JURY CHARGES:
DRIVING WHILE INTOXICATED CASES

THE 38.23 CHARGE

TEX. CODE CRIM. PRO. Art. 38.23 states:

> No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.
>
> In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then an in such event, the jury shall disregard any such evidence so obtained.

This article requires that the trial court give the appropriate instruction where the lawfulness of the police action is in issue. *See Jordan v. State*, 562 S.W.2d 472 (Tex. Crim. App. 1978); *Simmons v. State*, 741 S.W.2d 595, 596 (Tex. App. — Dallas 1987, pet. ref'd). The statute is mandatory — the only issue is whether the evidence at trial raises a factual dispute regarding the official action. *See id.* Of course, the evidence can come from any source, including the defendant's testimony. *See Simmons*, 741 S.W.2d at 596. Error is preserved on this charge in the usual way — either by request or by objection — and it's erroneous refusal is subject to *Almanza* review. *See Stone v. State*, 703 S.W.2d 652, 654-55 (Tex. Crim. App. 1986); *Johnson v. State*, 743 S.W.2d 307, 311 (Tex. App. — San Antonio 1987, pet. ref'd). The charge should instruct the jury, if it believes that the evidence was unlawfully obtained, *to disregard that evidence* — not to enter a verdict of acquittal. *See Stone*, 703 S.W.2d at 654-55; *Grant v. State*, 738 S.W.2d 309, 311-12 (Tex. App. — Houston [1st Dist.] 1987, pet. ref'd).

The main requirement (and the distinguishing factor between the 38.23 charge and a motion to suppress) is that *a factual dispute must arise as pertains to the official action.* Just saying that the police officer's testimony is not sufficient to establish reasonable suspicion is not enough. A factual dispute involves *actually controverting the police officer's testimony*. If the cop says your client was weaving within his lane, at trial there has to be some evidence that he actually was *not* weaving within his lane. For the same reason, the defendant is not entitled to an instruction setting out the evidentiary predicate for a breath test and telling the jury that they cannot consider the test as evidence unless they find beyond a reasonable doubt that the police followed those rules. *See, e.g.*, *Fernandez v. State*, 915 S.W.2d 572 (Tex. App. -- San Antonio 1996, no pet.); *Ray v. State*, 749 S.W.2d 939 (Tex. App. — San Antonio 1988, pet. ref'd); *Hewitt v. State*, 734 S.W.2d 745 (Tex. App. — Fort Worth 1987, pet. ref'd); *Mosely v. State*, 696 S.W.2d 934 (Tex. App. — Dallas 1985, pet. ref'd).

Various Cases on 38.23 and the Stop:

Reynolds v. State, 848 S.W.2d 148 (Tex. Crim. App. 1993)

> Trial court reversibly erred by denying defendant a requested 38.23 instruction on the legality of the stop. The fact issue was whether or not the defendant was speeding — the cop said he was, the defendant denied it.

Stone v. State, 703 S.W.2d 652 (Tex. Crim. App. 1986)

> Evidence raised a fact issue as to the legality of the stop. To deny the requested instruction was reversible error.

Le Flore v. State, 819 S.W.2d 665 (Tex. App. — Corpus Christi 1991, no pet.)

> Cop said the defendant was weaving — the defendant testified he was weaving because his car was malfunctioning. Stories not sufficiently conflicting — no 38.23 charge required.

Chubb v. State, 821 S.W.2d 298 (Tex. App. — Corpus Christi 1991, pet. ref'd)

> Charge given was adequate even if not as factually specific as the charge defendant had offered.

Jacobs v. State, 734 S.W.2d 704 (Tex. App. — Dallas 1987, pet. ref'd)

> Officer's testimony regarding stop was sufficiently controverted to warrant a 38.23 charge — to deny the request for the instruction was reversible error.

Espericueta v. State, 838 S.W.2d 880 (Tex. App. — Corpus Christi 1992, no pet.)

> Evidence at trial raised a fact issue as to legality of stop. Trial court's denial of requested 38.23 instruction was reversible error. Note: the trial court had overruled a previous motion to suppress on the same issue.

Johnson v. State, 743 S.W.2d 307 (Tex. App. — San Antonio 1987, pet. ref'd)

> Fact issue was raised regarding the stop of defendant's vehicle — to deny the requested instruction was reversible error.

Simmons v. State, 741 S.W.2d 595 (Tex. App. — Dallas 1987, pet. ref'd)

Trial court committed reversible error by denying 38.23 instruction as to stop.

38.23 Charge on a Blood Test

Bell v. State, 881 S.W.2d 794 (Tex. App. — Houston [1st Dist.] 1994, pet. ref'd)

Requested 38.23 instruction on blood test should have been given — case reversed and remanded.

38.23 Charge on 15 Minute Observation Period

The 15 minute observation period, of course, is now a 15 minute "presence" period. However, the following cases may still be of some help.

Atkinson v. State, 923 S.W.2d 21 (Tex. Crim. App. 1996)

Trial court should have submitted requested 38.23 instruction where the evidence raised an issue as to whether the police violated the requirement of a 15 minute observation period prior to the breath test. If the 15 minute observation period was not adhered to, the breath sample would not be collected "in accordance with DPS rules," a requirement for admissibility by statute. The court of appeals' reversal affirmed — case remanded for a new trial. Note: harm was shown on remand to the court of appeals. *See Atkinson v. State*, 934 S.W.2d 896 (Tex. App. — Fort Worth 1996, no pet.)

Smithey v. State, 850 S.W.2d 204 (Tex. App. — Fort Worth 1993, pet. ref'd)

Fact issue raised as to observation period — reversible error for trial court to refuse instruction.

Garcia v. State, 874 S.W.2d 688 (Tex. App. — El Paso 1993, no pet.)

Same. Reversed and remanded.

Gifford v. State, 793 S.W.2d 48 (Tex. App. — Dallas 1990, pet. dism'd)

Same. Reversed and remanded.

38.23 Charge on Involuntary Breath Test

Erdman v. State, 861 S.W.2d 890, 893 (Tex. Crim. App. 1993)

> A DWI suspect's consent to a breath test must be voluntary and not the result of coercion, physical or psychological pressures brought to bear by the police. An involuntary breath test is inadmissible.

Under the proper circumstances a defendant should not be afforded a 38.23 charge based on *Erdman*. *Cf. Vester v. State*, 916 S.W.2d 708, 712 (Tex. App. — Texarkana 1996, no pet.)(defendant not entitled to 38.23 charge for alleged involuntary breath test where claim of involuntariness is based upon failure to provide a blood test within 2 hours — but the fact that in this case defendant never requested the blood test may have been important to the analysis).

THE SYNERGISTIC CHARGE

The synergistic charge is given at the behest of the state when the defense develops evidence at trial that the defendant's appearance of intoxication is not due to alcohol but to something else — most often some prescription or over-the-counter medication. This should always be considered when your client wants to get up and testify about his antihistamine use. In the face of an argument that the synergistic charge expands the liability of the defendant beyond what the information — which no doubt mentions alcohol alone — allows, the synergistic charge has been justified on the basis that a "combination of liquor and drugs which would make an individual more susceptible to the influence of the liquor is in effect equivalent to intoxication on liquor alone." *Sutton v. State*, 899 S.W.2d 682, 685 (Tex. Crim. App. 1995)(alcohol and Klonopin). The charge has been around since at least 1939. *See Kessler v. State*, 136 Tex.Cr.R. 340, 125 S.W.2d 308 (1939)(alcohol and amytal). Several other cases have examined and approved the synergistic charge on the same logic. *See Heard v. State*, 665 S.W.2d 488 (Tex. Crim. App. 1984)(a variety of drugs, among them Valium); *Miller v. State*, 341 S.W.2d 440 (Tex. Crim. App. 1960)(Phenobarbital); *Booher v. State*, 668 S.W.2d 882 (Tex. App. — Houston [1st Dist.] 1984, pet. ref'd)("other substances").

Lately, however, we have begun to see the state requesting a synergistic charge where the evidence raises fatigue as an explanation for intoxication-type behavior. *See, e.g.*, *Atkins v. State*, ___ S.W.2d ___, 1999 WL 61397 (Tex. App. — Austin 1999, Feb. 11, 1999). The Austin court held that to give the "fatigue" synergistic charge over the objection of defendant was error. *See id.* at **4. The reasons, the court held, are two-fold. First, alcohol and fatigue is not a "combination of substances" and thus falls outside the statutory definition of "intoxication" (TEX. PENAL CODE ANN. § 49.01(2)) and thus comes much closer to expanding the criminal liability of the defendant beyond that charged in the information than does the instruction based on alcohol and drugs. Secondly, the instruction "borders on an impermissible comment on the weight of the evidence" (whatever the hell that means). Id. at **5. The trial court's error in submitting the charge, however, was found to be harmless — even on the "some harm" standard, because the defense had objected to the charge.

SEPARATE VERDICT FORMS?

In *Reidwig v. State*, 981 S.W.2d 399, 404-05 (Tex. App. ― San Antonio 1998, no pet.), the court of appeals discussed the contention that the failure, upon request, of the trial court to submit separate verdict forms for .10 and "loss of normal use" was reversible error. The court held that it was error to refuse such a request because it can result in the defendant being convicted by a non-unanimous verdict. *See id.* at 404 (citing *Ray v. State*, 749 S.W.2d 939, 944 (Tex. App. ― San Antonio 1988, pet. ref'd), *overruled sub silentio on other grounds, Atkinson v. State*, 923 S.W.2d 21, 23 (Tex. Crim. App. 1996); *Davis v. State*, 949 S.W.2d 28, 29-30 (Tex. App. ― San Antonio 1997, no pet.); *Owen v. State*, 905 S.W.2d 434, 437-39 (Tex. App. ― Waco 1995, pet. ref'd); see also State v. Carter, 810 S.W.2d 197, 200 (Tex. Crim. App. 1991)(holding that loss of normal use and .10 "are really two types of DWI offenses ... ."). The court held that the error is harmless, however, if there was sufficient evidence to support either of the two theories (even if not given separately). *See id.* at 404-05. In this case, where was sufficient evidence to support the alcohol concentration. *See id.* at 405. (This seems like a strange harm analysis ― what if the theories had been submitted separately and the jury acquitted on the alcohol concentration issue? Either way, the harm analysis renders appellate review on the "separate verdicts" issue less than useless, since there will always be evidence of loss of normal use.).

The Fort Worth Court of Appeals, in *State v. Lyons*, 820 S.W.2d 46 (Tex. App. ― Fort Worth 1991, no pet.), implied that the defendant could force the state to elect between the two manners and means of intoxication when they are plead together in the information. *See id.* at 48. In this case, the defendant had not forced the state to elect, so the court observed that sufficient evidence of either basis precluded any type of relief ― including the granting of a motion for new trial. *See id.*

Other courts, however, have taken the opposite view. In *Sims v. State*, 735 S.W.2d 913 (Tex. App. ― Dallas 1987, pet. ref'd), the court held that the defendant was not entitled to separate verdict forms for loss of normal use and .10 because this would violate the requirement that the verdict in criminal cases shall be general. *See id.* at 914-15 (citing TEX. CODE CRIM. PRO. art 37.07 § 1(a)). The court's reasoning was that while there are two ways to prove the offense of driving while intoxicated, it still is the same offense and thus no separate verdict forms are required. *See id.* In *McGinty v. State*, 740 S.W.2d 475 (Tex. App. ― Houston [1st Dist.] 1987, pet. ref'd), the court held essentially the same thing. *See id.* at 476-77. The court in *Watkins v. State*, 741 S.W.2d 546 (Tex. App. ― Dallas 1987, pet. ref'd) held that the loss of physical faculties and loss of mental faculties need not be submitted separately, dismissing the defendant's argument that failing to do so would allow a conviction on a non-unanimous verdict. *See id.* (citing *Garrett v. State*, 682 S.W.2d 301, 309 (Tex. Crim. App. 1984); *Brantley v. State*, 522 S.W.2d 519, 525 (Tex. Crim. App. 1975). These all pre-date *State v. Carter*, however, so it could easily be argued that these cases are no longer any good since the Court of Criminal Appeals has said that loss of normal use and .10 are two separate offenses. *See id.*, 810 S.W.2d at 200. But you still have the harm analysis to contend with.

DEADLY WEAPON

The following two cases found that affirmative findings of a deadly weapon were improper under the facts.

English v. State, 828 S.W.2d 33 (Tex. App. — Tyler 1991, pet. ref'd)

> There was a wreck at an intersection, but it could not be shown that the wreck was the defendant's fault or that he was operating his car in an unsafe manner at all (except, of course, for driving drunk). Affirmative finding of a deadly weapon deleted.

DEFENSES

Since DWI is a strict liability offense, any defense that goes to the culpable mental state of the defendant, such as insanity or involuntary intoxication, do not apply on the issue of guilt or innocence. *See, e.g., Aliff v. State*, 955 S.W.2d 891 (Tex. App. — El Paso 1997, no pet.)(involuntary intoxication and insanity). At least on court has held, however, that it was error for the trial court to deny the defendant's requested charge on temporary insanity due to voluntary intoxication during the *punishment phase* of a felony DWI trial where it was raised by the evidence and properly requested. *See Harvey v. State*, 798 S.W.2d 373 (Tex. App. — Beaumont 1990, no pet.); *see* TEX. PENAL CODE ANN. § 8.04(b).

Once all of the defenses aimed at the culpable mental state and the "use of force" defenses are set aside, that leaves three "defenses" that could apply to DWI: duress (TPC § 8.05)(an affirmative defense), entrapment (TPC § 8.06)(a defense to prosecution), and necessity (TPC § 9.22)(a justification).

Although one could see a scenario where the duress defense might apply to DWI, e.g., kidnaped and forced to drive from a bar parking lot, I did not quickly find a case dealing applying the defense to DWI. Entrapment I cannot even see, unless the task force was having a *really* slow night. The defense of necessity, however, has been addressed.

In *Gibbons v. State*, 874 S.W.2d 164 (Tex. App. — Houston [14th Dist.] 1994), aff'd, 115 S.Ct. 731, the court analyzed the evidence and held that under the facts of that case, the requested charge on necessity was properly denied. *See id.* at 165. In the process, the court reviewed another case where the instruction was properly denied. *See id.* at 165-66 (citing *Bush v. State*, 624 S.W.2d 377 (Tex. App. — Dallas 1981, no pet.). It is clear from reading the cases, however, that the courts are operating from the premise that the defendant is entitled to the defense under the right circumstances. In *Pentycuff v. State*, 680 S.W.2d 527 (Tex. App. — Waco 1984, pet. ref'd, untimely filed) the defendant was not entitled to the instruction only because he did not admit to the defense of driving while intoxicated. Of course a defendant is not entitled to any of these defenses unless he admits to the conduct. *See id.* at 528-29.

Note that the law surrounding legal defenses has changed recently in the case of *Giesberg v. State*, 984 S.W.2d 245 (Tex. Crim. App. 1998). The Court of Criminal Appeals has expressly

done away with all defenses that do not have a statutory basis. Also, remember that no defensive instruction need be submitted to the jury that simply attacks an element of the offense. See, e.g., Moore v. State, 736 S.W.2d 682 (Tex. Crim. App. 1987)(Offered instruction would basically tell jury that even if they found beyond a reasonable doubt that the defendant was driving, they could not find him guilty unless they found beyond a reasonable doubt that he was driving while intoxicated. No error to deny.); Neaves v. State, 725 S.W.2d 785 (Tex. App. — San Antonio 1987), aff'd, 767 S.W.2d 784 (Tex. Crim. App.)(Proposed instruction told jury that if they found that the intoxicated-like behavior was caused by a blow to the head, they must acquit.).

DEFINITIONS

A defendant is not entitled to a definition of the term "presence" because it is not defined by either statute or administrative rule. *See Davis v. State*, 949 S.W.2d 28, 29 (Tex. App. — San Antonio 1997, no pet.).

Formulating favorable definitions is always worthwhile. Sometimes the trial court will even submit one.

FAILURE TO VIDEOTAPE OR LOSS OR DESTRUCTION OF THE VIDEOTAPE

While this fact can come into evidence, the defendant cannot get an instruction on it submitted to the jury in the charge. See Logan v. State, 757 S.W.2d 160, 162 (Tex. App. — San Antonio 1988, no pet.)(such an instruction would be a comment on the weight of the evidence); Shaw v. State, 728 S.W.2d 889, 893 (Tex. App. — Houston [1st Dist.] 1987, no pet.)(same); Franks v. State, 724 S.W.2d 918, 920 (Tex. App. — San Antonio 1987, no pet.)(same).

REFUSAL TO TAKE BREATH TEST

By the same logic (comment on the weight of the evidence), the state should not receive an instruction highlighting in any way the defendant's refusal to take a breath test. I personally have never seen a prosecutor try. By the same token, the defense is not entitled to an instruction telling the jury that the refusal is *not* an admission of guilt. *See Massie v. State*, 744 S.W.2d 314, 317 (Tex. App. — Dallas 1988, pet. ref'd).