

UNIVERSITY OF HOUSTON  
LAW CENTER  
LAW 6348 - TEXAS CRIMINAL PROCEDURE  
PROFESSOR SECREST

**Course Description and Syllabus**

Procedural issues arising in Texas criminal practice are explored with emphasis placed on the Code of Criminal Procedure and case law interpretation of its provisions. Where applicable, a comparative approach is utilized to introduce the student to the Code's federal counterparts in an effort to compare and contrast the two regimes. Practical and strategic considerations are discussed from the perspectives of both the prosecutor and defense counsel. This course is considered by the instructor to be an advanced class and is aimed at introducing future criminal law practitioners to the reality of the criminal justice system in the State of Texas. A solid background in evidence, criminal procedure, and constitutional law is highly recommended.

Students should be prepared to cover 40 pages of material per class. In addition, outside reading assignments will be given from time to time. (The law in this area changes every Wednesday, when the Texas Court of Criminal Appeals hands down its latest decisions.) The Socratic method is employed. Students will be required to stand when called on and will be expected to fully answer questions concerning case law materials. A willingness to respectfully disagree with a proposition of law and/or see the other side of an argument is strongly encouraged; this being a hallmark of a robust and healthy advocacy.

The final grade will be based on the *in class* final examination. That test is comprised of essay questions, multiple choice, true/false, and short answers. Credit will be given for exceptional in class participation.

Professor Secrest may be contacted by calling his law office at 713-757-0679. He will be available for student consultations. Students are to contact him to schedule a time to meet.

Books required will be Reamey, *Texas Criminal Procedure*, 13<sup>th</sup> ed.<sup>1</sup>; Secret, *O'Connor's Criminal Codes plus* 2018-19.<sup>2</sup>

**Counseling and Psychological Services (CAPS)**: CAPS can help students who are having difficulties managing stress, adjusting to the demands of a professional program, or feeling sad and hopeless. You can reach CAPS ([www.uh.edu/caps](http://www.uh.edu/caps)) by calling 713-743-5454 during and after business hours for routine appointments or if you or someone you know is in crisis. No appointment is necessary for the “Let's Talk” program, a drop-in consultation service at convenient locations and hours around campus. [http://www.uh.edu/caps/outreach/lets\\_talk.html](http://www.uh.edu/caps/outreach/lets_talk.html).

## **I. Overview**

- A. Introduction to procedural law; distinction between substantive law and procedure
- B. Comparative analysis of state and federal rules and principles of procedure
- C. Hierarchy of law – constitutions, statutes, common law, rules, and procedures; constitutional considerations (state and federal)

## **II. Code of Criminal Procedure – General**

- A. The document's origin
- B. Interplay with the Rules of Appellate Procedure
- C. Case law interpretation

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<sup>1</sup>Please note that a new edition may be available before class begins. If so, I would recommend getting the latest edition.

<sup>2</sup>While it is acceptable to use any other version of the Code of Criminal Procedure, *O'Connor's Criminal Codes plus* 2018-2019, is annotated.

### III. Chapter 1 – The Law of Arrest

- A. Constitutional requirements – the Fourth Amendment and Article 1, § 9
- B. Statutory and procedural modifications – Chapter 14, Code of Criminal Procedure (“C.C.P.”)
- C. Implications of illegality of arrest
  - even an egregiously illegal arrest does not, in itself, invalidate a conviction. *Frisbie v. Collins*, 342 U.S. 519 (1952).
  - lawfulness of arrest, i.e., seizure, is important because it may determine the admissibility of evidence seized pursuant thereto – “fruit of the poisonous tree” doctrine – and may implicate the officer and others in civil liability.
- D. Litigating the lawfulness of arrest and admissibility of fruits of the arrest – suppression hearings and jury determinations under Article 38.23, C.C.P. Review of factual and legal findings on appeal.
- E. Characterization of police intervention – consensual encounter, arrest or investigative detention, Article 15.02, C.C.P.
- F. Arrest with warrant (warrant requirement)
  - the preference for warrants
  - probable cause requirement
  - insufficient description of person to be arrested or place to be searched
  - search or arrest of person or search of place not covered by warrant
  - facially defective warrants

- G. Warrantless arrest – *United States v. Watson*
- H. Jurisdictional issues
- I. Burden of proof
- J. Magistrate requirements after arrest has been effectuated – Article 15.17, C.C.P. (compare with 18 U.S.C. § 3501 and *McNabb/Mallory* rule)
- K. Offender about to escape
- L. Entry into residence – *Payton v. New York*, 445 U.S. 513 (1980); and *Steagald v. United States*, 451 U.S. 204 (1981)
- M. Arrest in theft cases
- N. Pretext arrest (objective reasonableness vs. subjective intentions)
- O. Traffic arrest

#### **IV. Chapter 2 – Search & Seizure**

- A. Preference that searches be conducted pursuant to warrant
- B. Standing (reasonable expectation of privacy vs. property rights)
- C. State action
  - exclusionary rule applies only to state action or to conduct of agents acting at behest of law enforcement officers
  - Article 38.23(a), C.C.P., applies to *any* person
- D. Substantive law overview
  - general rule – probable cause plus warrant, or

- consent, or
  - probable cause plus exigent circumstances, or
  - investigative detention/reasonable suspicion, i.e., stop and frisk (but this limits *scope* and *duration* of search
  - *Terry v. Ohio*
  - *Sibron v. New York*
  - *Adams v. Williams*
- E. Execution of warrant – prohibition against general warrants
- F. Evaluating the informant’s information – veracity and basis of knowledge – *Wood v. State*
- G. Types of warrants – Article 18.02, C.C.P.
- contraband
  - fruits and instrumentalities of crime
  - mere evidence
  - persons
- H. Good faith exceptions
- *United States v. Leon*
  - Article 38.23(b), C.C.P.
- I. The new federalism – the rule of *Heitman v. State*

- J. Four-corners doctrine
  - *Franks v. Delaware*
  - deliberate omission of material facts
- K. Typographical errors and administrative mistakes
- L. Execution, return, and inventory
- M. Seizure of evidence not described in warrant and mere evidence – Article 18.01 and 18.02, C.C.P.
- N. Plain view doctrine – *Horton v. California*; *Arizona v. Hicks*; and *Coolidge v. New Hampshire*
- O. Evidentiary warrants
- P. Search without warrant – Article 18.01(e), C.C.P. and its limitation on *Zurcher v. Stanford Daily News*
- Q. Search incident to arrest – *Arizona v. Gant*
- R. Vehicular inventories
- S. Check points and administrative searches
- T. Legitimate scope of searches
- U. Consent – *State v. Ibarra*
- V. Telephonic Warrants
- W. Residential Searches
- X. Third Party Searches

## V. Chapter 3 – Statements by the Accused

- A. Overview – oral statements are not encouraged; *Miranda v. Arizona* requirement is expanded under state law; Texas and federal law generally construed to prohibit only the compulsory seizure of “testimonial” evidence; requirement of “voluntariness” is more stringent under state law
- B. Unlawful inducements – due process implications
- C. Standards of review and burden of proof
- D. Admissibility of other evidence subsequently obtained as result of *Miranda* violation – *Baker v. State*
- E. Written confessions – Article 38.21 and 38.22, C.C.P.
  - sufficiency of warnings
  - voluntariness of waivers
  - prior illegalities affecting admissibility of “warned” statement
  - taped confessions (including DWI videos)
- F. Oral statements – in general
- G. Assertions of fact in oral confessions
- H. Custodial interrogation; use against defendant of non-custodial silence - *Salinas v. Texas*
- I. *Res gestae* statements
- J. Admissibility of otherwise inadmissible statements to impeach or discredit defendant

## **VI. Chapter 4 – Suppression of Evidence**

- A. Pretrial objections to evidence
  - waiver of pretrial rulings
  - Article 28.01, C.C.P.
  - inadequacy of motions in limine to preserve error
  - strategic considerations
- B. Preservation of objections through trial – curative admissibility and the *DeGarmo/LeDay* doctrine (and death of same).
- C. “Second bite at the apple”
  - Article 38.22 § 7, C.C.P. – confessions
  - Article 38.23(a), C.C.P. – general exclusionary statute
- D. Fruit of the poisonous tree and the attenuation of taint
- E. Consent – burden of proof
- F. Abandonment of property
- G. Review on appeal
  - standards of review – *Guzman v. State*
  - burden of proof

## **VII. Chapter 5 – Nature of the Charging Process**

- A. Overview



- police discretion in the process
- PIA (preliminary initial appearance and the right to counsel) – a critical stage?
- rule of *Gerstein v. Pugh*
- *Rothgerry v. Gillespie County, Texas*
- magistrate requirement of Article 15.17, C.C.P.

B. Felony charging process

- constitutional right to indictment?
- the function of the grand jury
- Selection of the grand jury - article 19.26
- grand jury secrecy requirements and limits thereon -- Article 20.02, C.C.P.

C. Applicability of procedural and evidentiary rules to grand jury proceedings

D. Self-incrimination issues -- Article 20.17, C.C.P.

E. Grants of immunity -- comparison of § 71.04 of the Penal Code with 18 U.S.C. §§ 6002, *et. seq.*

F. Communication with grand jury -- comparison of Article 20.04, C.C.P. with 18 U.S.C. § 1504

G. Formation of grand jury

- Articles 19.08 - 19.14, C.C.P.

- constitutional considerations -- *Castaneda v. Partida*
- challenges to the array -- Article 19.30, C.C.P.

H. Examining trial -- Article 16.01

- purposes; use of examining trial; testimony at trial; constitutional considerations -- *California v. Green*

I. Misdemeanor charging process

- requisites of the complaint -- Article 15.05, C.C.P.
- requirement of an oath -- Article 21.22, C.C.P.
- class C misdemeanors
- venue -- the *locus delicti* of crime; change of venue, Article 31.03, C.C.P.
- jurisdiction

**VIII. Chapter 6 – Charging Instruments**

- A. Overview – types of charging instruments
- B. Pleading practices – pre-1985 and the post-1985 changes – the demise of *American Plant Food*
- C. Multiplicity and duplicity
- D. Joinder of offenses – § 3.01 of the Penal Code (“criminal episode”) and Article 21.24, C.C.P.
- E. Waiver of defects – Article 1.14, C.C.P.; the rule of *Studer v. State*; federal constitutional considerations – *Stirone v. United States*

- F. Notice requirements – specificity of pleadings
  - constitutional and statutory standards
  - *Adams v. State* – requirement of harm
- G. Amendment of accusatory pleadings – Article 28.10, C.C.P.
- H. Constructive amendment of accusatory pleadings
- I. Jury instructions
- J. Variances

## **IX. Chapter 7 – Bail**

- A. Article 1, § 11 and 11(a) – constitutional requirements
- B. Definition of bail and purposes of the same
- C. Types of bonds
  - surety
  - personal
  - cash
- D. Challenging the amount of bail
  - Article 11.24 – writ of habeas corpus
  - burden of proof
  - factors to be considered in setting bail

- strategic considerations
- E. Bond pending appeal – Article 44.04, C.C.P.
- F. Challenging conditions of bail
- G. Release due to delay
- H. Denial of bail – Article 1, § 11(a)
  - capital cases
  - other exceptions
  - burden of proof

## **X. Chapter 8 – Discovery**

- A. Overview
- B. Right to limited notice
- C. Constitutional right to exculpatory/impeaching evidence - *Brady*, *Giglio*, *Kyles*
- D. Statutory/case law provisions
  - Article 39.14, C.C.P.
  - Article 38.22, § 3(a)(5), C.C.P.
  - Article 37.07, § 3(g), C.C.P.
  - Tex. R. Evid. 404(b) and (c)
  - Tex. R. Evid. 612
  - Tex. R. Evid. 615

- Tex. R. Evid. 705
- Govt. Code, § 724.028
- E. Federal counterparts – Fed. R. Crim. P. 16 and 26.02; *Jencks* Act (18 U.S.C. § 3500)
- F. Witnesses and informants – Tex. R. Evid. 508
- G. Depositions – Article 39.02, C.C.P.
- H. Trial discovery
  - *Gaskin* rule (Tex. R. Evid. 615)
  - use before the jury rule/refreshing recollection (Tex. R. Evid. 612)
- I. CrimeStoppers, victim impact statements, CPS files – right to *in camera* inspections
- J. Interlocutory appeal
- K. State’s right to discovery
- L. Use of subpoenas

## **XI. Chapter 9 – Jury Selection**

- A. Overview – selection versus elimination
- B. Statutory exemptions from jury service – Govt. Code Ann. 62.001
- C. Statutory qualifications for jury service – Govt. Code Ann. 62.102, Article 35.16 and 35.19, C.C.P.

- D. Pool of participants – driver’s license rolls – Govt. Code Ann. 62.001
- E. Challenges to the array – Article 35.07, C.C.P.
- F. Constitutional right to attorney-conducted voir dire
  - error in denial of proper questioning of voir dire
  - constitutionally protected areas of inquiry – *Turner v. Murray*
  - time constraints on voir dire
- G. Order of prospective jurors – jury shuffles
- H. Challenges for cause – Article 35.16, C.C.P. (bias against the law)
  - wrongful denial of challenge for cause
  - improper exclusion of qualified juror
  - harm analysis
- I. Peremptory challenges and constitutional limitations on the same – *Batson v. Kentucky* and its progeny

## **XII. Chapter 10 – Guilty Plea Process**

- A. Overview
- B. Nature of plea bargaining
- C. Right to specific performance or withdrawal of plea
- D. Admissibility at trial of statements made during plea negotiations – Tex. R. Evid. 410
- E. Voluntariness – due process requirement for every plea

- F. Admonishments – Article 26.13, C.C.P. and substantial compliance therewith
- G. Mechanics of the plea
- H. Waiver of jury trial – Article 1.13, C.C.P.
- I. Texas’s requirement that substantive evidence be offered in support of pleas – Article 1.15, C.C.P.
- J. Guilty pleas in misdemeanor cases
- K. Appeal from guilty pleas – the appeal of pretrial motions – Tex. R. App. P. 25.2(b)(3) and *Helms* rule
- L. Waiver of appeal as part of plea bargain
- M. Withdrawal of guilty pleas
- N. Right to effective assistance in plea process
- O. Collateral consequences - failure to properly advise defendant.

### **XIII. Chapter 11 – Court’s Charge to the Jury**

- A. Overview
- B. Preparing the trial’s road map before the jury is in the box
- C. Informing the jury of the elements of the offense
- D. Informing the jury of the defenses raised by the evidence – quantum of evidence required to raise issues
- E. Instructing the jury as to the definitions of terms applicable to the case

- F. Failure to include all elements of the charged conduct in the court's instructions to the jury
- G. Lesser included offenses and non-lesser included offenses
- H. Constructive amendments
- I. Abstraction/application requirement
- J. Prohibition against commenting on evidence – Article 36.14, C.C.P.
- K. Punishment charges
- L. Right to a reasonable opportunity to inspect jury charge
- M. Preservation of error – Articles 36.14 - 36.19, C.C.P.
- N. Fundamental/harmless error analysis
- O. Jury notes and supplemental jury instructions; the dynamite charge

#### **XIV. Chapter 12 – Double Jeopardy**

- A. Overview
- B. Federal versus state constitutional provisions (Fifth Amendment and Article 1, § 14)
- C. When does jeopardy attach? (federal and state)
  - jury trial
  - bench/court trial
- D. Abandonment of counts after trial has begun



- E. “Same offense” issues – rule of *Blockburger*
- F. Joinder of offenses – consolidation and joinder of prosecution (§§ 3.01 - 3.04 of the Penal Code)
- G. Implied acquittal
- H. Collateral estoppel – *Sauceda v. State*
- I. Proper method of appeal
  - special plea in bar – Article 27.05, C.C.P.
  - pretrial writs of habeas corpus
- J. Impact of reversal – lesser included offenses

## **XV. Chapter 13 – Sentencing**

- A. Overview
- B. Presentence Investigation Reports
- C. Relevant evidence
- D. Victim impact evidence
- E. Character evidence
- F. Prior offenses
- G. Capital Punishment

## **XVI. Chapter 14 – The Appeal**

- A. Overview

- B. Right to appeal? – statutory and constitutional considerations
- C. Defense counsel’s obligations to appeal – Article 26.04, C.C.P.; rule of *Anders*
- D. Preservation of errors on appeal and fundamental/plain error
- E. Motions for new trial
  - subject matter
  - procedural issues
  - time to file
  - overruled by operation of law
  - affirmative duty to timely present motion to trial court within 10 days of filing
- F. Notice of appeal – a jurisdictional requisite
- G. State’s right to appeal
- H. Out-of-time appeal
- I. Record on appeal
- J. Petitions for discretionary review
- K. Harmless error analysis – constitutional and statutory

**XVII. Chapter 15 – Community Supervision/Probation/Revocation**

- A. Overview
- B. Motion to revoke

- C. Specificity
- D. Time in which to file
- E. Right to counsel – state versus federal protections; Article 42.12 § 21(d), C.C.P.
- F. Double jeopardy implications
  - repeated efforts to revoke based on same evidence
  - revocation of probation on same basis of acquitted conduct
  - conviction of defendant by a jury for same conduct found insufficient to revoke – the rule of *Ex Parte Tarver/State v. Waters*
- G. Grounds for revocation
- H. Applicability of rules of evidence at revocation proceedings
- I. Deferred adjudication – strange rules for a strange procedure