. In Brown v. State, a condition of probation was that the defendant report to the probation officer as directed. The court reversed a revocation based on violation of that condition on the ground it was in impermissible delegation of authority to the probation officer. It then noted, however, that:

> The exercise of improperly delegated authority by a probation officer cannot make the delegation effective, although on different facts, where parties over a period of time have accepted such a delegation of authority as shown by the course of conduct between them, a probationer may be estopped from objecting to being held to the duty assumed.

[508 S.W.2d 366, 368 (1974)]

B. PRIVACY AND CONFIDENTIALITY IN PROBATION SUPERVISION

In the course of conducting presentence investigations and of supervising probationers, a probation officer quite properly comes into possession of information that is both personal and sensitive. The law requires with respect to pre-sentence investigations that all material in a presentence report be disclosed to the defendant or his attorney upon request. That has been discussed in Chapter 3.

The subject of confidentiality as it affects probation officers both in acquiring information and in disclosing it has been thoroughly discussed in a previous publication from the Texas Adult Probation Commission. The publication is Records Confidentiality for Adult Probation Offices--A Guideline and was published in January, 1980. It is recommended that questions concerning confidentiality be handled as an initial matter by consulting that excellent publication.

After the release of that publication, there has been one legal development related to this subject. A request of the Attorney General for an opinion under the Open Records Act was filed asking whether "that portion of the files of

probationers which indicates whether they are complying with the terms of their probation" must be disclosed under the Texas Open Records Act. The Attorney General noted that "the Judiciary" is exempted from the Open Records Act and that this exemption includes probation officers:

> Probation officers are employed by a district judge and subject to his supervision and control. Since the probation officer is thus an agent of the district judge, and acts according to his direction, it is our view that the requested information is a record of the judiciary and, as a result, not subject to the Open Records Act.
>
> As to the availablity of the information outside the scope of the Open Records Act, we believe that decision is within the discretion of the court, acting through its agent, the probation officer. The records about which you inquire here involve the administration of a continuing judicial function -- whether a probationer is complying with the terms set by the court -- and the court's supervision over the probationer continues throughout the term of his probation. As this office said in Attorney General Opinion H-826 (1976), a "court has inherent power to control public access to its own records".

[Open Records Decision No. 236 (March 27, 1980)]

The issue is sometimes raised whether communications by a probationer to his or her probation officer are privileged under Texas law. As indicated earlier, information in the probation case file is not public information disclosure of which can be compelled under the Texas Open Records Act. Further, the Texas Adult Probation Commission Code of Ethics for Probation Officers prohibits needless disclosure of case information: "Probation officers shall endeavor to: ... (11) maintain the integrity of private information; he will neither seek personal data beyond that needed to perform his responsibilities, nor reveal case information to anyone not having proper professional use for such". [5 Texas Register 351 (No. 8, Feb. 1, 1980)] At one time Texas law made communications from a probationer to his or her probation officer privileged and appeared to prohibit their disclosure even in a probation revocation hearing. [T.C.C.P. Art. 781b, §29 (1925), now repealed] That portion of the statute relating to probation was repealed in 1957 and the Texas Court of Criminal Appeals has held that a probation officer may properly tesify in court about statements made in confidence by a probationer. [Cunningham v. State, 488 S.W. 2d 117 (1972)] Since those communications are not privileged in law, it follows that a probation officer may be compelled by a court to testify about confidential communications from a probationer even if the probation officer desires not to testify.

There may be one exception to the general proposition that no legal privilege prohibits a probation officer from testifying about communications of a probationer. In 1971, the Legislature added an article to the Code of Criminal Procedure that provides in relevant part: "A communication to any persons 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". [Art. 38.101] There appear to be no appellate cases construing this statute. It could be argued, however, that it would prevent a counselor in a drug treatment program from testifying about statements made to him or her by a probationer who participated in the program as a condition of probation. It might also be argued that the statute applies when a probation officer is conducting group sessions for drug abusing probationers or is engaged in individual counselling with a probationer concerning drug abuse.

C. THE PROBATION TERM: WHEN IT BEGINS AND WHEN IT ENDS

This section addresses several questions relating to the term of probation. How short may the term be? How long may it be? What happens when a defendant has been convicted of more than one offense? May probation terms be ordered to run cumulatively? May a probation term be ordered to begin when the defendant has been released from a jail or prison sentence? When does the probation term begin? When does it end? Once the term is set, may it be modified to shorten or to extend it?

Under the recently amended misdemeanor probation law, the term of probation is initially set by operation of law at the maximum term the defendant could have been sentenced to jail for the offense of which he was convicted. [Art. 42.13, §3, 3a] The punishment assessed by the judge or jury may be any length up to the statutory maximum for the offense. Thus, there is no fixed relationship between the punishment assessed and the length of the probation term in misdemeanor cases and it is not uncommon to see cases in which a term of 30 days in jail is assessed but the defendant is placed on probation for a period of one year.

Under the felony probation law, the term of probation may also be different from the punishment assessed: "In all cases where the punishment is assessed by the Court it may fix the period of probation without regard to the term of punishment assessed, but in no event may the period of probation be greater than 10 years or less than the minimum prescribed for the offense for which the defendant was convicted". [Art. 42.12, §3] When the defendant has elected jury punishment, the jury may set the term of probation different from the punishment assessed but the term may not exceed 10 years. [Art. 42.12, §3a] It is the custom, however, in felony cases to set the term of probation at the same length as the punishment assessed. There is language in one case to the effect that if the term of probation is not specified by the judge or jury it will be deemed to be the same length as the punishment assessed in the case [Kinard v. State, 477 S.W.2d 896 (1972)] which is undoubtedly a sensible position considering the custom of making both figures the same.

There is no assessment of punishment when deferred adjudication and similar procedures are used. When felony deferred adjudication probation is utilized, the probation period may be set for any term up to 10 years [Art. 42.12, §3d (a)]. For misdemeanor deferred adjudication probation, the term may be for as long as the maximum period of confinement permitted for the offense to which the probationer pled. [Art. 42.13, §3d (a)] When the court utilizes deferred adjudication community service probation in a misdemeanor case, there is no set term of probation. Instead, the probationer is ordered to work a specified number of hours for a nonprofit agency and supervision is terminated when the work is complete. [Art. 42.13, §3B] Under the new felony deferred adjudication community service probation statute, probation must be terminated when the probationer completes the required number of community service hours and when any restitution ordered to the victim of the offense has been fully paid. [Art. 42.12, §10A (j)] One receiving conditional discharge under the Texas Controlled Substances Act for a felony or misdemeanor may be placed on probation for any term not to exceed two years without regard to the seriousness of the drug offense. [Civil Statutes Art. 4476-15, §4.12]

When a defendant has been convicted of two or more offenses and has received more than one sentence to jail or the Texas Department of Corrections, the trial court, in its discretion, may order that the sentences run concurrently or cumulatively. [Art. 42.08] If the sentences are ordered to run concurrently, the effect is to merge the shorter sentence into the longer one. If the sentences are cumulated or "stacked" the effect is to add the sentences together to make one longer sentence. When sentences are cumulated, service of the second sentence does not begin until the first sentence has been satisfied. May probation terms be stacked? May a probation term be stacked onto a jail or prison sentence to achieve the effect of a so-called "split sentence"? Unfortunately, there is very little authority on these questions in Texas. What little there is suggests that probation terms can be stacked upon each other or upon a prior jail or prison sentence. In Ex parte Davis [542 S.W.2d 117 (1976)] the defendant had pled guilty to three felony offenses. The trial court assessed two ten-year prison terms, denied probation on them and ordered that the sentences be served concurrently. The court then assessed a five-year prison term on the third offense, but granted probation on it and ordered that the probation term begin when service of the two prison sentences was completed. During the course of its opinion reversing the case for other reasons the Court suggested that cumulation of probation to a prison sentence is probably valid under the statute authorizing consecutive sentences. [Art. 42.08] If that is correct, it would be possible to impose very long probation terms when the defendant has been convicted of multi-

ple felonies since each term could be as long as 10 years and the terms could be stacked. Further, in Gordon v. State [575 S.W.2d 529 (En Banc 1979)] the Court approved of the implications of the Davis case and held that a trial court is empowered to enter a cumulation order when more than one probation is revoked and sentences imposed even though there was no cumulation order when the defendant was first placed on probation.

When does the probation term begin? The probation term begins when the defendant is placed on probation by the trial court unless the defendant takes some action that suspends the probation order. If the defendant files a timely motion for new trial, the probation term cannot begin until the motion is overruled by action of the trial court or by operation of law. [McConathy v. State, 544 S.W.2d 666 (1976)] However, the probation period is also suspended by the timely filing of notice of appeal. When probation is granted, notice of appeal may be filed after the granting of probation unless the defendant has timely filed a motion for new trial, in which event the notice of appeal must be filed after the overruling of the motion. [Art. 44.08] When notice of appeal is timely filed, the probation period does not begin until the case has been affirmed by the Court of Criminal Appeals and the clerk of that Court has issued a mandate of affirmance. [Delorme v. State, 488 S.W.2d 808 (1973); Smith v. State, 478 S.W.2d 518 (1972)] If the appeal is dismissed by the Court of Criminal Appeals, that is treated as a termination of the appeal and the probation period begins to run from the date of dismissal. [Ross v. State, 523 S.W.2d 402 (1975)] Thus, as long as the defendant's case is pending on motion for new trial or appeal, the probation order is suspended and the defendant should not be placed on supervision status of any kind.

When does probation end? Probation terminates by operation of law when the probationer has been on probation for the term set by the court. Obviously, the probation term ends when probation is revoked and the defendant does not appeal the revocation decision. However, if probation is revoked by the trial court and the defendant appeals the revocation decision to the Court of Criminal Appeals, the probation continues to run until the revocation decision is affirmed on appeal or the term of probation expires, whichever comes first. [Ex parte Miller, 552 S.W.2d 164 (1977); Ex parte Roberts, 547 S.W.2d 632 (1977); Nicklas v. State, 530 S.W.2d 537 (1975)] What this means is that even though the trial court has revoked probation the defendant remains on probation during the pendency of the appeal. If the probationer is free on bond, he or she should continue to be supervised by the probation officer until the revocation is affirmed or the original probation term expires. Further, if the probationer violates a condition of probation while free on bond pending appeal, a new motion to revoke

may be filed and probation may once again be revoked. Putting the matter differently, the appeal from a revocation suspends the revocation order just as an appeal from a conviction suspends an order placing a defendant on probation. Although there are no cases on point, it would seem that a defendant who appeals a revocation order but does not make bail also remains on probation during the pendancy of the appeal, even though he or she is securely in custody of the jail or the Department of Corrections.

The original probation term may be reduced by action of the trial court. A felony probation term may be reduced or early discharge granted when the probationer has satisfactorily completed one-third of the probation term or two years, whichever is less. [Art. 42.12, §7] A misdemeanor probation term may be reduced or early discharge granted when the probationer has successfully completed one-third of the probation term. [Art. 42.13, §7] The trial court may discharge a probationer from felony or misdemeanor deferred adjudication probation at any time during the original term "if in its opinion the best interest of society and the defendant will be served" by an early discharge. [Art. 42.12, §3d (c); Art. 42.13, §3d(c)] There is no specific statutory authority for early discharge from felony or misdemeanor deferred adjudication community service probation [Art. 42.12, §10A; Art. 42.13, §3B] but arguably the trial court has the general power to modify the conditions of this type of probation and that may include the power to grant early discharge. Under the conditional discharge law, the trial court is empowered to "dismiss the proceedings against the defendant and discharge him from probation before the expiration of the maximum period prescribed for his probationary period". [Civil Statutes Art. 4476-15, §4.12(b)]

Once the term of probation has been set by the trial court, may it be extended by the court if it acts during the original term of probation? Prior to 1979, the misdemeanor probation law provided that "the court may ... extend the term of the probationary period to any length of time not exceeding the maximum time of confinement allowed by law". [Art. 42.13, §3(b), now repealed] When the law was rewritten in 1979, that language was deleted in light of the requirement that all misdemeanor probation terms must be for the maximum time allowed for the particular offense, subject, of course, to the provision for early discharge from misdemeanor probation that was added as part of that same revision. Apparently, the felony probation law has never contained a provision specifically authorizing extension of the probation term. The felony law does empower the trial court "at any time, during the period of probation [to] alter or modify the conditions" of probation. [Art. 42.12, §6] Whether the power to modify includes power to extend the term of probation appears to be an open question.

D. INVESTIGATING PROBATION VIOLATIONS

Part of any probation officer's responsibility is to decide whether to seek the filing of a motion to revoke probation. Frequently, that decision can be made without any investigation personally being conducted by the probation officer, that is, reliance may be placed totally upon a completed police investigation. Sometime, however, a probation officer must personally conduct an investigation to determine whether there are grounds for seeking a revocation motion and to decide whether one should be sought should there be grounds. It is to that situation that this section speaks.

What limits are placed by the law upon the methods that may be employed by a probation officer in investigating possible violations of probation? Is the probation officer limited by the search and seizure restrictions of the Fourth Amendment and the Texas Constitution? Must the probation officer comply with the requirements of Miranda v. Arizona and warn the probationer of all legal rights before questioning him or her about possible violations of probation?

It is clear that in Texas the Fifth Amendment right to remain silent so as not to incriminate oneself and the Fourth Amendment freedom from unreasonable searches and seizures apply to probationers and that evidence obtained in violation of either of those amendments is not admissible in a hearing to revoke probation. [Tamez v. State, 534 S.W.2d 686 (1976) (Fourth Amendment); Dowdy v. State, 534 S.W.2d 336 (1976) (Fifth Amendment)]

In Miranda v. Arizona [384 U.S. 436 (1966)] the United States Supreme Court held that a confession given by one in police custody in response to interrogation is not admissible in evidence unless the suspect was warned of certain constitutional rights. Only if the person is properly warned and voluntarily waives those rights may any statement made be admissible in court. In Texas, the Legislature has codified the Miranda case. Article 38.22 of the Code of Criminal Procedure requires these warnings:

> (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.

Unless the suspect voluntarily waives these rights and agrees to talk with the questioner, any statement made is not admissible in evidence.

The Court of Criminal Appeals has had several occasions to consider the applicability of Miranda and Article 38.22 to statements made by probationers to probation officers. In Cunningham v. State, the probationer had failed to report for one month and was sent a "delinquent notice" by his probation officer. He appeared at the probation office shortly thereafter and the officer "using 'a set format' for monthly reports ... inquired of the [probationer] if he had used narcotics 'in the past month'". The probationer responded that he had used heroin three or four times a week. That statement was admitted into evidence at the revocation hearing and probation was revoked for violation of the probation condition that he "avoid injurious or vicious habits and abstain from the use of narcotic drugs in any form". On appeal, the probationer contended that the statement should have been excluded from evidence because he had not been warned of his constitutional rights by the probation officer before the questions were asked. The court held that the probation officer behaved properly in questioning the probationer without giving him warnings because the warnings are required only when the person being questioned is in custody:

> Here, the probation officer was taking a monthly report, not conducting an investigation into a suspected crime where the investigation had begun to focus upon the probationer. The appellant was not in custody and, in fact, left following the interview...
>
> The purpose of probation would be materially affected and the relationship between the probation officer and his probationer would be a strained one if upon every contact, monthly report, or visit, the officer was required to give the Miranda warnings and obtain an affirmative waiver of the probationer's rights.

[488 S.W.2d 117, 119-120 (1972)] The Cunningham case has been followed in numerous other cases, all of which hold that a probationer's statements to his probation officer are admissible at a revocation hearing if the probationer was not in custody at the time the statement was made. [Bustamante v. State, 493 S.W.2d 921 (1973); Simmons v. State, 564 S.W.2d 769 (Panel 1978); Payne v. State, 579 S.W.2d 932 (Panel 1979)] The probationer in Hoover v. State [603 S.W.2d 882 (Panel 1980)] was living in a residential treatment center as a condition of probation. Upon returning to the center one evening he appeared to the counselor on duty to be intoxicated and responded to the counselor's question that he had been drinking. The Court held that the probationer's statement was admissible in a revocation hearing despite claims it was obtained in violation of Miranda v. Arizona and Texas law. Although the probationer was required by order of court to reside at the center, he was not in custody for purpose of the requirements relating to custodial questioning.

However, if the probationer has been arrested and is detained in jail, then he is in custody for purposes of Miranda and Article 38.22 and must be warned of

rights before any statement made will be admissible at a revocation hearing. [Jackson v. State, 508 S.W.2d 89 (1974)] The probationer does not have to be detained in a jail or police station to be in custody. He or she may be in custody if detained in his or her own home or in the office of a probation officer. Creeks v. State, provides an illustration of this point. Creeks' probation officer learned that he had been arrested for theft and obtained the issuance of an arrest warrant for violation of probation. Creeks later called the officer and arranged to come to his office. The officer testified that he did not arrest Creeks and that the Chief Probation Officer told him "Do not stop anyone". However, when Creeks arrived at the probation office, another officer called the police to have them arrest him on the outstanding arrest warrant. While waiting for the police to arrive, Creeks made certain damaging statements to the probation officer. The Court distinguished the Cunningham case and found that the statements were not admissible because Creeks was in custody when he made them:

> In light of the record before us it is clear that while the probation officer ... may not have formally arrested the appellant, the appellant was in fact detained while awaiting the arrival of the arresting officers and was deprived of his freedom of action in a significant way. [542 S.W.2d 849, 852 (1976)]

In addition to codifying the requirements of the Miranda case, Article 38.22 imposes certain other limitations upon the use of statements made by persons in custody. Although the matter was thrown in doubt as a result of a 1977 amendment to the statute, until that time it was clear that under Article 38.22 any oral statement made by a person in custody was not admissible unless it led to tangible evidence of the offense and that was true whether or not the statement was made in response to interrogation. This requirement is in addition to the warnings required by Miranda. [Jimmerson v. State 561 S.W.2d 5 (En Banc 1978)] Whether or not the limits on oral confessions still exist after the 1977 amendment remains an open question. Finally, it should be noted that any statement made by the probationer to the probation officer must be a voluntary statement, whether or not the probationer is in custody, in order to be admissible at a revocation hearing. Voluntariness can be destroyed by a threat by a probation officer that induces the probationer to make the statement or by a promise of benefit if he or she makes a statement.

In summary, if the probationer is in custody no statement made to the probation officer is admissible at a revocation hearing unless the probationer was properly warned of rights and waived them. Even then, it is likely the statement must be written and signed to be admissible. The probation officer may interview the probationer who is in custody without warning him or her; but any statement

made is not admissible in evidence. When an admissible statement is desired, the best procedure is to have the probationer warned by a peace officer or a judge before questions are asked.

The Fourth Amendment to the United States Constitution and Article I, Sec. 9 of the Texas Constitution both prohibit unreasonable searches and seizures. It is clear that the "protection afforded by the Fourth Amendment and Article I, Sec, 9, Texas Constituion, extends to probationers. This Court has consistently and knowingly made this clear in ruling on appeals from orders revoking probation". [Tamez v. State, 534 S.W.2d 686, 692 (1976)] Can this legal protection be modified by a condition of probation? In the Tamez case, the trial court imposed the following as a condition of probation:

> Submit his person, place of residence and vehicle to search and seizure at any time of the day or night, with or without a search warrant, whenever requested to do so by the probation officer or any law enforcement officer.

The probationer was found by a Border Patrol officer in possession of a weapon in violation of Federal law. Although the search was unlawful under normal Fourth Amendment standards, the State sought to justify it under this special probation condition. An identical probation condition had been upheld by California courts, but the Texas Court of Criminal Appeals held that the probation condition was unlawful:

> The condition imposed would literally permit searches, without probable cause or even suspicion, of the probationer's person, vehicle or home at any time, day or night, by any peace officer, which could not possibly serve the ends of probation. For example, an intimidating and harassing search to serve law enforcement ends totally unrelated to either his prior conviction or his rehabilitation is authorized by the probationary condition. A probationer, like a parolee, has the right to enjoy a significant degree of privacy ...
>
> A diminution of Fourth Amendment protection and protection afforded by Article I, Sec. 9, Texas Constitution, can be justified only to the extent actually necessitated by the legitimate demands of the probation process. A probationer may be entitled to a diminished expectation of privacy because of the necessities of the correctional system, but his expectations may be diminished only to the extent necessary for his reformation and rehabilitation.
>
> Further, it is clear that in accepting the condition of probation the appellant's "consent" was not in fact freely and voluntarily given. The choice to reject probation and go to prison or accept the probationary condition was really no choice at all. It was in legal effect coerced.

[534 S.W.2d 686, 692 (1976)] The court concluded that the probation condition was not "reasonable in light of the purposes of Article 42.12" and declared it invalid.

One should distinguish the probation condition imposed in Tamez from one set out in Articles 42.12 and 42.13 requiring the probationer to "permit the probation officer to visit him at his home or elsewhere". [Art. 42.12, §6(e); Art. 42.13, §6(5)] Using the standard employed by the Court in Tamez, that probation condition should be held to be a valid one as being "necessitated by the legitimate demands of the probation process." It should be clear, however, that the power to visit the probationer in his or her home is not authorization to search the home for evidence of a probation violation nor is it authorization for the probation officer to conduct a search of the person of the probationer. What the probation officer observes in plain view (and without searching) during the course of a home visit authorized under a probation condition may, however, be used as the basis for revoking probation.

Similarly, a condition of probation requiring a probationer with a history of drug abuse to submit periodic urine samples for laboratory analysis to determine the presence of illicit substances undoubtedly is a requirement that the probationer submit to a search by providing the urine samples. Using the standard of Tamez, however, it is probably a valid condition of probation as being "necessitated by the legitimate demands of the probation process" if there is evidence of a relationship between the probationer's drug abuse and his willingness and ability to conform to the other conditions of probation.

CHAPTER 6.

PROBATION REVOCATION

The legal authority for revocation of probation in Texas appears in the Code of Criminal Procedure. For felony cases, Article 42.12, Section 8(a) controls and for misdemeanors, Article 42.13, Section 8(a). They are identical except the felony statute contains a sentence added by the Legislature in 1979 dealing with amendment of the motion to revoke probation. In the quotation that follows, that sentence is set out in brackets and appears only in the felony statute.

> At any time during the period of probation the court may issue a warrant for violation of any of the conditions of the probation and cause the defendant to be arrested. Any probation officer, police officer or other officer with power of arrest may arrest such defendant without a warrant upon the order of the judge of such court to be noted on the docket of the court. A probationer so arrested may be detained in the county jail or other appropriate place of detention until he can be taken before the court. Such officer shall forthwith report such arrest and detention to such court. If the defendant has not been released on bail, on motion by the defendant the court shall cause the defendant to be brought before it for a hearing within 20 days of filing of said motion, and after a hearing without a jury, may either continue, modify, or revoke the probation. [The state may amend the motion to revoke probation any time up to seven days before the date of the revocation hearing, after which time the motion may not be amended except for good cause shown, and in no event may the state amend the motion after the commencement of taking evidence at the hearing.] The court may continue the hearing for good cause shown by either the defendant or the state. If probation is revoked, the court may proceed to dispose of the case as if there had been no probation, or if it determines that the best interests of society and the probationer would be served by a shorter term of imprisonment, reduce the term of imprisonment originally assessed to any term of imprisonment not less than the minimum prescribed for the offense of which the probationer was convicted.

This Chapter consists of three parts: 1) arrest and detention of the probationer; 2) the motion to revoke probation; and 3) the revocation hearing.

A. ARREST AND DETENTION OF THE PROBATIONER

If a probationer is believed to have violated probation and is not already in custody, the Code of Criminal Procedure authorizes initiating revocation proceedings in three different ways. First, the court supervising the probationer may "issue a warrant for the defendant to be arrested". [Art. 42.12, §8(a); Art. 42.13, §8(a)] Second, the court may authorize arrest without a

warrant by making a docket entry ordering the probationer's arrest: "Any probation officer, police office or other officer with power of arrest may arrest such defendant without a warrant upon the order of the judge of such court to be noted on the docket of the court". [Art. 42.12, §8(a); Art. 42.13, §8(a)] Third, the court in its discretion may issue a summons instead of ordering the probationer's arrest: "A summons may be issued in any case where a warrant may be issued ..." [Art. 15.03(b)] If a summons is issued the probationer is not taken into custody but is ordered to appear at a specified time and place for a revocation hearing; unlike a warrant, a summons may be served by "mailing it to the defendant's last known address". If the probationer fails to respond to the summons, then a warrant must be issued. [Art. 15.03(b)]

It is important to note that nowhere does the law authorize the detention of a probationer on the basis of a probation violation hold. Detention is authorized only if the court supervising the probationer has issued an arrest warrant or made the appropriate docket entry. The law does not appear to require that a motion to revoke probation be filed before an arrest warrant may be issued or a docket entry made. However, it is very likely a violation of the probationer's rights under federal and state law to cause his or her arrest for probation violation without having first filed a document in court under oath setting out why it is believed the probationer violated the terms of probation.

A probationer who is detained for a violation of probation has a right under the Texas Constitution to reasonable bail pending the revocation hearing under some circumstances. If the probationer is on deferred adjudication probation for a misdemeanor or felony [Ex parte Laday, 594 S.W.2d 102 (En Banc 1980)] or on conditional discharge under the Controlled Substances Act [McIntyre v. State, 587 S.W.2d 413 (Panel 1979)] he or she has an absolute right to bail because he or she has not yet been convicted of an offense. However, a probationer arrested for a violation of regular felony probation does not have a <u>right</u> to bail pending revocation hearing because he or she has already been convicted of the offense for which he or she is on probation. [Jones v. State, 460 S.W.2d 428 (1970)] It is emphasized, however, that the trial court has the power to set bail in its discretion even when the person detained is on regular felony probation. [Ex parte Ainsworth, 532 S.W.2d 640 (1976)]

Prior to the 1979 amendments in the misdemeanor probation statute, all misdemeanor probations were in form deferred adjudication probation. Interpreting the pre-1979 statute the Court of Criminal Appeals has held that one on misdemeanor probation who is detained for a violation is entitled to reasonable bail because he or she has not yet been convicted of the offense for which he or she is on probation. [Ex parte Smith, 493 S.W.2d 958 (1973)] The 1979 amendments

to Article 42.13 changed the misdemeanor probation statute to conform it in most respects to the felony statute and in the process deleted the section interpreted in Ex parte Smith. It is an open question, upon which there is as yet no case-law, as to whether those amendments eliminated the misdemeanor probationer's right to bail.

The Texas Legislature amended the felony probation statute in 1975 to provide persons detained for felony probation violations with a right to have a revocation hearing within twenty days of a motion by the probationer for a speedy hearing. [Art. 42.12, §8(a)] In 1979, the same provision was inserted into the misdemeanor probation statute. [Art. 42.13, §8(a)] The probationer in custody must activate the statutory right to a speedy hearing by filing a written motion. Absent such a motion, the Court of Criminal Appeals has declined to set a maximum time limit within which a motion to revoke probation must be heard when the probationer is in jail. [Newcomb v. State, 547 S.W.2d 37 (1977)] The twenty-day time period stated in the statute begins from the date the probationer makes a motion for a speedy hearing, not from the date of arrest. [Hernandez v. State, 556 S.W.2d 337 (1977)] The probationer cannot properly make a motion for a speedy hearing, however, until a motion to revoke probation has been filed. [Williams v. State, 590 S.W.2d 709 (Panel 1979)] If the probationer makes no motion for a speedy hearing under the statute, the right is waived. [Champion v. State, 590 S.W.2d 495 (Panel 1979)] Nor is the twenty-day limit absolute, despite the general rule that the twenty-day limit is mandatory when the probationer held in custody moves for a speedy hearing and fails to get one. [Carney v. State, 573 S.W.2d 24 (En Banc 1978); Ex parte Trillo, 540 S.W.2d 728 (1976)] In one case, the Court of Criminal Appeals found that the normally mandatory remedy of dismissal, when a hearing on a motion to revoke was not held within twenty days of the probationer's motion for a speedy hearing, should not be provided when the hearing was held twenty-two days after the motion. [Ex parte Tijerina, 571 S.W.2d 910 (Panel 1978)] The exceptional circumstances of this case were the physical handicaps of the complaining witness, the probationer, and various other witnesses, which required the presence of six interpreters. Since a hearing without an interpreter for the deaf and mute probationer would have violated his constitutional rights to a fair trial, the Court of Criminal Appeals declined to require dismissal of the motion to revoke because of the extra two days of delay in the revocation proceeding required to obtain the necessary interpreters.

The trial judge may also grant a continuance in the revocation hearing for good cause shown. If the probationer makes no motion for a speedy resumption of the hearing, this right is waived. [Ex Parte Feldman, 593 S.W.2d 720

(En Banc 1980)] A hearing which has been triggered by the probationer's motion for a speedy hearing may also be continued for good cause shown. [Hernandez v. State 556 S.W.2d 337 (1977)]

The Court of Criminal Appeals has held that the Speedy Trial Act [Art. 32A.02] does not apply to proceedings for revocation of probation. [Champion v. State 590 S.W.2d 495 (Panel 1979); Gill v. State, 593 S.W.2d 697 (Panel 1980)]

A probationer faced with a revocation proceeding also has constitutional rights to a speedy hearing on the motion to revoke under the United States and Texas Constitutions. These rights must be asserted no later than the revocation hearing to avoid being lost. [Newcomb v. State, 547 S.W.2d 37 (1977); Ross v. State, 523 S.W.2d 402 (1975); McClure v. State, 496 S.W.2d 588 (1973)] The standards for establishing a violation of the constitutional right to a speedy hearing are based on the length of the delay, the reasons for the delay, the accused's assertion of the right, and the prejudice resulting to the probationer from the delay. [Hernandez v. State, 556 S.W.2d 337 (1977)] There is no specific time limit for the constitutional right to a speedy hearing. [Perkins v. State, 504 S.W.2d 458 (1974)]

In Hernandez, a delay of forty-two days after the commencement of a revocation hearing, to permit the State to research authorities on the admission of certain evidence, was not sufficient to require a finding of a violation of the probationer's constitutional right to a speedy hearing even though the State produced a new witness when the hearing resumed. There was no showing that the new witness was a reason for the delay, and the probationer's claims of prejudice and harm were not supported in the record.

For a violation of the probationer's statutory right to a speedy hearing, which has been properly asserted by a motion, dismissal of the motion to revoke is mandatory [Carney v. State, 573 S.W.2d 24 (En Banc 1978)] Merely ordering the release of the defendant on personal bond is not an adequate remedy. [Ex parte Trillo, 540 S.W.2d 728 (1976)] However, a dismissal of a motion to revoke for failure to hold a hearing within twenty days does not prevent the State from filing subsequent motions to revoke alleging the same grounds for revocation as the dismissed motion.

B. MOTION TO REVOKE PROBATION

The probation officer normally initiates the process of probation revocation by filing a report of a violation of probation conditions, either with the court that sentenced the probationer or with the office of the County or District Attorney. The Attorney's office then produces a motion to revoke probation and

files it with the court that granted probation. A warrant is then issued for the arrest of the probationer if one has not already been issued.

(1) Timing of the Motion to Revoke Probation.

For a motion to revoke probation to legally confer jurisdiction over the revocation proceeding, the motion must be filed and an arrest warrant or capias issued before the expiration of the term of probation. Thus, the report of the probation violation must be made in time for the county or district attorney to file the motion for revocation and have an arrest warrant issued. Both the filing of the motion and the issuance of the arrest warrant are required before the end of the probationary term. [Zillender v. State, 557 S.W.2d 515 (1977)] Unless both the motion has been filed and the arrest warrant issued before the end of the probation term, the court has no jurisdiction over the motion and cannot effectively revoke probation.

The length of a term of probation may be measured in days, months, or years; the probation officer should note that 180 days is not the same time period as six months, and this small difference can invalidate a revocation proceeding. The probation officer should be aware of the precise date of termination of probation, and make sure to file reports of violations soon enough to permit the motion to be filed and the arrest warrant or summons to be issued before the term expires. Violation reports which are filed near the end of the probation term should also include all the violations known to the officer at that time, since new violations cannot be added to the motion to revoke after the term of probation has concluded. The rules to determine when the probation term begins and ends are discussed in Chapter 5.

Although the arrest warrant must be issued befoe the conclusion of the probation term, the actual arrest need not take place before the term expires and while due diligence on the part of the State to arrest the probationer is required, if the delay between the issuance of the warrant and the arrest is attributable to the acts of the probationer, then a longer delay will be permitted. [Strickland v. State, 523 S.W.2d 250 (1975)] As long as the revocation hearing is held "shortly" after the arrest, there is usually no difficulty with an arrest effected after the term of probation has expired. Even a delay for as long as two years before actual arrest may be permissible, if the State was diligent and the probationer contributed to the delay. [Standley v. State, 517 S.W.2d 538 (1975)]

The jurisdiction of the court over the revocation hearing is limited when the hearing occurs after the term of probation has expired. Motions or amended motions filed before the end of the term of probation are properly before the court, but the court has no jurisdiciton over violations which are alleged in an amendment of the motion to revoke filed after the probation term has expired.

[Standley v. State, supra] Thus, any charges of violations added to a motion after the term expired will not confer jurisdiction on the court to revoke probation on those charges.

Similarly, if the original term of probation set by the trial court was not authorized, for example, if the judge imposed two years of probation when the maximum prison sentence was only one year, a motion alleging a violation during the illegal term will not confer jurisdiction on the court. [Pedraza v. State, 562 S.W.2d 259 (Panel 1978)] In such a situation, only violations within the first year of probation could be the subject of a revocation hearing, and an order revoking probation for a violation which occurred after the first year is void.

(2) Amending the Motion to Revoke and Multiple Motions.

There are two types of amendments to motions to revoke probation: those filed before the hearing begins and those filed during the hearing. Prior to 1979 there were virtually no restrictions on the state's filing of amended motions to revoke before the hearing began. The only requirement was that if the amended motion to revoke alleged new grounds for revocation, rather than an amplification of previously-alleged grounds, then the amended motion had to be filed before the term of probation expired in order to confer jurisdiction on the trial court. [Cox v. State, 445 S.W.2d 200 (1969)]

Furthermore, trial amendments to the motion were permissible. Thus, if the state filed a motion to revoke probation and the proof at the revocation hearing showed a different violation than alleged in the motion, the state, with the permission of the trial court, was allowed to amend the motion at the hearing to conform it to the proof presented. [Stessney v. State, 593 S.W.2d 699 (Panel 1980)] If the probationer claimed surprise at the turn of events at the hearing, the trial court was required to grant a reasonable continuance of the hearing. The Court of Criminal Appeals explained this procedure in Franks v. State:

> It would have been proper, upon the proof showing an offense other than that alleged, for the trial court to permit amendment of the motion to revoke to conform with the proof. Upon objection or request by the defense at such time, the hearing should be recessed to allow time needed for preparation or investigation to meet the new pleadings. Thereafter the hearing would continue on the amended motion, and if the court then finds such offense to have been committed, probation could be revoked. [516 S.W.2d 185, 188 n. 3 (1974)]

In 1979, the Legislature amended the felony probation statute to regulate the matter of amendments in motions to revoke probation. It provided:

> The state may amend the motion to revoke probation at any time up to seven days before the date of the revocation hearing, after which time the motion may not be amended except for good cause shown, and in no event may the state amend the motion after the commencement of taking evidence at the hearing.

[Art. 42.12, §8(a)] Because there is no comparable amendment in the misdemeanor probation statute, presumably the more permissive rules regarding amendments still apply to revocation of misdemeanor probation.

Since a hearing to revoke probation is not a criminal proceeding in the true sense, the Double Jeopardy Clauses of the United States and Texas Constitutions do not prohibit the State from attempting to revoke probation for the same violation more than once. [Davenport v. State, 574 S.W.2d 73 (En Banc 1978)] However, a motion for revocation which has been denied must be refiled before the end of the probationary term for the court to have jurisdiction over it, despite a previous timely filing of the first motion containing the same alleged violation. The State is not bound by factual determinations of issues made in the previous revocation hearing on the identical violation charged. [Davenport, supra] There is, therefore, no theoretical limit on the number of times the State may attempt to revoke a probation for the same alleged probation violation; however, there may be some limits if repeated attempts to revoke probation for the same alleged violation constitute harassment of the probationer, especially where previous hearings have resulted in a ruling of insufficient evidence to prove the violation occurred. [See Davenport, supra (Judge Phillips dissenting)]

(3) Legal Sufficiency of the Motion.

The following section on "minimum requirements' discusses those defects in motions to revoke probation that the law deems serious enough to deprive the trial court of jurisdiction over the revocation proceedings. A revocation of probation based on such a motion is void and can be challenged by the probationer at any time. But there are a number of other requirements that a motion to revoke probation must meet. These requirements deal mainly with sufficent particularity in the motion to give the probationer adequate notice of what he or she is charged with having done. Unlike minimum requirements, failure to meet these requirements does not affect revocation proceedings upon appeal unless the probationer called the attention of the trial court to the defects in a proper and timely fashion. The procedural vehicle by which this is accomplished is by a motion to quash the motion to revoke probation. Unfortunately, deciding whether a defect in a motion to revoke is a failure to meet minimum requirements or merely a failure to meet additional notice requirements is often a difficult and uncertain venture.

a. Minimum Requirements

The conditions of probation allegedly violated must be valid conditions of probation. Thus, where a motion to revoke was based on finding that the

probationer had failed to report to the probation officer and had failed to pay fees of probation, yet the record did not disclose that these were conditions of probation, the revocation was invalid. [Brown v. State, 508 S.W.2d 366 (1974)] Conditions of probation that are invalid cannot be a proper basis of revocation. A violation of a condition to submit person, vehicle, or residence to a search by a peace officer at any time is an overly broad condition. It infringed upon the probationer's constitutional protection against unreasonable searches and seizures, and thus could not support a valid order to revoke probation. [Tamez v. State, 534 S.W.2d 686 (1976)] However, a condition of probation which ordered the probationer, an illegal alien, to refrain from again illegally entering the United States, was valid, where the defendant had been formally deported and was again found in the United State. [Hernandez v. State, 556 S.W.2d 337 (1977)] Here, the violation could have been alleged either as a violation of the condition to "commit no offense" or as a violation of the special condition not to enter the United States illegally.

Valid conditions of probation must be included in the original conditions of the probation or a modification of these original terms. Thus, if the probation conditions require monthly reports and the probation officer requires a probationer to report on a weekly basis, a revocation based on a failure to report weekly is not valid, unless the probation conditions have been modified by the court to require weekly reports. [Whitehead v. State, 556 S.W.2d 802 (1977)]

A motion to revoke alleging that the probationer violated the condition that probationer abstain from injurious or vicious habits by using a narcotic, will support a finding of a violation where the trial court conditioned probation on complete avoidance of narcotics. [Chacon v. State, 558 S.W.2d 874 (1977)] While the evidence was insufficient to support a finding of a "habit," the condition had been supplemented to include prohibitions of <u>any</u> drug use, and that was a valid condition of probation.

Conditions of probation which delegate authority from a court to a probation officer or to another person will not support a revocation order, since only a court may determine conditions of probation. Thus, where the probation conditions required a probationer to make restitution "as and when directed by the probation officer," a violation of the probation officer's directions was held not to be a valid basis for revocation. [Cox v. State, 445 S.W.2d 200 (1969)] Conditions must be set forth clearly in the order granting probation so that it is clear to the probationer, the probation department and the courts just what the terms of probationa are. A motion alleging a violation of the condition to report to the probation officer as directed, even when the defendant did not raise the insufficiency of this allegation in the motion to revoke, could not

support revocation where there was no indication of when the probationer was ordered to report, or that he knew of this reporting condition. [Campbell v. State, 420 S.W.2d 715 (1967)] In the same case, a condition to report a change of address within 24 hours was also insufficient to support revocation, where the condition did not state to whom the probationer was to report a change of address. Alleging a failure to report on "the required day each month of each year during the period of probation", was a sufficient statement of a violation of the reporting condition, where the order granting probation indicated monthly reports were required. [Perkins v. State, 504 S.W.2d 458 (1974)] In Perkins, the order granting probation ordered a report to a named sheriff. However, the record showed that the defendant had submitted reports to the named sheriff's successor in office, and the defendant did not claim to have been misled by the requirement of reporting to a particular named sheriff. The Court concluded that the duty to report included the named sheriff's successor in office, and the revocation was valid. However, where an order requires reports to a particular named probation officer and it is not shown to have been modified by the court to require reports to a different named probation officer, the order to revoke based on the failure to report to the second named officer was invalid. [Brewer v. State, 572 S.W.2d 719 (Panel 1978)]

A motion to revoke must be based on the probation terms as modified; thus, where a probationer has been given permission to move to Prescott, Arizona, and to maintain a residence there, revocation on the basis of being in Las Vegas, Nevada in violation of the condition to remain in Ector County, Texas was invalid. [Grommes v. State, 589 S.W.2d 461 (Panel 1979)]

Unlike conditions which purport to delegate to the probation officer the authority to set time of reporting or amounts of restitution, conditions requiring compliance with the rules and regulations of specific treatment programs do not constitute improper delegation of authority. [Salmons v. State, 571 S.W.2d 29 (Panel 1978); Jones v. State, 571 S.W.2d 191 (Panel 1978)] Such conditions of probation are usually found in cases of drug abuse. A modification of a condition substituting one treatment program for another was held a valid basis for revocation, where evidence from the probationer himself indicated his knowledge that the modification has been made. [Taylor v. State, 592 S.W.2d 614 (Panel 1980)] The Court of Criminal Appeals in Taylor added its disapproval of oral modification of probation conditions, where there is no showing in the record of the modification and the furnishing of a copy of modified conditions to the probationer. However, since the evidence indicated that the defendant had a definite and precise awareness of the modified terms, there was no basis to complain about the failure of the court clerk to provide him a written copy of the modified terms.

A motion to revoke should specifically allege how the probationer has violated a condition of probation. A motion, alleging only "on or about October 7, 1971 and October 8, 1971, the defendant violated paragraphs (a), (b), and (c) of his Conditions of Probation, "is not sufficent to give fair notice of the acts or conduct upon which the State intended to rely at the revocation hearing. [Burkett v. State, 485 S.W.2d 578 (1972)] For most probation conditions, allegations of the particular conduct by which a probationer violated conditions, with the date and location of such conduct, will suffice to give the defendant notice of the charged violation. However, to allege a violation of the condition to "commit no offense against the laws of this State or of any other State or of the United States" is often more complex.

First, the motion must sufficiently identify the offense which the probationer is accused of committing while on probation. In general, this consists of alleging facts which include all of the essential elements of a penal offense. Thus, a motion which merely alleged that the probationer had possessed a pistol and traveled with it in interstate commerce was too general to inform the defendant of which federal gun law he was charged to have violated. [Tamez v. State, 534 S.W.2d 686 (1976)] However, allegations of an offense against the penal laws need neither be as specific, nor meet the formal requirements of, an indictment or an information. [Davila v. State, 547 S.W.2d 606 (1977)] A motion to revoke for commission of a penal offense need not allege the county where the offense was committed, as an indictment must. Of course, the location must be described in order to put the defendant on notice as to the offense charged, but the county, necessary for venue purposes in an indictment, need not be shown.

A motion to revoke for committing theft need not necessarily contain allegations as to the ownership of property allegedly stolen by the defendant, or of specific descriptions of such property, unless the defendant objects to such omissions in a motion to quash the motion to revoke. [Tone v. State, 505 S.W.2d 300 (1973)] A motion alleging that the probationer is charged by complaint with willful injury to property, and containing descriptions of the property injured is not sufficient where it did not include a direct statement that "commit no offense" was the condition that probationer violated. [Barrow v. State, 505 S.W.2d 808 (1974)]

A motion alleging a violation of the condition to "commit no offense" should always state the conduct which constitutes the offense itself, rather than an allegation that the probationer has been convicted for a particular offense. A condition of probation which required a probationer to "neither commit nor be convicted of any offense against the laws of the State of Texas" was an invalid condition to the extent that it required the probationer to not be convicted of

offenses committed before the terms of probation had taken effect. [Ex parte Moffett, 542 S.W.2d 184 (1976)] The Court of Criminal Appeals has repeatedly warned against relying on the allegation of a conviction to prove a violation of the condition that probationer "commit no offense". [Long v. State, 590 S.W.2d 138 (Panel 1979)] The problems in proving an allegation of a conviction in a revocation proceeding are discussed under proof of alleged violation. The important point in providing information for a motion to revoke probation is to allege facts constituting a penal offense, and to avoid alleging a conviction in the motion to revoke.

The failure of the clerk of the trial court that granted probation to furnish the probationer with a written copy of the terms and conditions of probation (including a copy of subsequently modified conditions) violates Article 42.12, Section 6 or Article 42.13, Section 6, and invalidates an order to revoke. [Stevenson v. State, 517 S.W.2d 280 (1975)] The burden is on the State to show compliance with this statutory requirement; the best practice is for the record of the proceeding granting probation to reflect that the clerk delivered a written copy to the probationer. However, failure to comply with this requirement must be raised by the probationer at the hearing to revoke probation. Failure to do so results in a waiver of the requirement, and the defendant may not first raise this issue on appeal of an order revoking probation. [Bush v. State, 506 S.W.2d 603 (1974)] Also, where evidence at the revocation hearing indicates that the probationer had a precise knowledge of the terms and conditions of probation, the State need not prove modification of conditions by a written order which was given to the probationer since the probationer was not harmed. [Taylor v. State, 592 S.W.2d 614 (Panel 1980)] Similarly, since the purpose of the statute is to give the probationer adequate notice of the conditions and to insure a record of an adequate explanation of the conditions to him or her, where evidence shows that the probationer was provided with a written copy of the conditions alleged as a basis for revocation well before the violation occurred, there is no error in revoking probation on the basis of these conditions. [Stevenson v. State, 516 S.W.2d 280 (1975)] Thus, the written copy need not have been given to the probationer at the very outset of probation; a showing that the written copy was provided sufficiently in advance of the occurrence of the charged violation of probation to put the person on notice of the condition allegedly violated, is sufficient.

b. Additional Notice Requirements

The defects in motions to revoke probation discussed in this section are those that relate only to whether the motion gives the probationer adequate notice of the violation charged. If the probationer failed to call the lack of

adequate notice to the trial court in a proper and timely fashion, the law engages in the assumption that the probationer was satisfied with the notice provided by the motion and will not permit him or her to challenge the adequacy of that notice on appeal or in later proceeedings. The probationer must call the defect to the attention of the trial court by filing a motion to quash the motion to revoke.

For a motion to quash to be properly made, it should be written and filed with the court before the probationer's announcement of ready in the trial court. [Dempsey v. State, 496 S.W.2d 49 (1973)] In Dempsey an oral motion was made at the revocation hearing immediately after the probationer pled "not true" to the motion to revoke. The motion to revoke alleging commission of the offense of theft would not have been sufficient to withstand a timely motion to quash. However, because the motion to quash was oral, was not made until after the probationer had pled, and the defense attorney did not request a continuance after the motion to quash was denied, there was no error in failing to require the State to amend the motion to revoke. In this particular instance, the allegation of the offense in the motion to revoke was not so deficient as to deny the probationer due process of law by failing to provide sufficient notice to enable the probationer to prepare a defense.

The sufficiency of a motion to revoke in face of a timely motion to quash largely depends on the adequacy of the allegations to notify the probationer of the conduct that is claimed to constitute a violation of probation. In Matte v. State, [572 S.W.2d 547 (Panel 1978)] the motion to revoke alleged that the probationer knowingly made a false written statement to a licensed firearms dealer in acquiring a firearm, which statement was intended to and was likely to deceive the dealer with respect to facts material to the legality of the sale. Given the probationer's timely exception to the failure of the motion to specify the nature of the statement which was allegedly false, failure to grant the motion to quash was a denial of the probationer's right to due process of law. The range of possible false statements on which the State might have been relying was so great that the motion to revoke failed to give adequate notice to permit the probationer to prepare a defense. Similarly, in Whitehead v. State, [556 S.W.2d 802 (1977)] a motion to revoke alleged that the probationer had committed an offense against the laws of Texas by taking two checks from his mother's checkbook, then writing and cashing one for $45.00 and one for $50.00. The failure to grant the probationer's timely motion to quash was erroneous. The allegation of a penal offense was too vague to put the probationer on notice of just what penal offense--theft or forgery--the State would try to prove. In Garner v. State, [545 S.W.2d 178 (1977)] a general allegation in the motion to

revoke that the probationer committed the offense of theft on or about a certain date was insufficient in face of a motion to quash. The motion to revoke referred by number to an indictment in a district court other than the district court which was hearing the motion to revoke. Such a referance was insufficient for the motion to revoke to provide the probationer with adequate notice of the alleged offense. In Graham v. State, [502 S.W.2d 809 (1973)] a motion to revoke containing general allegations that the probationer failed to report to the probation officer as directed; failed to remain in a specified place; failed to support his dependents; and failed to report change of address or employment immediately to the probation officer, without allegations of dates or specific conduct relied on, failed to give proper notice to the probationer. Failure of the hearing judge to grant the motion to quash was erroneous. In Leyva v. State, [552 S.W.2d 158 (1977)] a motion to revoke alleged the commission of theft by appropriation, but omitted to state that the probationer appropriated the property with the intent to deprive the owner of the property, an element of the offense of theft. Failure to grant the probationer's motion to quash was not erroneous. The motion to revoke gave adequate notice of the offense alleged, and the adequacy of notice was shown by the motion to quash itself, which revealed that the probationer knew the offense charged was theft by appropriation. Thus, the probationer was not surprised or harmed by the omission in the motion to revoke.

C. THE REVOCATION HEARING

This section deals with the probation revocation hearing itself. In Texas, probation revocation hearings are conducted by the court that placed the defendant on probation, rather than by an administrative agency. Although trial before the court on a new criminal charge is in some respects similar to a probation revocation hearing, the analogy is not a very complete one. In truth, a probation revocation hearing in Texas is sui generis, that is, one of a kind in the law; there is nothing quite like it.

It is important at the outset to note that the procedural requirements discussed in this chapter apply only to revocation of regular felony or misdemeanor probation. When probation is in form deferred adjudication, the statutes merely require that the trial court hold a "hearing" before proceeding to judgement and sentence. The nature of the hearing and what, if anything, must be proved are not discussed in the statutes. Further, it is unlikely the Court of Criminal Appeals will ever be able to specify the procedural steps for revocation of deferred adjudication probation because the statutes specifically provide that the trial court's decision to proceed to judgement is not appealable. [Art. 42.12, §3d(b); Art. 42.13, §3d(b); Shields v. State, 608 S.W.2d 924 (Panel 1980)]

(1) Procedural Rights of Probationer in Revocation Proceedings.

Persons charged with criminal offenses enjoy many procedural rights that are not possessed by probationers charged with probation violations. There is no right to a jury trial in probation revocation proceedings, even when the probationer is charged with commission of a new offense. [Rhodes v. State, 491 S.W.2d 895 (1973)] A probationer is not entitled to a preliminary hearing or examining trial to determine whether there is probable cause to proceed to a revocation hearing. [Whisenant v. State, 557 S.W.2d 102 (1977)] Proof of guilt in a criminal trial must be beyond a reasonable doubt, but, in probation revocation proceedings, it need not be greater than by a preponderance of the evidence, the standard used in civil cases. [Scamardo v. State, 517 S.W.2d 293 (1973)] The testimony of an accomplice must be corroborated to support a criminal conviction, but there is no such requirement for revocation of probation. [Howery v. State, 528 S.W.2d 230 (1975)] Double jeopardy protections do not apply in revocation proceedings, since they are not criminal trials. [Davenport v. State, 574 S.W.2d 73 (En Banc 1978)]

Probationers are not totally bereft of procedural rights. They have a Fourth Amendment right against unreasonable searches and seizures and in Texas, unlike many other states, the products of an unreasonable search and seizure are not admissible in a probation revocation hearing. [Tamez v. State, 534 S.W.2d 686 (1976)] They also have a Fifth Amendment right not to be compelled to incriminate themselves. [Dowdy v. State, 534 S.W.2d 336 (1976)] Finally, they have a right to counsel and to the appointment of counsel if they cannot afford to employ one. [Ruedas v. State, 586 S.W.2d 520 (Panel 1979)]

(2) Plea Bargaining and the Plea of True.

At the beginning of the revocation hearing, the trial judge should read the motion to revoke to the probationer unless he or she waives reading. Then the probationer is called upon to plead to the motion. The probationer should plead "true" or "not true". A plea of not true requires the state to prove the allegations it has made, just as a plea of not guilty does in a criminal trial. A plea of true, however, is not quite the equivalent of a plea of guilty or nolo contendere in a criminal trial. In a felony trial, one cannot be convicted solely on the basis of a plea of guilty or nolo contendere. Evidence must be introduced that substantiates commission of the offense charged. [Art. 1.15] In revocation proceedings, however, a plea of true is sufficient in and of itself to support an order revoking probation. [Cole v. State, 578 S.W.2d 127 (Panel 1979)] Formerly, the Court of Criminal Appeals had held in Roberson v. State, [549 S.W.2d 749 (1977)] that the trial judge erred in failing to withdraw the

probationer's plea of true when the probationer took the stand at the revocation hearing and raised defensive issues (denying intent to commit theft when motion alleged burglary of habitation with intent to commit theft). The Cole case overruled Roberson, and held that there was no error in failing to withdraw a plea of true. Thus, a plea of true will foreclose any attack on the sufficiency of the evidence, despite attempts by the probationer to raise defensive issues in the revocation hearing.

Usually, however, a careful trial judge will require both a plea of true and a judicial confession before ordering revocation. [Benoit v. State, 561 S. W. 2d 819 (1977)] It is a better practice for the trial judge to hear evidence despite a plea of true, especially when the plea of true is only to one of several charged violations. This will avoid a situation in which a probationer pleads true to a defective allegation of a violation, which is invalidated upon appeal, and the State must hold another revocation hearing in order to prove other violations which could have been proved at the original hearing and which would have been a basis for upholding the order to revoke.

It is quite common for the defense attorney and prosecutor to plea bargain in probation revocation proceedings just as they do when new criminal charges are filed. If new charges have been filed as well as a motion to revoke, they may agree that if the probationer pleads true to the motion to revoke, the prosecutor will obtain dismissal of the new charges or that concurrent sentences on the new charge and the probation revocation will be recommended to the trial court. If probation is revoked, the trial court has discretion to reduce the sentence assessed to any sentence that could have been imposed originally. [Art. 42.12, §8 (a); Art. 42.13, §8 (a)] Thus, it is quite common for the prosecutor and the defense attorney to plea bargain for a specific sentence to be imposed if the probationer enters a plea of true.

Whatever form plea bargaining may take and whether or not the trial court chooses to participate in the bargaining process, it is important that the probation officer and the probation department maintain a stance of absolute neutrality. Probation should not enter the plea negotiations in any way. To do so would inevitably appear to favor one side of the case or the other. The entire credibility of the probation department depends upon its not being an arm either of the prosecutor or the defense, and entering into plea bargaining endangers that credibility. However, this is not to say that the probation department should not properly communicate to either side information about the probationer and resources that may be available in dealing with the problems that gave rise to the revocation motion.

(3) Proving Violations of Probation

This section discusses the numerous problems that arise in proving a violation of probation conditions at a revocation hearing. After a brief discussion of the Texas rule excluding from the revocation hearing the products of Fourth or Fifth Amendment violations and of the necessity of identifying the person before the court as the one placed on probation, this section discusses proof problems for each of the probation violation that are typically alleged.

a. Excluding Illegally Seized Evidence

In a probation revocation hearing in Texas, the probationer is protected by the constitutional guarantees against illegal searches and seizures and improperly obtained confessions.

The remedy for violations of a probationer's rights under the Fourth and Fifth amendments (illegal searches and compelled confessions) is the exclusion of evidence, illegally obtained, at the revocation hearing. However, a probationer may waive these rights by failing at a revocation hearing to object to the admission of evidence. Thus, where evidence from the probationer's burglary trial was admitted in the probation revocation hearing without objection, the order to revoke was valid, even though the burglary conviction was subsequently reversed on appeal, due to the admission of illegally seized evidence. [Scott v. State, 543 S.W.2d 128 (1976)]

Evidence seized in a search of a vehicle at a stationary checkpoint, 25 to 30 miles from the Mexican border, was not validly seized as a search at a border or its functional equivalent. Therefore, the evidence could not be introduced in a revocation hearing. [Tamez v. State, 534 S.W.2d 686 (1976)] If evidence is seized as incident to an arrest, then the arrest itself must be shown to be based on probable cause. If a valid basis for an arrest is not reflected in the record of the revocation hearing, the Court of Criminal Appeals will conclude that the arrest, and the seizure of evidence should have been excluded. [Dowdy v. State, 534 S.W.2d 336 (1976)] When one is subjected to a limited stop by a police officer, for the purposes of investigation, a patdown frisk is permissible for the safety of the officer. However, a bulge in a suspect's pocket, when there is no evidence that the officer thought such a bulge might have been a weapon, does not give the officer leave to further investigate the contents of a person's pocket. [Davis v. State, 576 S.W.2d 378 (Panel 1978)] In this case, the marijuana seized from the probationer was inadmissible in a revocation hearing, since no justification was presented for the search and seizure by the officer's testimony.

Furthermore, a probationer may waive the right against illegal searches and seizures by voluntarily consenting to a search. [Rice v. State, 548 S.W.2d 725 (1977)] A finding that the probationer has voluntarily consented to a search

will render the evidence admissible at the revocation hearing. In Rice, the desire by the probationer to protect his female companion from arrest and criminal sanctions did not render his consent to a search of his vehicle involuntary. The trial judge at the revocation hearing is the sole trier of fact and judge of the credibility of the witnesses and weight of the evidence. [McClure v. State, 496 S.W.2d 588 (1973)] It is also presumed that the trial judge will have disregarded inadmissible testimony. This would appear to put the burden on the probationer to show that the order to revoke is based on inadmissible evidence. [Hernandez v. State, 556 S.W.2d 337 (1977)]

The trial judge also determines the fact of the voluntary nature of a confession or admission by the probationer. [Newcomb v. State, 547 S.W.2d 37 (1977)] In Dowdy, supra, the defendant's probation officer and a police officer went to the probationer's house and asked him to come to the police station to talk to a detective. He was arrested shortly after his arrival at the police station. There was no interrogation before the arrest; there was no prolonged interrogation after the arrest nor before the first confession. Therefore, the trial court found the confessions voluntary. As long as there is a basis for the trial court's finding of fact as to the voluntary nature of a confession or consent to a search, the Court of Criminal Appeals will not disturb such a finding by the hearing judge.

b. Identification of the Probationer

The identification of the probationer at a revocation hearing as the same person who was placed on probation for a particular offense is a prerequisite for a valid order to revoke probation. [McClure v. State, 496 S.W.2d 588 (1973)] This requirement is usually easily met, and may even be met by an objection by the probationer's attorney (to the identification by the probation officer) stating, "It is rather obvious that Mr. Gill is the man seated to my right". [Gill v. State, 556 S.W.2d 354 (1977)] The probation officer or probation department representative who was present in court when the probationer was placed on probation often provides the identification testimony that the person before the court at the revocation proceeding is indeed the same person who was placed on a particular term of probation for a particular offense.

c. Specific Proof Problems

In addition to the necessity of showing that a probationer has been placed on a valid condition of probation, the evidence at the revocation hearing must show that the probationer engaged in conduct that constituted a violation of a valid condition. The standard of proof at a probation revocation hearing, unlike

a criminal trial, is by a preponderance of the evidence. The State need only show that it is more likely than not that the probationer engaged in conduct which violated probation conditions.

1. No Drinking of Intoxicants

When it was made a condition of the probation that the probationer should not drink intoxicating liquors, it was unnecessary for the State to prove the allegation in the motion to revoke that the defendant drank liquor in Randall County, Texas. Since the condition of probation was to not drink intoxicating liquor, the allegation in the motion that the conduct occurred in Randall County was surplusage, and the State had only to prove that the probationer drank liquor on the date alleged in the motion to revoke. (Acton v. State, 530 S.W.2d 568 (1975)]

2. Changing Place of Residence

When a motion to revoke probation alleged that the probationer had changed his residence without complying with the condition of probation that he report such a change, testimony which indicated that he had indeed changed his residence was required for revocation. Furthermore, since the condition to report a change of address did not specify to whom the probationer was to report such a change, the evidence was insufficient to show a violation of the condition. [Campbell v. State, 420 S.W.2d 715 (1967)] Even an admission by the probationer at the revocation hearing that he had changed his residence was insufficient to support a finding that he had changed his residence without reporting it to his probation officer. Since the term "residence" is a legal term, which depends on such facts as the length of stay and the probationer's intent, the admission by the probationer was a legal conclusion by a lay person and he was not bound by it. [Whitehead v. State, 556 S.W.2d 802 (1977)] Since the evidence showed only a two-week stay with the probationer's cousin and there was no evidence of his intent to change his residence -- or other conduct -- such as moving of his possessions -- from which such an intent might be inferred, the evidence was insufficient to show a change of residence.

Since "residence" is a legal term, the probation officer who testifies to a change of residence by a probationer should be careful to state specific facts from which the hearing judge may conclude that a change of residence has occurred. When the condition of probation allegedly violated was "...not change his place of residence without the prior approval of the Victoria County Probation Office," and the motion to revoke alleged that the "probationer has moved to California without the prior approval of the Victoria County Probation Office," the State was required to prove that the probationer had moved to

California. [Herrington v. State, 534 S.W.2d 331 (1976)] However, the probation officer only made a conclusory assertion in his testimony that the probationer had moved. He stated no facts on which this conclusion was based; therefore, there was no evidence introduced to indicate that the person had indeed moved or changed his residence. Probation officers must be careful in testifying at revocation hearings; merely stating that a condition has been violated constitutes no evidence at all of a violation. The testimony must include facts which show conduct which is a violation of a condition of probation.

3. Leaving County Without Permission

Similar problems have arisen where a violation of the condition to obtain permission before leaving the county of probation is alleged in the motion to revoke probation. In Aguilar v. State [542 S.W.2d 871 (1976)] two separate violations in connection with departure from the county were alleged: the failure to return to El Paso from Los Angeles, California on the date set by the probation officer, and the failure to obtain the court's permission to leave El Paso County. The probation officer's testimony showed that the officer issued a travel permit to the probationer to travel to Los Angeles from August 29th to September 7th. The policy of the El Paso Probation Department was shown to grant permission for a probationer to be absent from the county for 30 days or less at the discretion of the individual probation officers. Even though the order granting probation had specified that the court's permission to leave the county was required, revocation was held to be an abuse of discretion when the probationer had a travel permit from the probation officer and the order granting probation had instructed her to obey the orders of the probation officer.

4. Paying Cost, Compensation, Fees and Restitution

It is commonly made a condition of probation that the probationer pay court costs, probation supervision fees, compensation to the county for fees paid to appointed counsel and restitution to the victim of the offense. Prior to 1977, in order to revoke for failure to pay any of these obligations, the State was required to prove that the probationer had the ability to pay and intentionally failed to do so. [Valdez v. State, 508 S.W.2d 842 (1973)] This frequently proved to be a difficult burden for the State to bear. In 1977, the Legislature amended the felony probation statute to provide that when the only violations alleged are failure to pay "the inability of the probationer to pay as ordered by the court is an affirmative defense to revocation, which the probationer must prove by a preponderance of the evidence". [Art. 42.12, §8(c)] As a result of that amendment, a violation of these types of conditions is now proved if there is testimony that the probationer failed to pay as required by a probation

condition. [Jones v. State, 589 S.W.2d 419 (Panel 1979)] The burden then, is upon the probationer to present proof that he or she had the inability to make the required payments. [Champion v. State, 590 S.W.2d 495 (Panel 1979)] If evidence of inability to pay is introduced, the trial court must determine whether inablility to pay has been shown by the probationer. In 1979, the misdemeanor probation statute was amended to contain the same provisions. [Art. 42.13, §8(c)] Under these statutes, when violations of failure to pay are alleged in a motion to revoke with other allegations, such as failure to report or commission of an offense, the burden of proving inability to pay remains upon the State, that is, the statutes shift the burden to the probationer only in pure failure to pay proceedings.

5. Report to Probation Officer

Admissions by the probationer are sufficient to prove a violation of this condition. Thus, when the probationer admitted at the revocation hearing that he knew of his obligation to report to his probation officer on a monthly basis, that he had failed to do so for a period of four months, and that a friend could have provided transportation to the probation office, this was sufficient evidence to support the trial court's finding that probationer failed to report. [Valdez v. State, 508 S.W.2d 842 (1973)]

However, the condition to report to a probation officer is often a troublesome violation to prove, due to problems with indefinite, modified or delegated reporting requirements. When the order setting forth the conditions of probation read, "Report as directed by the probation officer, at least once a month", there were difficulties attempting to revoke for failure to report more frequently than once a month. Even though the motion to revoke alleged that the probationer had been instructed by the probation officer to report weekly while he was unemployed and the officer so testified, the probation officer did not have the authority to order reporting more frequently than once a month. [Herrington v. State, 534 S.W. 2d 331 (1976)] Since the state did not allege a failure to report monthly, but a failure to comply with the weekly requirement of the probation officer, and there was no evidence at the hearing of failure to report monthly, revocation was improper. In Herrington, the testimony at the revocation hearing showed that the order granting probation was on January 15th and that the probationer had reported on February 17th. The only other evidence of a failure to meet the monthly reporting requirement was the conclusory testimony of the probation officer that the probationer "had failed to report as directed by the probation officer, at least once a month". The Court of Criminal Appeals found that without other facts in the hearing record this testimony was too vague and

ambiguous to show that the probationer had violated the court's condition to report once a month.

When the condition of probation was for the probationer to report either in person or by letter to the county sheriff, and there was no evidence to indicate that this condition had been modified by the court to transfer supervision to the adult probation department, it was improper to revoke probation for failing to report to the probation officer. [Ivy v. State, 545 S.W.2d 827 (1977)] In Ivy, there were a number of problems with the testimony at the revocation hearing. The chief jailer, the county sheriff's chief deputy and the county probation officer testified at the probation revocation hearing. However, the testimony of the deputy that the probationer had never paid any fees or reported to the sheriff's department, was held by the Court of Criminal Appeals not to prove whether the probationer had failed to report to the sheriff in person or by letter as required. This was because: 1) the reporting requirement was stated in the alternative, and 2) testimony that probationer had not reported in person did not prove that he had not reported by letter. In addition, neither the jailer nor the deputy sheriff had personal knowledge of the sheriff's probation activities, nor was the deputy qualified to testify as a custodian of the probation records of the accused. The testimony by the probation officer that the probationer did not report to the probation department was not relevant since the condition was to report to the sheriff, and the probation officer did not have personal knowledge that the probationer had failed to report to the sheriff. Thus, there was no evidence in the hearing record that the probationer had failed to report as directed.

When the order granting probation ordering the probationer to report on September 10th and weekly thereafter was shown at the hearing to have been modified to require reporting to a particular named probation officer, it was improper for the court to revoke probation on showing that the probationer had failed to report to a different probation officer other than the one named in the modified order to report. [Brewer v. State, 572 S.W.2d 719 (Panel 1978)] When the particular person to whom the probationer must report has been specifically named in the order of probation, there must be evidence showing that the court has later directed the person to report to a different officer.

6. Avoid Disreputable Persons

In order to revoke probation for violation of this condition, the proof must show that the probationer knew that the person with whom he or she was found associating was disreputable. [Gill v. State, 556, S.W.2d 354 (1977)] For example, evidence that the probationer was arrested in the company of an escaped felon and had previously been warned by the sheriff that the particular person

had escaped was held to be sufficient proof of violation of this condition. [Gill v. State, 593 S.W.2d 697 (Panel 1980)]

7. Avoid Injurious Habits

In order to prove a violation of the condition to avoid injurious or vicious habits, evidence showing an injurious act, such as narcotic use, on only a single occasion is not sufficient to show a violation. [Chacon v. State, 558 S.W.2d 874 (1977)] This is because a single instance of some improper action does not show a "habit". However, in Chacon the probationer had been placed on probation by the trial judge. A trial judge may impose reasonable conditions of probation in such a case in addition to the statutory conditions. The additional conditions imposed were to "abstain from the use of drugs, narcotics, and intoxicating liquors; and ...may not possess, use, sell or have under his control any narcotic drugs, deadly weapon, or any type of firearms." Since these were reasonable conditions they were valid. The probation officer testified that the probationer had admitted to him that an infected bump on his arm had been caused by taking a single shot of heroin. Since the motion alleged violations in terms of the entire conditions listed above, no merely for a "habit", these allegations necessarily included violations of the conditions not to use or possess heroin. Since the probationer had made no claim of confusion as to his defense to the charged violations of probation, revocation was valid even where the motion and the order to revoke did not specifically distinguish the violation of "habit" from the additional requirements not to use or possess. Since there was no prejudice to the probationer indicated in the record, there was no error in Chacon, although the finding of a violation was not as specific as it might have been.

8. Commit No Offense

Violations of the condition to "commit no offense against the laws of the State of Texas, or any other state, or the United States," are among the most frequent grounds for revocation of probation. Such violations can also be among the most difficult to allege properly in a motion to revoke and to prove at the revocation hearing. In particular, the State should not attempt to rely on a motion which alleges a conviction for, rather than the commission of, an offense against the laws of Texas or another jurisdiction. The Court of Criminal Appeals has frequently overturned revocations based on findings of a conviction, and has often warned against reliance on a conviction to establish the commission of an offense. [Long v. State, 590 S.W.2d 138 (Panel 1979] The motion should allege conduct that constitutes the commission of an offense.

The reasons for the difficulties in relying on a conviction are numerous. Even when the State offers sufficient, admissible evidence of a conviction at the revocation hearing, it must also prove that the conviction is a final conviction and that the conviction was the result of conduct which occurred during the term of probation. Failure to introduce facts in the hearing to prove these two additional elements will render an order to revoke on the basis of a conviction invalid. [Nelson v. State, 484 S.W.2d 774 (1972)] Thus, the evidence at the revocation hearing would have to include proof that the conviction had either been affirmed on appeal, or that no appeal had been taken during the period available to file an appeal. Also, proof of the date when an offense was committed must also appear in the record of the revocation hearing. The charging instrument (indictment, complaint or information) alleging that the offense occurred on or about a specific date is not sufficient to show the actual date on which the offense was committed. Thus, when the record from the revocation hearing showed only that the defendant was convicted of a Class C Misdemeanor after being placed on probation, and that the arrest and conviction had occurred after probation began, the evidence was insufficient to show when the offense itself actually occurred, and whether it occurred while the defendant was actually on probation. Revocation on this record was invalid. [Mason v. State, 438 S.W.2d 556 (1969)]

Another problem in proving a conviction can be the admissibility at the revocation hearing of documentary evidence showing a conviction. In Long v. State [590 S.W.2d 138 (Panel 1979)] the State attempted to introduce the sheriff's booking sheet to prove the fact of a conviction. The probationer's attorney objected to this document on the ground that it was hearsay; the Court of Criminal Appeals found that this objection was sufficient to preserve the error that the document did not meet the statutory requirements for documentary evidence to prove the fact of a conviction. The error here was in the failure properly to authenticate the booking sheet. The document contained no certification that it was a true and correct copy; it was not signed. The witness testified he had nothing to do with the preparation of the document. In this case, the booking sheet was essential, since it showed the same name, driver's license number, and birthdate as those on the probationer's information sheet. This evidence was essential to show that it was the probationer who was convicted of theft. The booking sheet, was the only proof that the judgment and sentence which the State produced referred to the probationer.

A slight variation on the difficulties of relying on a conviction for revocation was presented in Ex Parte Moffett [542 S.W.2d 184 (1976)]. In that case, the condition of probation allegedly violated was to "neither commit nor be

convicted of any offense against the laws of the State of Texas". A showing of a conviction was not sufficient in this instance, since the portion of the condition not to be convicted of an offense was unreasonable to the extent that it included a conviction for offenses committed before the term of probation began. Since the evidence indicated that the conviction involved was for an offense committed before the term of probation had begun, revocation for such a conviction was an abuse of discretion.

The mere proof of a complaint filed and the arrest of the probationer is insufficient to show the commission of a penal offense in violation of the condition to "commit no offense". [Rutledge v. State, 468 S.W.2d 802 (1971)] Both the motion to revoke and the proof must include facts that would constitute a penal offense. Being found passed out from intoxicating liquor, on private property, did not constitute the offense of public intoxication as alleged in the motion to revoke. Thus, revocation for committing the offense of public intoxication was erroneous. However, in Rutledge the hearing judge also found that the probationer had committed an offense by threatening the lives of the officers who arrested him for intoxication. Since the trial judge is the sole trier of the fact and judge of the credibility of the witnesses, his decision that these threats were seriously made would not be disturbed on appeal. Since there was one offense alleged and proved at the hearing, revocation would be upheld, even though one of the grounds was invalid.

Various inferences are available to the State in order to prove a violation of the law. Evidence that stolen items identified by the complaining witness as hers and found in the residence of a probationer and the fact that the probationer gave no explanation of their presence when they were found, was held to be sufficient evidence to support the revocation for commission of the burglary in which the items were taken. [Banks v. State, 491 S.W.2d 417 (1973)] In another case, under a motion alleging the commission of robbery in violation of the "commit no offense" condition an uncorrobarated confession coupled with evidence showing that the probationer was present at the location of the crime, knowing the unlawful intent of another person to commit robbery, and that the probationer aided or encouraged the other person by words, was sufficient to permit the trial judge to infer an agreement to commit the offense. [Bush v. State, 506 S.W.2d 603 (1974)] The agreement to commit the offense could be inferred from the conduct of the parties; since the probationer was found to have agreed to the commission of an offense, he was a principal, regardless of whether he had actually aided in the physical commission of the act of robbery.

Unlike in a criminal trial, the uncorroborated testimony of an accomplice witness [Scamardo v. State, 517 S.W.2d 293 (1973)] or an uncorroborated, extra-

judicial confession of the probationer himself [Bush, supra] may be sufficient to support an order to revoke.

In a revocation hearing for committing the offense of public intoxication, the testimony at the hearing by a municipal court judge that the probationer had plead guilty to "drunkenness" on a certain date, was insufficient evidence to show when the offense occurred; the testimony of the arresting officer was sufficient to prove when it occurred. [Balli v. State, 530 S.W.2d 123 (1975)] Had the State been relying on a conviction, this evidence would have been insufficient. However, the arresting officer also testified to finding the probationer wandering down the middle of a public street, after dark, in a very intoxicated condition. While the officer may not have had probable cause to stop and question the probationer, this point was waived by the failure of the defense to object to the officer's testimony. But the Court of Criminal Appeals stated that probable cause to investigate existed anyway, and that the testimony of the officer showed the elements of public intoxication. The written order to revoke stated both commission of public intoxication and failure to avoid injurious habits by using alcohol as bases for revocation. Although the single instance of alcohol use would not have been sufficient to show a "habit", since the finding of commission of public intoxication was supported by sufficient evidence, this single valid basis for revocation made any other errors in revocation irrelevant.

The offense shown to have been committed by the probationer must be an offense which is alleged in the motion to revoke, or an offense which is necessarily included in the allegations of the motion. [Pickett v. State, 542 S.W.2d 868 (1976)] In Pickett, the hearing judge revoked probation based on a finding that the probationer had committed burglary; the motion to revoke alleged attempted burglary. Since burglary is not a lesser included offense of attempted burglary, the hearing judge erred in revoking probation for commission of an offense which was not alleged in the motion to revoke. However, the Court of Criminal Appeals found that the evidence introduced at the revocation hearing was sufficient to prove that the probationer had committed attempted burglary, instead of burglary, since the record on appeal contained all of the necessary information for the Court of Criminal Appeals to make the proper finding.

Cases on revocation of probation show that where commission of an offense is shown at the hearing only by circumstantial evidence, all other possible implications of the circumstantial evidence, other than the guilt of the accused, must be eliminated before commission of an offense has been properly proved. [Battle v. State, 571 S.W.2d 20 (Panel 1978); Grant v. State, 566 S.W.2d 954 (Panel 1978)] Battle involved an allegation of a violation by commission of theft. There was no direct evidence of theft shown at the hearing. The only

evidence of the probationer's guilt of theft was his presence at the scene of the crime. Because there was no direct evidence that the accused had committed the theft and because the evidence did not eliminate all of the reasonable possibilities other than the probationer's guilt, it was an abuse of discretion to revoke for committing theft. Grant also involved revocation for theft shown by circumstantial evidence. Possession of stolen goods is merely circumstantial evidence of theft. Even when possession was near to the time of theft and unexplained, the State still had failed to carry its burden to show personal possession of the goods by the probationer, or a distinct and conscious assertion of ownership over the object in question by the probationer. The State's evidence in Grant was simply that the probationer was one of three persons who had been pushing a recently stolen lawnmower along a public street, and that the probationer had helped another man load the mower into the other person's truck. This evidence was insufficient to show theft by a preponderance of the evidence, where the defense witness provided alternative explanations for probationer's conduct.

Frequently, a revocation proceeding is held on a motion alleging commission of an offense before the same trial judge who had tried the probationer for the offense alleged for revocation. Since the standard of proof required for an actual conviction for a crime is much greater (beyond a reasonable doubt) than for a finding of an offense for revocation of probation, a person may be acquitted in a trial, and then have probation revoked on the basis of the very same evidence. [Russell v. State, 551 S.W.2d 710 (1977)] Acquittal at trial is not a bar to revocation for the same offense; this is not double jeopardy, since the revocation hearing is not considered a criminal trial. In Russell, the record showed that the probationer had been acquitted of the offense at trial solely because of improper venue. The offense had actually been committed in Van Zandt County, while the trial court was in Dallas County. However, the proof of theft was sufficient to show an offense, and since the condition of probation "to commit no offense" is not limited to any particular county, or even the State of Texas, proof of the county of the offense was not necessary.

In alleging the elements of an offense in the motion to revoke, the State may sometimes state more than is necessary to allege an offense. In Fowler v. State [509 S.W.2d 871 (1974)] the motion to revoke alleged that the defendant violated probation by fraudulently taking two tires which "were the property of Perry Dickerson, Mr. Quick's, Harker Heights, Texas," without the effective consent of Perry Dickerson. Here, the Court of Criminal Appeals held that the inclusion of "Mr. Quick's" was not an allegation of a general owner. Since the motion alleged ownership only in the special owner, Dickerson, the addition of

"Mr. Quick's" was surplusage, and did not require proof of Mr. Quick's ownership. However, in Easeley v. State, [319 S.W.2d 325 (1959)] the motion to revoke properly alleged ownership in both a special and a general owner; the State was also required to prove ownership and lack of consent by the general owner as well as the special owner. Since the elements were not proved as to the general owner in Easeley, the Court of Criminal Appeals reversed the order to revoke.

A further distinction in proving theft for a criminal conviction and as a violation of the "commit no offense" condition of probation is proof of the value of stolen goods. In a revocation hearing, it is not necessary for the State to prove the value of an allegedly stolen item. All that is necessary is for the State to show that the item had some value. Nor was it error, even though the value in dollars was unnecessary, to permit the owner of a stolen truck to testify that its value was greater than $200.00 [Davila v. State, 547 S.W.2d 606 (1977)]

To prove the offense of theft in continuing to possess a leased car without making the required monthly payments, the evidence was sufficient to show theft when payment is normally made immediately and no payment was made. Although initially obtaining the leased car could not have been a basis of revocation, since the lease was initiated before the defendant was placed on probation, continued possession without payment was adequate to show intent to avoid payment. No credit arrangement had been extended to the accused and continued possession without payment when payment would normally have been tendered immediately on demand, was sufficient to prove theft of services. [Littlefield v. State, 586 S.W.2d 534 (Panel 1979)]

In Barrow v. State, [505 S.W.2d 808 (1974)] the probationer was charged with committing a willful injury to property, which was sufficiently described as a tractor. The testimony of the driver of the car in which the probationer had been riding was that she saw a driverless tractor moving in the distance. The testimony of another occupant of the car was that the accused had gone out to the tractor, had shown the passenger a key upon getting back into the car, and had later stated that the key was the key to the tractor. The owner of the tractor testified that the damage to the tractor had been estimated at $2,000.00. These facts were sufficient evidence to show willful injury to the tractor, and revocation was upheld. In another case, when the evidence at the revocation hearing showed that the probationer had committed the offense of criminal trespass, a lesser included offense of burglary, which was the offense charged in the motion to revoke, revocation was proper, and the Court of Criminal Appeals reformed the order to revoke to show commission of criminal trespass, rather than

burglary. There was evidence of unlawful entry, but no evidence of the intent to commit theft. [Roberson v. State, 549 S.W.2d 749 (1977)]

While the consolidation of a trial for a criminal offense along with a proceeding to revoke probation for commission of the same offense is not recommended by the Court of Criminal Appeals, the defendant must be able to point out harm or prejudice resulting from such a procedure for the consolidation to constitute reversible error. [Moreno v. State, 587 S.W.2d 405 (Panel 1979)] The Court of Criminal Appeals has held, over a strong dissent, that a trial judge may take judicial notice of the evidence already presented to him in a prior criminal trial for purposes of a revocation proceeding. [Barrientez v. State, 500 S.W.2d 474 (1973)] Thus, commission of an offense may be shown by evidence heard by the same trial judge in a previous trial, judicially noticed by the trial court at the revocation hearing. Such previous testimony may also be admitted at the revocation hearing by offering excerpts from the trial transcipt [Stephenson v. State, 500 S.W.2d 855 (1973)]

However, problems may sometimes arise when testimony of a previous trial has been judicially noticed by the judge at the revocation hearing. [Bradley v. State, 564 S.W.2d 727 (En Banc 1978)] In this case, the record from the revocation hearing did not indicate the content of the matters judicially noticed by the hearing judge, who had also presided at the probationer's trial for murder. The transcript of the murder trial was never admitted into evidence at the revocation hearing. A record which does not show what facts were judicially noticed is not sufficient to support a finding that the probationer had committed the offense of murder. The State must take care to include specific facts in the revocation hearing record, either by including the court reporter's transcribed notes from the trial into evidence or by reading the testimony which is judicially noticed into the hearing record. However, this burden is to be carried by the State, and the Court of Criminal Appeals stated that it would not require the probationer to go beyond the hearing on revocation in requesting a record for appeal. Thus, the probationer is not required to include the transcript of the previous trial for an appeal to the Court of Criminal Appeals of the revocation based on evidence from the previous trial. But if the trial which has been judicially noticed at the revocation was appealed to the Court of Criminal Appeals, the State can cite and rely on this record in showing that adequate evidence was shown at revocation to permit revocation for committing an offense. The record of the revocation hearing must indicate the precise matters judicially noticed for this approach to work. If no appeal of the previous trial has been taken, or if the revocation record does not indicate what was judicially noticed with adequate specificity, the State must itself produce the record of the

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noticed testimony for the revocation hearing record. This must be done while the case is still within the jurisdiction of the trial court, and before jurisdiction rests solely with the Court of Criminal Appeals. A third possibility mentioned in Bradley was that the State and the defense could, with the permission of the trial judge, agree to a brief statement of the facts which have been judicially noticed. In Bradley, the testimony judicially noticed was identified as the testimony from a particular case style and cause number. The Court of Criminal Appeals decided to abate the appeal until the State had obtained a supplemental record of the testimony in the previous trial. Bradley indicates that the burden is on the State to make sure that the necessary facts to support revocation are shown in the revocation hearing record, even when such facts come from testimony which has been judicially noticed. A failure in the hearing record to indicate what facts have been noticed will invalidate an order to revoke. However, this is not a problem when the trial, which is judicially noticed, has been appealed; in such a case, the Court of Criminal Appeals will look directly to the record of the trial which is filed on appeal. [Cleland v. State, 572 S.W.2d 673 (Panel 1978)] As long as the revocation record indicates what was judicially noticed, the record of the trial on appeal will be sufficient record for review by the Court of Criminal Appeals.

(4) Written Findings By the Court.

The probationer has a right to request written findings of fact and conclusions of law by the trial judge at the revocation hearing. Objections to a lack of such written findings, or the sufficiency of the findings, may not be raised for the first time on appeal of an order to revoke. Where no request was made in the trial court for more specific findings of fact, a probationer may not complain on appeal of the inadequacy of the court's statements in the written order to revoke probation. [Clapper v. State, 562 S.W.2d 250 (Panel 1978)] Futhermore, written findings control over oral statements of the trial judge in the hearing record. [Benoit v. State, 561 S.W.2d 819 (1977)]

The importance of proper written findings indicating the basis of the decision by the judge at the revocation hearing cannot be stressed too strongly. Thus, where a trial judge has orally stated he revoked probation on the basis of both failure to return to El Paso county upon the date agreed to with the probation officer and possession of heroin, but the written order indicated only the former violation as a basis of revocation, the finding that the probationer possessed heroin could not support revocation. Since the other condition which the trial court had found to be violated was not a valid condition of probation, the order to revoke probation was reversed. [Aguilar v. State, 542 S.W.2d 871 (1976)]

To avoid confusion and protect the rights of a probationer, findings of fact and conclusions of law should be contained in the written order revoking, modifying, or continuing the probationer on probation. These findings should state: 1) the condition(s) of probation found to have been violated; 2) the conduct by which the probationer violated such condition(s); 3) the violations of probation upon which the judge based the decision to revoke, modify, or continue probation; and 4) whether probation is revoked, modified, continued, or whether no decision was rendered and the hearing was continued until a later date. These specific findings will also help avoid the problems associated with a subsequent revocation which involves a violation which was the subject of an earlier revocation hearing.

(5) Trial Court Options on Hearing the Motion to Revoke.

After hearing the evidence on the motion to revoke probation, the trial court may, at its discretion, continue the probationer on probation under the same terms and conditions as before; modify the terms of probation; or revoke probation and sentence the defendant to a term of imprisonment. [Art. 42.12, §8(a); Art. 42.13, §8(a); Flournoy v. State, 589 S.W.2d 705 (Panel 1979)] This wide discretion is limited only by the requirements that the probationer be provided with due process of law in reaching the decision. The court is not required to revoke probation even if a violation of the terms or conditions is proved at the revocation hearing.

However, once a violation of probation is alleged in a motion to revoke, proved at a hearing on the motion, and the defendant has been ordered continued on probation by the court, no further action may be taken on the basis of violations which were already before the court in this revocation proceeding. [Ex Parte Feldman, 593 S.W.2d 720 (En Banc 1980)] If the court continued a defendant on modified terms of probation and does not revoke probation after a violation has been shown at the revocation hearing, the trial court may not change this decision at a later hearing on a motion to revoke without a showing of a further violation of probation terms. [Furrh v. State, 582 S.W.2d 824 (Panel 1979)] Instead of continuing the probationer on the original terms of probation, modifying the conditions, or revoking probation, the trial judge at a revocation hearing is empowered to continue the hearing. This gives the trial judge an opportunity to consider the circumstances of a violation and the subsequent conduct of the probationer, and to revoke probation without proof of a subsequent violation [Traylor v. State, 561 S.W.2d 492 (Panel 1978)]

However, problems have frequently arisen in this area largely due to conflicting statements in court records as to what action has been taken, or ambiguity in the actions of the trial court. For instance, in Wallace v. State,

[575 S.W.2d 512 (Panel 1979)] the trial court orally stated that probation was revoked after a revocation hearing. No written order to revoke probation was entered; the docket sheet read "sentence deferred; defendant to serve 4 months county jail". Later, the conditions of probation were modified to require more frequent reporting. After the probationer was arrested for new offenses, the State filed a motion for sentencing, alleging that the defendant had committed penal offenses after sentencing had been deferred following the earlier revocation hearing. The State was ordered to file a motion to revoke probation; an amended motion alleging the new violations was filed, the court revoked the defendant's probation on the basis of his previous plea of true to one of the allegations in the first motion to revoke probation. Since the record showed no written order to revoke probation and no imposition of sentence, and since the conditions of probation were modified and the defendant released from custody, the Court of Criminal Appeals concluded that the trial court was improperly attempting to revoke the defendant's probation on the basis of a violation proved in the first hearing when the trial court first continued the probation instead of revoking it. Had the revocation order been based on proof of the new violations alleged in the amended motion to revoke, the revocation would have been valid.

A similarly ambiguous action by a trial court occurred in Stanfield v. State [588 S.W.2d 945 (En Banc 1979)] At the revocation hearing, the defendant pled true to an allegation of violation of the condition to report. The hearing was continued and no decision was made on the motion to revoke before the trial court revoked probation. This situation was considerably less clear than in Traylor v. State in which the trial court had stated unambiguously that it was taking the decision on revocation under advisement and there was nothing in the record indicating that revocation was based on a subsequent violation of probation. By a vote of 5 to 4, the Court of Criminal Appeals decided in Stanfield that there was no indication in the record that the revocation was based on violations not contained in the revocation motion already heard by the court. The majority also found that merely withdrawing the arrest warrant for the probationer was not an indication that the court had decided to continue him on probation. The dissent strongly objected to the majority opinion. Judge Onion, writing for the four dissenters, felt that the record indicated that new violations of probation, on which a revocation hearing had not been held, were the trial court's reason for revoking probation, as in Wallace v. State, discussed earlier.

These cases indicate that probation officers, attorneys, and trial judges should be especially careful to show clearly whether: (1) probation is being continued (with or without modification of the probation conditions); or (2)

whether the probationer is being permitted to remain on probation while the trial court takes the revocation motion under advisement. If probation has been continued, it cannot later be revoked except upon the allegation and proof of a later violation. If the revocation decision was taken under advisement by the trial court, probation can later be revoked without proof of a new violation.

After revoking a probated sentence, the trial judge has discretion to reduce the term of jail or imprisonment originally assessed. [Art. 42.12, §8(a); Art. 42.13, §8(a)] However, the decision to reduce a sentence upon revocation appears to be entirely in the discretion of the trial court. Failure to give the defendant even a hearing on a motion to reduce sentence is not an abuse of discretion. [Stessney v. State, 593 S.W.2d 699 (Panel 1980)] Of course, in reducing a sentence, the trial judge's discretion is limited by the minimum period of jail or imprisonment for the offense. Reducing a sentence to less than five years, the minimum sentence for a first-degree felony, for instance, would be beyond the power of the trial court. [Clapper v. State, 562 S.W.2d 250 (Panel 1978)]

If the probation revoked was regular felony or misdemeanor probation, the trial court, upon revocation, may not increase the prison or jail sentence beyond the term that was assessed when the defendant was placed on probation. For example, if the probationer was convicted of a third-degree felony, he could receive a sentence of from two to ten years. If a sentence of five years was assessed and probation given, upon revocation the trial court may impose a prison sentence of between two and five years, but may not impose a sentence greater than five years even though the probationer could have received as much as a ten year sentence as an original matter had he not been placed on probation.

It is possible, however, for the trial court to, in effect, increase the punishment assessed when a defendant is being sentenced for more than one offense. If two probations are being revoked at the same time or if the defendant's probation is revoked and he is being sentenced for a new offense, the trial court has discretion to make the sentences run concurrently or consecutively. [Art. 42.08] If the latter is elected, it has the effect of increasing the sentence assessed on the offenses for which sentence is imposed consecutively. This matter is discussed more fully in Chapter 5.

However, when the defendant has been given felony or misdemeanor deferred adjudication probation, community service deferred adjudication probation or a conditional discharge under the Controlled Substances Act, the trial court upon revocation of probation may impose any jail or prison sentence that could have been imposed as an original matter. In the example used above, if the probationer were convicted of a third-degree felony and were given a five-year

deferred adjudication probation, upon revocation the trial court could impose any sentence between two and ten years. The reason for this distinction is that in these various forms of deferred adjudication probation, the criminal process was halted before a judgment of guilt was entered by the court and without any assessment of sentence. Therefore, when such a probation is "revoked" what the trial court is actually doing is re-initiating the criminal process at the point it was halted and proceeding to judgment, assessment of punishment and imposition of sentence.

When probation has been revoked and the defendant has been sentenced to prison or jail, if he qualifies under Article 42.12, Section 3e or Article 42.13, Section 3e, he may be given shock probation after he has served the required time in the prison or jail. When released, he is placed on regular felony or misdemeanor probation, depending upon the offense committed. To be eligible for shock felony probation, the trial court must find that the defendant "has never been incarcerated in a penitentiary serving a sentence for a felony and in the opinion of the judge the defendant would not benefit from further incarceration in a penitentiary." [Art. 42.12, §3e(a)] To be eligible for shock misdemeanor probation, the trial court must find that "the defendant had never been incarcerated in a penitentiary or jail serving a sentence for a felony or misdemeanor and in the opinion of the judge the defendant would not benefit from further incarceration in a jail." [Art. 42.13, §3e(a)]

When probation is revoked and the probationer is sentenced to prison or jail, he does not receive credit for the time he was on probation. [Art. 42.12, §8(b); Art. 42.13, §8(b)] However, he does receive credit, including credit for good conduct, for all time spent in jail in connection with the case for which probation was revoked. This includes time incarcerated before being placed on probation as well as time spent in jail pending hearing on a motion to revoke and imposition of sentence. [Art. 42.03]

CHAPTER 7.

COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION

The direct consequences of a criminal conviction are well-known; the offender may be sentenced to jail or prison, placed on probation, required to pay a fine and required to pay court costs, probation supervision fees, reimbursement of the county for fees paid to court-appointed defense counsel, restitution to the victim of the offense, and the Texas tax on criminal offenses. The collateral--other--consequences of a criminal conviction are less well-known but frequently are of more concern to the offender and society than the direct consequences. Our purpose in this chapter is to discuss the law of collateral consequences of Texas criminal convictions. It is important knowledge for a probation officer to possess since the actions he or she takes may have a significant impact upon those consequences. Discussion is organized into twelve areas: (1) enhancement of punishment for a subsequent offense; (2) proof of prior criminal record at the penalty phase of a subsequent trial; (3) increased punishment for subsequent offenses, such as driving while intoxicated or driving under the influence of drugs; (4) effect of a criminal conviction upon future eligibility for probation; (5) denial of release on bond under the Texas Constitution for a subsequent offense; (6) impeachment of the testimony of a witness with a criminal conviction; (7) suspension of motor vehicle operator's license; (8) deportation of an alien; (10) effect on civil rights, such as right to vote, hold public office or serve on juries; (11) effect on eligibility for occupational licenses from state or local governments; and (12) expunction of criminal records.

The law in this area is complicated. The effect of a criminal conviction differs depending upon which of these areas is being discussed and, for some areas, such as occupational licensing, the effects differ within an area depending upon which specific occupation is being considered. There are, however, some legal distinctions that run throughout this discussion.

The <u>first</u> is the distinction between a felony and a misdemeanor. A felony is any criminal offense that is called a felony by law or is "punishable by death or confinement in a penitentiary". [T.P.C. §1.07(a) (14)] A misdemeanor is any criminal offense that is called a misdemeanor by law or is "punishable by fine, by confinement in jail, or by both fine and confinement in jail". [T.P.C. §1.07(a)(21)] Note that in both instances, the law defines the category in terms of being "punishable" by jail or penitentiary time; thus, a criminal offense is a felony or misdemeanor based on what sentence can be imposed, not on whether the offender actually goes to the jail or penitentiary.

The second major distinction is between being convicted and not being convicted. A person placed on regular felony or (after the 1979 revision) misdemeanor probation has been convicted. But a person placed on felony or misdemeanor deferred adjudication probation [Art. 42.12, §3d; Art. 42.13, §3d], on felony or misdemeanor community service probation [Art. 42.12, §10A; Art. 42.13, §3B] or under felony or misdemeanor conditional discharge under the Controlled Substances Act [Civil Statutes Art. 4475-15, §4.12] has not been convicted, because each of these provisions operates on a theory that the adjudication of guilt rather than merely the sentence has been suspended.

The third major distinction is between a conviction and a final conviction. A conviction becomes final when it is affirmed by the highest appellate court in which review is sought (ordinarily, in Texas, the Court of Criminal Appeals) or when the time for taking an appeal has expired and no appeal has been taken.

The fourth major distinction is between being placed on probation or being sentenced to jail, to prison, or to pay a fine. In some situations, the collateral consequences of a conviction may vary depending upon whether or not the defendant was given probation.

The fifth major distinction is between being on probation and already having served the probation term. In some situations, the collateral effect of a conviction will differ depending upon this variable.

The sixth major distinction is between simply having served probation and the term of probation having expired, on the one hand, and being formally discharged and having the case dismissed with restoration of certain rights, on the other. Dismissal is authorized under Article 42.12, Section 7 of the Code of Criminal Procedure:

> In case the defendant has been convicted or has entered a plea of guilty or a plea of nolo contendere, and the court has discharged the defendant hereunder, such court may set aside the verdict or permit the defendant to withdraw his plea, and shall dismiss the accusation, complaint, information or indictment against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted or to which he has pleaded guilty, except that proof of his said conviction or plea of guilty shall be made known to the court should the defendant again be convicted of any criminal offense.

Article 42.13, Section 7 contains the identical provision when a defendant is discharged from misdemeanor probation, except the statute is mandatory in that it provides that the "court shall set aside" the conviction, rather than the "court may set aside" the conviction. Some collateral consequences of conviction depend upon whether the probationer's conviction has been set aside under either of these provisions.

The seventh and final distinction is between felony probation and misdemeanor probation. Here the law is especially unclear. Except for deferred adjudication probation, a person placed on felony probation has long been regarded as having a criminal conviction. In part, this is because probation is defined in the felony probation statute as "the release of a convicted defendant by a court under conditions imposed by the court for a specified period during which the imposition of sentence is suspended". [Art. 42.12, §2b] In contrast, one placed on misdemeanor probation was for most purposes not regarded as having a criminal conviction. The misdemeanor probation law defined probation as "the release by a court under terms and for a period specified by the court of a defendant who has been found guilty of a misdemeanor". [Art. 42.13, §2(2), repealed in 1979] Further, the misdemeanor law provied that "when a defendant is granted probation under the terms of this Act, the finding of guilty does not become final, nor may the court render judgment thereon" unless probation is later revoked. [Art. 42.13, §4(a), repealed in 1979] Finally, the misdemeanor probation law provided that when the probationer has completed probation, "the court shall, upon its own motion, discharge him from probation and enter an order in the minutes of the court setting aside the finding of guilty and dismissing the accusation or complaint and the information or indictment against the probationer". [Art. 42.13, §7(a), repealed in 1979] That same section of the law then provided:

> After the case against the probationer is dismissed by the court, his finding of guilty may not be considered for any purpose except to determine his entitlement to a future probation under this Act, or any other probation Act.

[Art. 42.13, §7(b), repealed in 1979, emphasis as in the original] In 1979, the misdemeanor probation law was subjected to a comprehensive revision to make it virtually identical to the felony probation law. The basic question as a result of that revision is whether one placed on misdemeanor probation has been convicted of a criminal offense. Although there are no appellate cases on this question, an Attorney General's opinion dealing with suspension of a driver's license upon being placed on misdemeanor DWI probation would indicate that the distinction between being on felony and misdemeanor probation has been abolished by the Legislature and that both now result in conviction of a criminal offense. [AG Opinion No. MW-133 (1980)]

(1) Enhancement of Punishment for a Subsequent Offense.

Texas law contains numerous statutes that increase the punishment for an offense upon proof of a prior criminal conviction. The Penal Code contains several of these provisions applicable to cases in which both the present offense and the prior conviction are for a felony. If the defendant is convicted of a

third-degree felony (punishable by 2 to 10 years imprisonment) and has a previous felony conviction, the punishment for the present offense is increased to that of a second-degree felony (2 to 20 years imprisonment). If the defendant is convicted of a second-degree felony and has a previous felony conviction, the punishment for the present offense is increased to that of a first-degree felony (5 to 99 years or life imprisonment). If the defendant is convicted of a first-degree felony and has a previous felony conviction, the punishment for the present offense is increased to a term of 15 to 99 years or life imprisonment. Finally, if the defendant is convicted of any felony and has two prior felony convictions of any grade, the punishment is increased to a mandatory term of life imprisonment. [T.C.P. §12.42] For a prior conviction to qualify for enhancement of felony punishment, the defendant must have been sentenced to the penitentiary in the previous case or cases. If the defendant was placed on probation and successfully served it or is still on probation, he or she has not been convicted for these purposes. However, if the defendant was placed on probation and probation was revoked, he or she then has been convicted for these purposes. Also, the conviction in the previous case must have occurred before the commission of the present offense in order to qualify for enhancement of punishment. Punishment cannot be enhanced unless the State pleads the prior conviction in the indictment and proves it at the penalty stage of the trial on the present offense. [Ex Parte Murchison, 560 S.W.2d 654 (En Banc 1978)]

The Penal Code also contains enhancement provisions for misdemeanors. If the defendant is convicted of a Class A misdeamnor (up to one year in jail and a fine up to $2,000.) and has previously been convicted of a Class A misdemeanor or any degreee of felony, the punishment for the present offense is increased to a term of not less than 90 days nor more than one year in jail. If the defendant is convicted of a Class B misdemeanor (up to 180 days in jail and a fine of $1,000) and has previously been convicted of a Class A or Class B misdemeanor or any degree of felony, the punishment for the present offense is increased to a term of not less than 30 days nor more than 180 days in jail. [T.P.C. §12.43] Of course, the defendant is still eligible for probation even though punishment has been enhanced.

There are special enhancement provisions that apply to theft offenses. The degree of seriousness of theft of property depends upon the value of the property stolen. If the value of the property is less than $5, it is a Class C Misdemeanor; $5 but less than $20, a Class B misdemeanor; $20 but less than $200, a Class A misdemeanor; $200 but less than $10,000, a third-degree felony; and $10,000 or more, a second-degree felony. [T.P.C. §31.03(d)] However, if the value of the property stolen is less than $5 and the defendant has previously

been convicted of any grade of theft, then the present offense is a Class B misdemeanor rather than a Class C misdemeanor. [T.P.C. Art. 31.03 (d)(2)(B)] If the value of the property stolen is less than $200 and the defendant has been previously convicted two or more times of any grade of theft, than the present offense becomes a third-degree felony rather than whatever misdemeanor offense the value of the property stolen would determine. [T.P.C. §31.03(d)(4)(C)] Because the grade of the present offense is increased with theft enhancements, rather than merely an increase in punishment, the State must plead the prior convictions and prove them in the guilt/innocence stage of the trial, rather than in the penalty phase.

There are also enhancement provisions outside the Penal Code. When there are special enhancement provisions applicable to particular offenses, they control over the general enhancement provisions of the Penal Code. One example of such a special enhancement provision is in the Dangerous Drugs Act in which possession of a dangerous drug is punished by a term in jail not to exceed six months and a fine not to exceed $1,000 but upon a subsequent violation, the punishment is increased to a jail term of not more than one year and a fine of not more than $2,000. [Civil Statutes Art. 4476-14, §15.]

Finally, the Court of Criminal Appeals has held that a prior conviction may be used for enhancement of punishment even if the defendant has received a Presidential or Gubernatorial pardon for the offense unless the pardon was based on proof of innocence. [Watkins v. State, 572 S.W.2d 339 (Panel 1978)]

(2) Proof of Prior Criminal Record at the Penalty Phase of a Subsequent Trial.

Article 37.07 of the Code of Criminal Procedure permits the State during the penalty phase of a trial to prove the defendant's prior criminal record to assist the judge or jury in assessing punishment and granting or denying probation. Unlike in enhancement of punishment, a prior conviction is admissible here whether 1) the defendant was sentenced to prison or was placed on probation [Art. 37.07, §3(a); Ex Parte Flores, 537 S.W.2d 458 (1976)]; or 2) the defendant is still on probation, probation was revoked or was successfully served and the case dismissed under the felony or misdemeanor discharge provisions. [Art. 42.12, §7; Art. 42.13, §7] The prior conviction must be a final conviction, [Art. 37.07, §3(a)] that is, it is not admissible if it is still pending decision on appeal to the Court of Criminal Appeals. Finally, the conviction must have occurred in a court of record, which excludes all Justices of the Peace and most municipal courts, unless it is a final conviction in one of those courts that is "material to the offense charged". [Art. 37.07, §3(a)] The trial court will examine the

interests protected by the present offense and the prior offense to determine whether the latter is "material" to the former. Thus, in Chestnut v. State, the court decided that three Class C misdemeanor assaults from a municipal court that was not a court of record were admissible at the penalty phase of a robbery trial because the primary interests protected by the robbery and assault statutes are the same: "security of the person from bodily injury or threat of bodily injury". [567 S.W.2d 1, 2 (Panel 1978)]

Although the statute requires that a prior offense must have resulted in a final conviction to be admissible at punishment, special provisions have been made for deferred adjudication probation. In the absence of such provisions, a defendant who has successfully served deferred adjudication probation or who is still serving such a probation term would not have a prior conviction admissible at punishment. However, both the felony [Art. 42.12, §3d] and misdemeanor [Art. 42.13, §3d] deferred adjudication probation statutes and the felony and misdemeanor community service deferred adjudication probation statute [Art. 42.12, §10A; Art. 42.13, §3B] specifically provide that the State may prove at the penalty stage of a subsequent case that the defendant has received deferred adjudication probation. Similarly, under the conditional discharge provisions of the Controlled Substances Act, the fact that the defendant received a conditional discharge may be revealed to the court should the defendant be convicted in a subsequent drug case to determine whether he or she qualifies for a conditional discharge in that case. [Civil Statutes Art. 4476-15,§4.12(b)]

It should be remembered that the defendant's prior criminal record, including arrests and pending charges, may be shown to the judge in a presentence report without the limitations discussed here about a final conviction. See Chapter 3 of this text. It should also be noted that a prior conviction is admissable at the punishment stage of a capital case even if it is not a final conviction. [McManus v. State, 591 S.W.2d 505 (En Banc 1979)]

(3) Increased Punishment for Subsequent Offenses of Driving While Intoxicated or Under the Influence of Drugs.

Driving while intoxicated or under the influence of intoxicating liquor is a misdemeanor offense, punishable by confinement in the county jail of not less than three days nor more than two years and by a fine of not less than $50 nor more than $500 or both. The trial court may grant probation for a period of not less than six months. [Civil Statutes Art. 6701L-1] If a person charged with driving while intoxicated has a previous conviction for the same offense, he or she can be charged with a felony. Upon proof of the present offense and the previous conviction, the defendant can be found guilty of a felony and punished by a fine of not less than $100 nor more than $5,000 and by confinement in the

county jail for not less than ten days nor more than two years, or both, or by imprisonment in the penitentiary for a period not to exceed five years. [Civil Statutes Art. 6701L-2] A misdemeanor conviction for driving while intoxicated does not qualify to increase a subsequent offense to a felony unless it is a final conviction. Thus, if an appeal from the misdemeanor case is still pending a decision from the Court of Criminal Appeals at the time the subsequent offense was committed, it does not qualify as a prior conviction and the subsequent offense must be charged as a misdemeanor.

Until the 1979 revision of the misdemeanor probation law, if the defendant was on probation for misdemeanor driving while intoxicated or had successfully served probation for that offense at the time of commission of the subsequent offense, the prior conviction was not regarded as being final and the subsequent offense must be charged as a misdemeanor.

However, as a result of the 1979 revision of the misdemeanor law, it is now arguable that the conviction for misdemeanor driving while intoxicated becomes final when the defendant is placed on probation, if no appeal is taken, and that for a subsequent offense he or she can be charged with a felony. See Atty.Gen. Opinion No. MW-133 (1980) for a discussion of the similar question whether being placed on misdemeanor probation qualifies as a conviction for automatic suspension of motor vehicle operator's license. There is at present no caselaw on this question, however. Even if regular misdemeanor probation qualifies as a prior conviction to make a subsequent offense a felony, it seems clear that if the defendant was placed on deferred adjudication probation [Art. 42.13, §3d] or deferred adjudication community service probation [Art. 42.13, §3B] that status does not qualify as a prior conviction for these purposes.

Texas law also prohibits driving under the influence of drugs. First offense is punishable by a fine of not less than $100 nor more than $1000 and by confinement in jail for not less than ten days nor more than two years. For a subsequent offense, by a fine of not more than $1,000 and by confinement in jail for not less than 90 days nor more than two years. [Civil Statutes Art. 6701d, §50]

(4) Effect of a Criminal Conviction Upon Future Eligibilty for Probation.

The entire matter of probation eligibility has been discussed earlier in this text. (See Chapter 2) Here, we will simply summarize the effect of a prior conviction on probation eligibility to round out the picture of the collateral consequences of a criminal conviction.

If the State pleads and proves two prior felony convictions, the defendant is not eligible for felony probation from either the judge or the jury because

the law requires a sentence of life imprisonment to be imposed. [T.P.C. §12.42(d)] If the defendant is found guilty of a first-degree felony and the State has plead and proved one prior felony conviction, the defendant is not eligibile for probation from either judge or jury because the law requires a sentence of at least 15 years to be imposed. [T.P.C. §12.42(c)]

Except in those two instances, a defendant is not precluded from receiving felony probation from the trial judge because of prior convictions. [Art. 42.12, §3c] A defendant is not ever precluded from receiving misdemeanor probation from the trial judge. [Art. 42.13, §3c] If the defendant wishes the jury to recommend probation, it must be shown that he or she has never before been convicted of a felony in order to be eligible for either felony or misdemeanor probation. [Art. 42.12, §3a; Art. 42.13, §3a]

A defendant charged with a violation of the Controlled Substances Act is eligible for conditional discharge probation unless he or she has previously been convicted of an offense under the Controlled Substances Act or of an offense under other statutes relating to a substance that is defined as a controlled substance under the Act. [Civil Statutes Art. 4476-15, §4.12(a)]

To be eligible for misdemeanor deferred adjudication community service probation, the person must plead "guilty or nolo contendere to a first offense misdemeanor". [Art. 42.13, §3B(a)] To be eligible for felony deferred adjudication community service probation, the person must plead "guilty or nolo contendere to a first offense felony". [Art. 42.12, §10A(a)] The language in each statute is ambiguous. Is one with a previous misdemeanor conviction eligible for felony community service probation? Is one with a previous felony conviction eligible for misdemeanor community service probation? Should it make any difference whether the person was on regular or deferred adjudication probation in the previous misdemeanor or felony case?

(5) Denial of Release on Bond for a Subsequent Offense.

The Texas Constitution gives prisoners before trial the right to require a judicial officer to set a bail amount. If the accused deposts assets equal to the bail amount or purchases a surety bond for the bail amount, he or she must be released pending trial. The Constitution also provides that persons charged with a capital offense may be held without bond if the State proves in a pre-trial hearing that the accused quite likely committed a capital offense and that it is likely the jury will return a verdict of death. [Tex. Constitution Art. I, §11; Ex Parte Wilson, 527 S.W.2d 310 (1975)]

As a result of amendments in the Constitution, Texas law now provides that a defendant charged with a non-capital offense may be detained pending trial

without bail in two circumstances because of prior convictions. First, if the defendant is charged with a felony and has twice before been convicted of felonies under circumstances that the habitual offender law could be invoked [T.P.C. §12.42(d)] he or she may be detained without bail. [Ex Parte Smith, 548 S.W.2d 410 (1977)] Second, if the defendant was previously convicted of any felony and is charged with a felony "involving the use of a deadly weapon" he or she may be detained without bail. [Tex. Constitution, Art. I, §11a]

(6) Impeaching the Testimony of a Witness with a Prior Conviction.

A witness has been impeached when some fact is revealed that adversely affects the believability of the testimony he or she has given. For example, a witness may be impeached by showing that at an earlier time he or she made a statement that is inconsistent with a statement made from the witness stand. Witnesses, whether State or defense, including the defendant, may have their testimony in any judicial proceeding impeached by showing a prior conviction of certain criminal offenses. The theory is that a convicted person is less deserving of belief than one without such a conviction.

In Texas, the testimony of a witness may be impeached by showing he or she has previously been convicted of a felony or of a misdemeanor involving moral turpitude. [Thomas v. State, 482 S.W.2d 218 (1972)] By statute, the conviction must be a final conviction; if it has been appealed and the appeal has not been decided at the time the testimony is given, it may not be used to impeach. [Salazar v. State, 432 S.W.2d 957 (1968)] However, the statute also permits a conviction to be used to impeach if the witness was placed on probation and is still on probation at the time he or she testifies. [Art. 38.29] If, however, he or she has served the probation term before testifying, then the conviction may not be used to impeach. [Zillender v. State, 557 S.W.2d 515 (1977)]

Since the reason a prior conviction may be used to impeach is because it may be of assistance to the judge or jury in assessing the character of the witness and, therefore, the credibility of his or her testimony, it follows that extremely old convictions ought not be permitted to be used in this fashion. The Court of Criminal Appeals has recognized this principle and has fashioned a rule that bars old convictions from use for impeachment. As a rule of thumb, any conviction more than ten years old may not be used to impeach. [Penix v. State, 488 S.W.2d 86 (1972)]

Any felony conviction may be used to impeach. Only those misdemeanors involving moral turpitude may be used to impeach. The Court of Criminal Appeals has not provided general guidance on the question which misdemeanors do and which do not involve moral turpitude. From decided cases, however, the following misdemeanors have been held <u>not</u> to involve moral turpitude:

Driving while intoxicated [Stephens v. State, 417 S.W.2d 286 (1967)]
Driving while license suspended [Stephens v. State, 417 S.W.2d 286 (1967)]
Drunkenness (public intoxication) [Hoover v. State, 449 S.W.2d 60 (1969)]
Aggravated assault not committed on a female [Valdez v. State, 450 S.W.2d 624 (1970)]
Homosexuality [Thrash v. State, 482 S.W.2d 213 (1972)]
Unlawfully carrying weapon [Thomas v. State, 482 S.W.2d 218 (1972)]
Possession of untaxed whiskey [Smith v. State, 346 S.W.2d 611 (1961)]
Gaming [Neill v. State, 258 S.W.2d 328 (1953)]
Liquor law violations [Rivera v. State, 255 S.W.2d 219 (1953)]

In addition, certain misdemeanors have been declared by statute not to involve moral turpitude:

Traffic offenses [Civil Statutes Art. 6701d, §151]
Possession of marijuana [Civil Statutes Art. 4476-15, §4.05(c)]

Arguably, no Class C misdemeanor is admissible to impeach the testimony of a witness because of the provision in the Penal Code that "conviction of a Class C misdemeanor does not impose any legal disablity or disadvantage". [T.P.C. §12.03(c)]

By decided cases, the following misdemeanors have been held to involve moral turpitude and, therefore, to be admissible to impeach:

Aggravated assault committed on a female [Valdez v. State, 450 S.W.2d 624 (1970)]
Prostitution [Johnson v. State, 453 S.W.2d 828 (1970)]
Procuring a prostitute [Taylor v. State, 470 S.W.2d 663 (1971)]
Forgery [White v. State, 135 S.W. 562 (1911)]
Theft [Martin v. State, 491 S.W.2d 928 (1973)]

(7) Suspension of Motor Vehicle Operator's License.

Texas law provides for the automatic suspension of a person's motor vehicle operator's license upon conviction of the following offenses: negligent homicide resulting from the operation of a motor vehicle; driving a motor vehicle while under the influence of intoxicating liquor or narcotic drugs; any offense punishable as a felony under the motor vehicle laws of Texas; failure to stop, render aid and disclose identity at the scene of an accident or collision; and aggravated assault by means of a motor vehicle. [Civil Statutes Art. 6687b, §24(a)] The license is suspended for a period of twelve months. [Civil Statutes Art. 6687(b), §24(b)] The suspension is automatic and accomplished by operation of law; it is not necessary for an official to take possession of the license to put the suspension into effect. [Atty. Gen. Opinion No. H-1053 (1977)]

Once the suspension begins, it runs for the statutory period of one year and the right to drive cannot be restored by exercise of the Governor's powers of clemency. [Atty. Gen. Opinion No. WW-567 (1959)]

A conviction is not final while an appeal is pending. For a number of years, the law distinguished between misdemeanor and felony probation under the

automatic suspension statute. One placed on felony probation for a designated offense was regarded as being finally convicted and automatically had his or her operator's license suspended for one year. But, because of language in the misdemeanor probation statute indicating that a defendant on misdemeanor probation is not convicted, license suspension was not imposed when misdemeanor probation was given. [Atty. Gen. Opinion No. M-1057 (1972)] However, the misdemeanor probation statute was subjected to a comprehensive revision in 1979 to make it virtually indentical to the felony statute and the language earlier relied upon to distinguish the two statutes was repealed. As a result, the Attorney General has given an opinion that suspension of license is automatic for one placed on regular probation for a designated offense, whether it is a felony or a misdemeanor. [Atty. Gen. Opinion No. MW-133 (1980)] Although there are as yet no judicial opinions on this question, it is likely the courts will follow the Attorney General's opinion.

In the same opinion, however, the Attorney General stated that a person placed on misdemeanor deferred adjudication probation [Art. 42.13, §3d] is not convicted of a criminal offense and therefore would not come within the automatic suspension statute. Although the Attorney General mentioned only the misdemeanor deferred adjudication probation statute, the same principle would apply to misdemeanor or felony deferred adjudication community service probation [Art.42.13, §3B; Art. 42.12, §10A] and, indeed, to felony deferred adjudication probation. [Art. 42.12, §3d]

A person convicted of one of the designated offenses who has his license suspended may apply to the convicting court for a restricted license. The restricted licensing statute provides:

> The court may enter an order restricting the operation of a motor vehicle to the person's occupation or to participation in an alcoholic or drug treatment, rehabilitation, or educational program, provided the person gives proof of a valid policy of automobile liability insurance... The order shall state restrictions as to hours of the day, days of the week, type of occupation or program, and areas or routes of travel to be permitted, except that the person convicted may not be allowed to operate a motor vehicle more than ten (10) hours in any consecutive twenty-four (24) hours, providing, on proper showing of necessity, the court may waive the ten (10) hour restriction.

[Civil Statutes Art. 6687b, §25(a)]

Under a bill passed in 1981 and effective on January 1, 1981, a person convicted of misdemeanor driving while intoxicated may keep his motor vehicle operator's license under any one of three circumstances. If he or she has elected jury sentencing and the jury has recommended that the license not be suspended, it cannot be suspended. If he or she is placed on probation the trial judge is required to order participation in an educational program designed to rehabilitate persons who have driven while intoxicated. The license is not suspended while the probationer is attending the program and if the program is successfully completed, the license will not be suspended. Finally, for good

cause shown in a written motion, the trial court may waive the requirement of attendance at the educational program. Under that circumstance as well, the license is not suspended. [Art. 42.13, §§3a and 6c; Civil Statutes Art. 6687b]

(8) Possession by a Felon of Firearms under Federal and Texas Law.

Federal statutes prohibit persons who have been convicted of certain criminal offenses from possessing firearms that have traveled in interstate commerce (as virtually all firearms have). Under one federal statute, it is an offense punishable by $10,000 fine and two years' imprisonment for one who has been convicted of a felony to receive, possess, transport in commerce or affecting commerce any firearm. [18 U.S.C. App., §1202(a)] Under this statute, "firearm" includes a shotgun and rifle as well as a handgun. [18 U.S.C. Appeals §1202(c)(3)] Under a different federal statute, it is a criminal offense punishable by a fine of $5,000 and imprisonment for five years [18 U.S.C., §924 (a)] for a person who has been convicted of a felony or an offense punishable by more than two years imprisonment to ship or transport any firearm or ammunition in interstate or foreign commerce or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce. [18 U.S.C., §922 (g) and (h)]

A person on regular probation from a Texas court who possesses a firearm does so in violation of federal law. He or she has been convicted of a felony for purposes of these federal provisions. [U.S. v. Goodie, 524 F.2d 515 (5th Cir. 1975)] However, if he or she was placed on felony deferred adjudication probation [Art. 42.12, §3d], on felony community service probation [Art. 42.12, §10A] or on conditional discharge for felony violation of the Controlled Substances Act [Civil Statues Art. 4476-15, §4.12] then he or she <u>probably</u> has not been convicted of a felony for these purposes and may possess a firearm without violating federal law. [United States v. Dotson, 555 F.2d 134 (5th Cir. 1977)]

However, if a person was on regular felony probation and was discharged and had the case dismissed under Article 42.12, Section 7 of the Code of Criminal Procedure and then came into contact with a firearm he would probably be in violation of federal law under these statutes.

The Texas Penal Code provides: "A person who has been convicted of a felony involving an act of violence or threatened violence to a person or property commits an offense if he possesses a firearm away from the premises where he lives." The offense is punishable as a felony by a term of up to ten years in prison. [T.P.C. §46.05] It should be noted that a firearm includes a shotgun and rifle as well as a handgun. What is a "felony involving an act of violence or threatened violence to a person or property"? The court has held that robbery

is always such an offense. [Scott v. State, 571 S.W.2d 893 (Panel 1978)] It has also held that burglary and burglary of a motor vehicle may be such an offense, depending upon the particualr facts of the offense. [Tew v. State, 551 S.W.2d 375 (1977); Powell v. State, 538 S.W.2d 617 (1976)] If the defendant was convicted of a felony that meets the statute's definition, the fact that he or she later was pardoned for the offense (unless upon subsequent proof of innocence) does not prevent the offense from occurring upon possession of a firearm. [Runo v. State, 556 S.W.2d 808 (1977)] Finally, it is unclear whether it makes any difference that the defendant was sentenced to prison or placed on probation for the prior felony and, if the latter, whether he or she was still on probation or was discharged from probation at the time the firearm was possessed. Presumably, however, if there was an appeal pending from the prior felony conviction at the time of the firearm possession, that would not be a conviction that would qualify under the statute.

(9) Deportation of an Alien.

An alien lawfully in the United States is nonetheless subject to deportation under federal law upon conviction of certain criminal offenses. There are four major situations in which this may occur. First, if an alien "is convicted of a crime involving moral turpitude committed within five years after entry <u>and</u> receives a prison or jail sentence of one year or longer, he or she is subject to deportation. [8 U.S.C. §1251(a)(4)] Second, if an alien "at any time after entry is convicted of two crimes involving moral turpiturde, not arising out of a single scheme of criminal misconduct" he or she is subject to deportation whether sentenced to prison or receiving probation for the offenses. [8 U.S.C. §1251(a)(4)] Third, if an alien at any time is convicted of violating any law "relating to the illicit possession of or traffic in narcotic drugs or marijuana" he or she is subject to deportation. [8 U.S.C. §1251 (a)(11)] Fourth, if an alien at any time after entry is convicted of "possessing or carrying in violation of any law any weapon which shoots or is designed to shoot automatically or semi-automatically more than one shot without manual reloading, by a single function of the trigger, or a weapon commonly called a "sawed-off shotgun" he or she is subject to deportation. [8 U.S.C. §1251 (a)(14)]

Congress and the courts have treated the first and second situations differently from the third and fourth. In the first and second situations deportation is prevented if either the alien receives "a full and unconditional pardon" by the President or a Governor of a State <u>or</u> the sentencing court at the time of sentence or within thrity days thereafter recommends to the Attorney General of the United States that the alien not be deported. Although this is in

form only a recommendation, it is binding on the Federal government and the alien cannot be deported for the criminal conviction. (8 U.S.C. §1251 (b)]

The procedure precluding deportation upon a pardon or judicial recommendation does not apply either to the third or fourth situation. [8 U.S.C. §1251 (b)] Furthermore, the courts have held that if an alien in the third situation--a drug conviction--is placed on probation, successfully serves it and the case is then dismissed as provided by Texas law, he or she is nevertheless convicted and is still subject to deportation. The courts have recognized that Article 42.12, Section 7 of the Code of Criminal Procedure provides that upon discharge and dismissal the probationer "shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted".

The courts respond to arguments based on that language that:

> Rather than a statute that completely erases the conviction, we believe that provision ... is accurately characterized as one that rewards a convicted party for good behavior during probation by releasing him from certain penalities and disabilities otherwise imposed upon convicted persons by Texas law. Secondly, we believe that the sanctions [of deportation for a drug conviction] are triggered by the fact of the state conviction. The manner in which Texas chooses to deal with a party subsequent to his conviction is simply not of controlling importance insofar as a deportation proceeding--a function of federal, not state, law--is concerned.

Gonzalez de Lara v. United States, 439 F.2d 1316, 1318 (5th Cir. 1971)] The same position has been taken when the criminal offense was the fourth situation--violation of certain weapons laws. [Gutierrez-Rubio v. Immigration & Naturalization Service, 453 F.2d 1243 (5th Cir. 1972)]

(10) Effects on Civil Rights.

Being convicted of a felony in Texas deprives one of civil rights--the right to vote, to hold public office and to serve on juries. The Texas Constitution provides that "all persons convicted of any felony, subject to such exceptions as the Legislature may make" are not allowed to vote in Texas. [Texas Constitution Art. VI, §1] The Election Code provides that "all persons convicted of any felony except those restored to full citizenship and right of suffrage or pardoned" are not allowed to vote. [Election Code Art. 5.01] Further, Texas law provides that one must be eligible to vote in order to hold public office. [Election Code Art. 1.05] Finally, Texas law provides that one is not eligible to serve on a jury if "he has been convicted of theft or any felony". [Art. 35.16(a)(2)]

One convicted of a felony and sentenced to prison loses civil rights to vote, hold public office and serve on juries for the remainder of his or her

life. Those rights may be restored only if the conviction is reversed or set aside or if the individual receives a pardon from the Governor for the offense. [Texas Constitution Art. IV, §11; Art. 42.12, §25] In recent years, pardons to restore civil rights have been given to former TDC inmates on a highly selective basis. During the fiscal year ending August 31, 1979, the Texas Board of Pardons and Paroles considered such clemency in 3986 cases, while recommending it in only 162 cases. Of those, the Governor granted clemency in 137 cases, while refusing the Board's recommendation of clemency in 17 cases and not acting in 8 others. [Texas Board of Pardons and Paroles, Thirty-Second Annual Statistical Report 24 (August 31, 1979)]

The matter is quite different, however, if one convicted of a felony is placed on probation. During the time he or she is on probation civil rights are suspended and he or she cannot vote, hold public office or serve on juries. [Atty. Gen. Opinion No. M-795 (1971)] However, if he or she successfully serves probation and if the trial court discharges him or her and dismisses the case under Article 42.12, Section 7 of the Code of Criminal Procedure, civil rights are restored by the action of the trial court. He or she may then serve on juries. [Payton v. State, 572 S.W.2d 677 (En Banc 1978)] He or she may also vote and hold public office. [Atty. Gen. Opinion No. M-1184 (1972); Atty. Gen. Opinion No. M640 (1970)]

(11) Effect on Eligibility for Occupational Licenses from State or Local Governments.

Texas, in common with many American states, has an extensive set of statutes requiring licenses to engage in numerous occupations. As of 1976, a total of 61 occupations were licensed by Texas and there are probably many more by now. In addition, municipalities have limited powers to require occupational licenses for certain kinds of activities within their city limits. In 1976, the State Bar of Texas published a pamphlet titled Barriers to Ex-offender Employment in Texas that lists each of the occupations required to be licensed by Texas law and the licensing requirements related to whether the applicant has been convicted of a criminal offense. For many licenses, the law specifically permits the licensing board to exclude anybody convicted of a felony. For others, anybody convicted of a felony or a misdemeanor involving moral turpitude can be excluded. Still other statutes require that the holder of a license be of good moral character. A survey of state licensing boards conducted for the State Bar of Texas publication revealed the following:

> In an informal telephone inquiry of 17 state boards and commissions with licensing requirements of "good moral character' or its variants, we were told that only in rare circumstances were exoffenders rejected out of hand. Rather, they would be given "special consideration". It

> is very special indeed! The peculiar thing about good moral character is that for all applicants other than ex-offenders the evidence is usually negative; that is, good moral character is assumed in the absence of evidence to the contrary, if only for practical reasons. Licensing boards cannot possibly conduct FBI-like investigations of each potential licensee, and would be little better off if they could, given the nebulousness of the concept. Therefore, the whole weight of the ambiguous phrase falls almost entirely on the ex-felon, though he may in fact have positive testimony on his moral character.

[State Bar of Texas, Barriers to Ex-offender Employment in Texas, 10 (1976)]

Although the requirement of an occupational license reaches such traditionally-licensed activities as the practice of medicine or law, it also reaches deeply into the economic fabric of the State and touches a surprising variety of activities. According to the State Bar pamphlet, the following are some of the occupations that in Texas are required to be licensed: athletic trainer, auctioneers, boxer/wrestler, dental hygienist, driver training instructor, fire alarm installer, hearing aid dispenser, insurance agent, labor organizer, landscape architect, notary public, pawnbroker, physical therapist, polygraph examiners, proprietary school instructors, real estate brokers and salespeople, teachers and vocational nurses.

There is very little law on what constitutes a criminal conviction for purposes of authorizing a licensing board to exclude one from a profession or occupation. Indeed, with standards such as a requirement that the applicant display "good moral character" one could be excluded under that standard without ever having been convicted.

Is a person who was on felony probation and has successfully served it and had the case dismissed under Article 42.12, Section 7 of the Code of Criminal Procedure required to state in an application for employment or for an occupational license that he or she has been convicted of a felony? The Attorney General has indicated in the affirmative:

> [T]he statute [Art. 42.12, § 7] by its own wording makes it clear that the "conviction" itself has not been entirely erased. The right of such a defendant to state to his prospective employer that he has never been convicted is not dealt with in the statute. Employers are entitled to know the truth about their prospective employees, and this the statute has not taken away. Such is not a "penalty" or "disability" which was released by the statute. It is, therefore, concluded that such person cannot state in an application for employment that he has never been "convicted of a felony".

[Atty.Gen. Opinion No. M-640 (1970)]

(12) Expunction of Criminal Records.

In a typical case, criminal records will be assembled and maintained by the following agencies: the police department that effected the arrest, the Texas Department of Public Safety, the Federal Bureau of Investigation, the magistrate

where the initial complaint was filed, the Sheriff's Department where the arrestee was detained pending disposition of the case or release on bond, a county personal bond office if there is one and the person was released on personal bond, the office of the prosecuting attorney, the clerk of the court where the case was filed and, if the person was placed on probation or was supervised by a probationer officer while on personal bond, the local probation department. In addition, if the person is sentenced to prison the Texas Department of Corrections will assemble and maintain a record of the case.

Even when a probationer has completed the term of probation successfully and the case has been dismissed under Article 42.12, Section 7 or Article 42.13, Section 7, the criminal records generated by the case still exist. The dismissal under Section 7 does not erase or expunge them. In some other states, if a person completes probation or even a prison sentence and is not arrested or convicted of a criminal offense for a certain period of time thereafter, he or she is regarded as being rehabilitated and may apply for the expunction of his criminal records. Texas has such a statute but it is applicable only to juvenile offenders. [Texas Family Code §51.16]

In 1977, the Texas Legislature enacted an expunction statute for adult offenders, but it is a very limited one and does not apply to persons who have been convicted and placed on probation. Chapter 55 of the Code of Criminal Procedure permits records to be ordered sent to a District Court where they will be sealed and made available only with the permission of the defendant. If the record cannot physically be sent to the District Court, such as an entry in a large book of records, the entry respecting the defendant must be obliterated. Once an order of expunction is entered if the defendant is later questioned about the events he or she "may deny the occurrence of the arrest and the existence of the expunction order" unless questioned under oath in a criminal proceeding. [Art. 55.03 (2) & (3)]

A person arrested may not apply for expunction if an indictment or information charging him or her with a felony has been filed even if he or she is later found not guilty of the offense charged. The only exception to this rule is if the felony indictment or information was later dismissed and a court finds there was no probable cause to believe the defendant guilty or that it was void. A person is also not eligible to apply for expunction if the charge has resulted in a final conviction of any kind or there was "court ordered supervision" under Article 42.13 (misdemeanor probation statute) or a conditional discharge under Section 4.12 of the Texas Controlled Substances Act. Finally, a person may not apply for expunction if he or she has been convicted of a felony in the five years preceding the date of the arrest.

It appears that under the expunction statute, one who has been placed on deferred adjudication probation for a felony [Art. 42.12, §3d] or a misdemeanor [Art. 42.13, §3d] or on felony or misdemeanor deferred adjudication community service probation [Art. 42.12, §10A; Art. 42.13, §3B] is not eligible for expunction when successfully completing "probation" under those statutes. Even though for most purposes such a person would be regarded as not having been convicted, he or she was under "court ordered supervision" and therefore is not eligible for expunction.

CHAPTER 8.

CIVIL LIABILITY OF PROBATION OFFICERS FOR OFFICIAL ACTS OF OMISSIONS

The focus of this chapter is upon the civil liability of a probation officer for injuries inflicted upon others as a result of official acts or omissions. Civil liability means a judgment from a court requiring the probation officer or someone on his or her behalf to pay money to compensate the person injured for the harm inflicted. In some instance, the award of money may include punitive damages, that is, money extracted to punish the wrongdoer and to deter future wrongful acts. An award of damages may be made against the probation officer personally, in which case the money comes from his or her pocket if there is no insurance, or it may be made against the governmental unit for which the probation officer works, in which case the money comes from the budget of that agency. In some circumstances a person such as a chief probation officer or a supervisor in a probation department may be held personally liable for the acts or omissions of a probation officer under his or her control and supervision.

Although there is considerable overlap, it is useful to divide the question of civil liability into liabilty under Texas law and liability under federal law.

A. LIABILITY UNDER TEXAS LAW

A probation officer may be sued under Texas law for official acts or omissions that harm another. The suit may be brought by a probationer, former probationer, another person on behalf of a probationer, or a total stranger who was harmed by the manner in which the probation officer did his or her job. This section discusses the major problem situations that are likely to be encountered by a probation officer. It also discusses the defenses that are available to the probation officer. Finally, it discusses the questions of governmental liability and of liability insurance.

(1) Situations Giving Rise to Liability.

There is no restricted number of situations in which a probation officer is liable for official acts or omissions. Any conduct which harms another may be the basis of liability. For example, if a probation officer is driving from office to make a home visit to a probationer and through carelessness injures another with his or her automobile, he or she can be sued and held liable in damages. Because of the nature of probation work, however, there are certain

recurring situations that are of special importance, and those are discussed here.

One potential for probation officer liability is for false arrest or detention. If a probation officer restrains a probationer without legal authority he or she is liable in damages for false arrest. Virtually any restraint in freedom of movement is enough to constitute false arrest; it need not be for a long periods of time nor result in incarceration in a prison or jail. In addition, the restraint may take the form of an "intentional breach of duty to take active steps to release the plaintiff from a confinement in which he has already properly been placed--as, for example, a failure to let him out at the end of his sentence to a term in jail, or to produce him in court promptly after an arrest". [W. Prosser, Law of Torts 46 (4th Ed. 1971)] Thus, it is arguable that if a sheriff detained a probationer in jail on the basis of a "hold" filed by a probation officer, that officer would be liable in damages for false arrest, unless there were specific legal authority for the probation hold. An adult probation officer is not a peace officer in Texas [Art. 2.12] and with one exception he or she has only the powers of arrest possessed by any other citizen. That exception authorizes the arrest of probationers for violation of probation:

> At any time during the period of probation the court may issue a warrant for violation of any of the conditions of the probation and cause the defendant to be arrested. Any probation officer, police officer or other officer with power of arrest may arrest such defendant without a warrant upon the order of the judge of such court to be noted on the docket of the court. A probationer so arrested may be detained in the county jail or other appropriate place of detention until he can be taken before the court. Such officer shall forthwith report such arrest and detention to such court.

[Art. 42.12, §8(a); Art. 42.13, §8(a)] Although the statute literally authorizes a probation officer to arrest without a warrant only upon a docket entry, it is safe to conclude that the officer may arrest as well when the court has taken the trouble to issue an arrest warrant. In the absence of such a warrant or of a docket entry to arrest, a probation officer may arrest, as may any citizen, only if 1) an "offense is committed in his presence or within his view, if the offense is one classed as a felony or as an offense against the public peace" [Art. 14.01(a)]; or 2) to prevent the consequences of theft "by seizing any personal property which has been stolen and bringing it, with the supposed offender, if he can be taken, before a magistrate..." [Art. 18.16] The essential point is that without legal authority, any detention of a probationer by a probation officer is unlawful and the probation officer may be sued for false arrest.

What liability does a probation officer incur when he or she files papers in court that result in the arrest of a probationer for violation of probation? The officer would not be liable for false arrest, because the probationer is being detained under the court's authority, not that of the probation officer. But, depending upon the circumstances, the officer might be liable for malicious prosecution. "Malicious prosecution is the groundless institution of criminal proceedings against the plaintiff." [W. Prosser, Law of Torts 49 (4th Ed. 1971)] To prove malicious prosecution, the probationer would have to show that the proceedings (revocation of probation) terminated in his or her favor and that the probation officer filed the violation report without probable cause to believe that the charges made were true. "Probable cause" merely means reasonable grounds to believe; it does not require that the charges in fact be true.

Probation officers regularly testify in probation revocation proceedings. They also discuss information about probationers with others in the course of performing their duties. In many of these instances, the information related about the probationer is not flattering, to say the least. What, then, of the possibility of liability for defamation should any of the statements turn out to be untrue? As to testimony in court, the law grants an absolute privilege from suits for defamation to courtroom testimony even if it could be shown that the witness deliberately lied. As to untrue statements of a derogatory nature made out of court, the law accords a qualified privilege with respect to them. Basically, if the statement was appropriate to discharge a duty of the probation officer, then it is privileged and the person disparaged cannot sue for defamation if the statement turns out to be untrue, unless the probation officer knew it was untrue at the time the statement was made. [W. Prosser, Law of Torts 776-96 (4th Ed. 1971)] It is important to remember, however, that the qualified privilege applies only when the communication is part of the probation officer's job and does not apply to gossip or idle chitchat.

Probationers, like other citizens, are accorded by the law a right of privacy. A probation officer would be liable in damages for an unauthorized invasion of a probationer's right of privacy, for example, by intrustion upon his "physical solitude or seclusion, as by invading his home or other quarters, or an illegal search" of his home or person. [W. Prosser, Law of Torts 807 (4th Ed. 1971)] The key is that the invasion must be unauthorized. An unannounced home visit to a probationer by a probation officer is an invasion of the probationer's privacy but if it is authorized by a condition of probation it is most certainly a lawful invasion. The probationer's right of privacy also may be invaded unlawfully in "publicity of a highly objectionable kind given to private information about the [probationer] even though it is true [information] and no

action would lie for defamation". [W. Prosser, Law of Torts 809 (4th Ed. 1971)] Once again, however, if the public disclosure is required as a part of the probation officer's employment, as when personal information about a probationer is reported to a court in revocation proceedings, the invasion of privacy is permissible because authorized by law.

Are there circumstances in which a probation officer might be liable to third persons for failure to protect them from a probationer? A leading case in this area is from the Supreme Court of California. A patient in therapy confided to his psychologist an intention to kill a particular person. The psychologist caused the patient to be detained briefly because of the threat, but the patient was released when he appeared to be rational again. The psychologist did not take steps to warn the person threatened of the danger posed by the patient. Approximately two months later, the patient murdered the person whom he had threatened to kill when talking with the psychologist. The parents of the murdered girl sued the psychologist for damages because of his failure to warn her of the danger. The California Supreme Court held that the psychologist under these circumstances had a duty to warn her:

> When a therapist determines, or pursuant to the standards of his profession, should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances.

[Tarasoff v. Regents of University of California, 551 P.2d 334, 340 (Cal. 1976)] There are no similar cases from Texas and, of course, a Texas court would not be required to come to the same conclusion. Furthermore, it can be argued that the basis of the duty to warn is the supposed ability of a trained therapist to separate those threats that pose a real danger to another from those that do not; since such claims of clairvoyance are not made by most probation officers, it is arguable that the case has no applicability to them at all.

Semler v. Psychiatric Institute of Washington, D.C. [538 F.2d 121 (4th Cir. 1976)] is the only case discovered in which a probation officer was sued for damages for an official act or omission. A probationer on the officer's caseload had been placed on probation on the condition that he be in a day-care status with the Psychiatric Institute and live with his parents. Later, upon the recommendation of the Institute, but without seeking the approval of the judge who placed the person on probation, the probation officer agreed to permit the probationer to live and work on his own and to attend two weekly group sessions at the Institute. Shortly thereafter the probationer murdered the plaintiff's

daughter. There was sufficient information in the probationer's background to indicate some danger to others. The court approved an award of $25,000 in damages, half of which was charged personally to the probation officer. It was clear that the probation officer was held liable because he acted without authority in permitting a departure from the treatment plan approved by the court and made a condition of probation. Because the probation officer acted beyond his authority, he was not entitled to official immunity from liability to the parents of the murdered girl.

(2) Official Immunity.

Even if a valid claim for damages is made against a probation officer for an official act or omission, there may be a defense of official immunity. The reasons for granting official immunity have been stated as follows:

> The complex process of legal administration requires that officers shall be charged with the duty of making decisions, either of law or of fact, and acting in accordance with their determinations. Public servants would be unduly hampered and intimidated in the discharge of their duties, and an impossible burden would fall upon all our agencies of government if the immunity to private liability were not extended, in some reasonable degree, to those who act improperly, or exceed the authority given.

[W.Prosser, Law of Torts 987 (4th Ed. 1971)] Judges are given absolute immunity for all official acts within the jurisdiction of their courts; they cannot be held liable even if they act from totally improper motives. Other public officials, however, generally enjoy at best a qualified immunity. That means that the official is immune from liability so long as he or she acted honestly and in a good faith belief that his or her conduct was in accordance with the law. Whether there is even a qualified immunity may depend, however, on whether the act in question was one that called upon the official to exercise judgement or discretion or whether it was a so-called ministerial act that the official was under a legal duty to perform. Some courts say there is no qualified official immunity in the latter situation. [W. Prosser, Law of Torts 988-91 (4th Ed. 1971)]

(3) Governmental and Insurance Liability.

If a probation officer is liable for injury to another as a result of an official act or omission, to what extent, if any, is the government also liable for that same injury? If a lawsuit is filed against a probation officer for official acts of omissions, may the government provide legal counsel to defend the probation officer and may it pay the judgment against the probation officer if one is obtained? Is the government required to provide liability insurance for probation officers?

Under the common law, a unit of government would not be liable for injuries caused by the acts or omissions of a probation officer under the doctrine of sovereign immunity. The Texas Legislature has enacted the Texas Tort Claims Act [Civil Statutes Art. 6252-19], which provides that a governmental unit will be held liable for certain conduct of its employees performed within the scope of their employment. Although the employee could still be sued, when the Tort Claims Act applies for practical purposes that removes the burdens of paying the judgment from the employee and places it on the governmental unit for which he or she works. Furthermore, and of equal importance, the governmental unit is required to employ counsel to defend the lawsuit. Unfortunately, although there are no cases directly on point, it seems clear that the Tort Claims Act does not apply to probation officers. Three of the exemptions from the applicability of the Act together cover all potential liability of probation officers. Exempted from the Act is "any claim arising out of assault, battery, false imprisonment, or any other intentional tort..." [Civil Statutes Art. 6252-19, §14(10)] Also exempted is "any claim based upon an act or omission of an officer, agent or employee of any unit of government in the execution of the lawful orders of any court". [Civil Statutes Art. 6252-19, §14(4)] Finally, and most broadly, there is exempted "any claim based upon an act or omission of any of the courts of the State of Texas, or any member thereof acting in his official capacity, or to the judicial functions of any unit of government subject to the provisions hereof". [Civil Statutes Art. 6252-19, §14(3)]

Although the Tort Claims Act does not apply to probation officers, in 1979 the Texas Legislature enacted a statute which permits, but does not require, governmental units to pay certain judgments against employees for official acts or omissions and which permits those governmental units to employ counsel to defend a lawsuit filed against an employee for official conduct. [Civil Statutes Art. 6252-19b] The statute applies to an act or omission of an employee in the scope of employment but only if the lawsuit is for negligence, that is, an unintentional injury. It does not apply to a "willful or wrongful act or omission or an act or omission constituting gross negligence or for official misconduct". [Civil Statutes Art. 6252-19b, §2(a)] The governmental units covered by this statute are "a county, city, town, special purpose district, or any other political subdivision of the state". [Civil Statutes Art. 6252-19b, §1] Thus, whether or not this statute applies to probation officers would depend upon whether the judicial district for which the officer works is a "political subdivision of the state". Under current law, this question is unanswered. The Texas Legislature in 1975 had enacted a statute providing for paying judgments against and defending state officials from state funds. [Civil

Statutes Art. 6252-26] Since the state treasury was being reached, the Legislature made that statute mandatory. The statute enacted in 1979 is almost identical to the 1975 state official statute, except because the funds come from the budgets of polititcal subdivisions the Legislature gave those bodies discretion whether or not to pay a judgment and employ counsel to defend. In light of the existence of the 1975 statute, it seems highly likely the Legislature intended by enacting the 1979 statute to extend coverage of this type to all public employees in the state; thus, probation department employees are probably covered.

The law does appear to make it mandatory that probation officers be covered by liablility insurance and that the government pay for the policy. The Code of Criminal Procedure provides that "personnel of the respective district probation departments shall not be deemed state employees and the responsible judge or judges of a district probation department shall negotiate a contract for all district probation department staff to participate in that county's group insurance programs, liability insurance, or self-insurance for acts done in the course and scope of their employment as probation department staff..." [Art. 42.12, §10(g)] Of course, a liability insurance policy would, and self-insurance program should, provide legal counsel to defend any claim made against a probation officer that would be covered by the policy or the self-insurance program. Only by consulting the terms of the policy or the self-insurance program can it be determined what acts or ommissions are covered.

Finally, any probation department employee who handles funds, whether collected from probationers or otherwise, should be covered by a fidelity or honesty bond. The Texas Adult Probation Commission Standards .080 h (Rev. 4/80) provides: "Probation departments should insure that all public monies are protected by requiring that all employees with access to monies are covered by honesty bonds. The fee for these bonds may be paid from the Judicial District Adult Probation fund."

B. LIABILITY UNDER FEDERAL LAW

A person harmed by an official act or omission of a probation officer will frequently have a choice of basing a lawsuit against the probation officer on state or federal law. This section focuses upon the federal law that determines liability and the defenses that are available to the probation officer when a claim is made under federal law.

(1) Liability for Violating Federal Rights.

Under the Civil Rights Act of 1871 a state official or the official of a state subdivision may be liable to pay damages for the violation of another person's federal constitutional or other federal rights. That statute, popularly known as Section 1983, provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[42 U.S.C. §1983] Examples of the types of claims that might be pressed under this statute are: an unreasonable search of a probationer by a probation officer in violation of the Fourth Amendment to the United States Constitution; an unreasonable arrest of a probationer by a probation officer in violation of the Fourth Amendment; questioning of a probationer by a probation officer in such a way as to elicit self-incriminatory statements in violation of the Fifth Amendment; interference with a probationer's right to communicate with an attorney in violation of the Sixth Amendment; or engaging in conduct that would be in violation of the "cruel and unusual punishment" prohibition of the Eighth Amendment.

Although the potential for liablility by probation officers under Section 1983 is great, it is important to remember that no cases have been found reported at the appellate level in which a probation officer was sued under Section 1983.

(2) Defenses to Suits Under Section 1983.

Of course, it is a defense to a suit under Section 1983 that the probation officer's act or omission did not violate the other's federal rights. It is also a defense that while those rights were violated, the probation officer was not involved in the violation to the extent necessary to hold him or her liable. But there is one major defense that is prominent in Section 1983 suits, and that is the defense of official immunity.

There are two general kinds of official immunity--absolute and qualified. If the person being sued enjoys absolute immunity, he or she may prevent the lawsuit from even going to trial by asserting absolute immunity. If the official has only a qualified immunity then it will frequently be necessary to defend the lawsuit in a trial in order to establish that he or she behaved within the scope of the qualified immunity. Absolute immunity has been provided when it is the public duty of the official to make decisions that are extremely likely to engender hostility from some of the persons affected and when it is particularly

important that those decisions be made without fear of retaliatory lawsuits. Thus, a judge enjoys absolute immunity for any decisions within the jurisdiction of the court. As explained by the Supreme Court of the United States:

> It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.

[Pierson v. Ray, 386 U.S. 547,554 (1967)] Similarly, a public prosecutor enjoys absolute immunity with respect to those duties that involve being an advocate for the government in court, as opposed to administrative functions or investigative activities. [Imbler v. Pachtman, 424 U.S. 409 (1976)] On the other hand, most officials in the executive branch of government enjoy only a qualified immunity. This includes police officers [Pierson v. Ray, supra]; school board members [Wood v. Strickland, 420 U.S.308 (1975)], prison officials and officers [Procunier v. Navarette, 434 U.S. 555 (1978)], superintendent of a state hospital [O'Connor v. Donaldson, 422 U.S. 563 (1975)] and the Governor of a state [Scheuer v. Rhodes, 416 U.S. 232 (1974)]

Because a probation officer is a judicial employee it can be argued that he or she should enjoy the same absolute immunity possessed by a judge. That is probably an expansive application of the doctrine of absolute immunity, however, since a probation officer does not have the same decisional responsibilities as a judge and, therefore, is in less need of such an absolute immunity. If, on the other hand, the specific act of misconduct that forms the basis of the claim under §1983 was carried out by the probation officer under judicial order, then with respect to that act the officer should be able to claim the absolute immunity of the judge since it was really the court's decision that resulted in the deprivation of federal rights. Of course, the officer might nevertheless be held liable if he or she knew the court order was illegal.

Assuming that a probation officer possesses only the qualified immunity of most officials of the executive branch, what does that mean? The scope and force of the defense of qualified immunity differs depending upon what position the official in question occupies in government. In general, an official is liable under §1983 only if he or she knew or reasonably should have known that the act or omission would violate the constitutional or other federal rights of the person affected. [Wood v. Strickland, 420 U.S. 308 (1975)] Frequently, that determination in turn depends upon the status of the caselaw defining the federal rights at the time of the act or omission in question. Was the right in question recognized by the United States Supreme Court before the act? Was it recognized

by some or all of the lower courts that had occasion to consider the issue? How many courts had considered the issue? These and other questions are all germane to determining the status of the federal right.

There is another defense to a Section 1983 suit that applies when a person is being sued not for his or her own acts but because he or she occupies a supervisory position over one who is claimed to have violated the federal rights of another. Generally, an employer is liable for any wrongs committed by employees in the course of their employment; no specific proof of wrongdoing by the employer need be shown. This legal doctrine, called respondeat superior, is not applicable in a Section 1983 suit. For a superior, such as a Chief Probation Officer, to be held liable under Section 1983 for the acts or omissions of a subordinate, there must be some proof that the superior specifically authorized the act, authorized in general terms acts of that nature, knew of the existence of acts of that general nature and failed to exercise power to prevent them from occurring, or in some way was connected with the acts beyond merely being in a supervisory capacity. [Monell v. Dept. of Soc. Serv. of City of N.Y., 436 U.S. 658 (1978)]

(3) Governmental Liability.

To the extent a governmental unit is liable in damages for harmful acts under Section 1983, that has the consequences of (1) increasing the likelihood that suits will be brought because a defendant with funds can be found (the government unit), and (2) if a judgment of money damages is obtained, making it extremely likely that the injured person will seek the money from the government rather than the private person. A state government cannot be sued for money under Section 1983 because such a suit is prohibited by the Eleventh Amendment to the U.S. Constitution. However, some political subdivisions of a state can be sued under Section 1983. For example, cities can be sued. [Monell v. Dept. of Soc. Serv. of City of N.Y., 98 S.Ct. 2018 (1978)] At the present time, it is unclear which other political subdivisions of the state may be sued under Section 1983 without violating the Eleventh Amendment, for example, whether the fund of a Texas judicial district could be reached in a Section 1983 suit. Of course, if a governmental unit is sued under Section 1983, then it will provide counsel to defend the suit. That attorney would ordinarily also defend the probation officer whose act or omission is the basis of the claim against the governmental unit.

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