

Deferred Adjudication In Texas

When the Official Record Does Not Accurately Represent the
Official Disposition of a Court in a Criminal Matter

BY

William L. Castle

Copyright 2000, B.C.Expertise
156 Rusty Lane
Waxahachie, Texas 75165
ALL RIGHTS RESERVED

Table Of Contents

Foreword	Page 3
Purpose	Page 4
Study Boundaries and Scope of Information	Page 5
Deferred Adjudication Defined	Page 6
Answering the Study Questions	Page 10
“Deferred Adjudication” is what type of agreement?	Page 10
Who are the parties to the agreement?	Page 14
What are the terms of the agreement?	Page 14
Which laws determine the penalties for failure to perform, or fulfill, the terms of the agreement?	Page 15
Are the provisions of the agreement binding on all parties entering into the agreement?	Page 21
What constitutes satisfactory performance in complying with the terms of the agreement?	Page 29
How many of these agreements have been completely fulfilled by all parties to the agreement?	Page 29
Is the agreement a public record once the defendant has completed his obligations under the agreement?	Page 29
Are there any agreements that have been misrepresented, or been recorded inaccurately?	Page 30
Texas Department of Public Safety Issues	Page 31

Foreword

This study reviews Criminal History Record Information obtained through Texas Open Records decision OR99-1914, the text of which is freely available through the Attorney General of the State of Texas, and examines the current statutes, case law, and administrative reporting requirements that apply to these criminal records. In light of the results of this research study, it is this author's sincere wish that improvements will be made within the criminal history reporting system that currently exists in the State of Texas. Areas of emphasis that implore the reader's attention include reporting accuracy, reporting responsibility, and dissemination issues.

The amount of actual time necessary to review and compile the data included in this report was several hundred hours. Obtaining the legal authority to procure and examine these records took several months, and was only possible through the combined efforts of numerous individuals attached to both the Texas Department of Public Safety, and the Office of the Attorney General of the State of Texas. Specific thanks go to Valerie Fulmer, Manager of the Criminal Records Service Legal Staff at the Texas Department of Public Safety, Colonel Tommy Davis, Director of the Texas Department of Public Safety, and June B. Hardin, Assistant Attorney General, Open Records Division, Office of the Attorney General of the State of Texas.

Purpose

The central purpose of this study is to determine whether or not the provisions of Article 42.12 of the Texas Code of Criminal Procedure have been complied with by the criminal justice system in Texas. Responsibilities conveyed upon both the State in its prosecution of criminal offenses, and the defendants named in these criminal offenses, are codified in legal statutes, and further defined by courts in the appellant process. The courts have on numerous occasions specifically defined the application of this Article to both prosecutors and defendants, creating a standard for the enforcement of the provisions of this statute.

In seeking to faithfully make an irrefutable determination as to whether or not the criminal justice system itself is in compliance with Article 42.12 section 5 of the Texas Code of Criminal Procedure, several questions would need to be asked:

Since this provision of Texas law describes an agreement, what type of agreement is it?

Who are the parties to the agreement?

What are the terms of the agreement?

Which laws determine the penalties for failure to perform, or fulfill, the terms of the agreement?

Are the provisions of the agreement binding on all parties entering into the agreement?

What constitutes satisfactory performance in complying with the terms of the agreement?

How many of these agreements have been completely fulfilled by all parties to the agreement?

Is the agreement a public record once the defendant has completed his obligations under the agreement?

Are there any agreements that have been misrepresented, or been recorded inaccurately?

The answers to the questions above will fulfill the purpose of this study. More importantly, those answers could have a significant impact on the criminal justice system in Texas, and in other states as well. If this study impacts the criminal justice system in a positive manner that benefits defendants and taxpayers, and results in changes that improve the accountability of the criminal justice system to the citizens, then it will have served an invaluable and noble purpose.

Study Boundaries and Scope of Information

This study is limited to a very narrow and specifically defined examination of Criminal Record History Information that was obtained through a request submitted to the Texas Department of Public Safety in compliance with the Texas Open Records Act, and enforced by a Texas Open Records decision rendered by the Office of the Attorney General of the State of Texas; styled as OR99-1914. The Open Records request was a request for inspection of the Criminal History Record Information maintained by the Texas Department of Public Safety for any person who, after being sentenced to deferred adjudication, had his deferred adjudication dismissed in accordance with section 5 (c) of Article 42.12 of the Texas Code of Criminal Procedure, and a request for the specific procedures established to record this type of court disposition in the database of Criminal History Record Information maintained by the Texas Department of Public Safety. The Texas Department of Public Safety represents the records reviewed in this study as those records, that were available in an electronic format, ordered to be released by the Office of the Attorney General of the State of Texas, as defined in OR99-1914. This study does not address the applicability of any federal statutes adopted by the United States Congress and signed into law by the President of the United States, or any rule adopted by any agency, commission, or any other representative of the federal government of the United States of America.

The applicability of the laws of the State of Texas, the enforcement of those laws, and the responsibilities and limitations placed upon citizens and government in regards to these laws, are an important aspect of this study. The Texas Constitution sets forth guiding principles that govern the interaction between citizens and government within the boundaries of the State of Texas. As of this writing, the Texas Constitution is still the principle legal document upon which all other legal decisions must rest and be in agreement with. Therefore, the findings of this study will be framed in an environment that relies upon a strict interpretation of the guiding principles of the Texas Constitution for their foundation.

An examination of the prevailing legal rulings, current statutes, and their applicability involving the records that are reviewed herein is an important aspect of this study. This examination provides the foundation upon which improvements can be made to the criminal justice system that currently exists in the State of Texas. Any improvements that need to be made to the criminal justice system to better serve the interests of society can only be made with the cooperation of all participants in the system. That includes not only the people who operate the system (judges, juries, and representatives of the courts), and the people who modify the system through legislation (the legislative and executive branches of government), but also the people who are the most active participants in the system: prosecutors, defense attorneys, witnesses, and defendants. Only with the cooperation of all of these parties can the criminal justice system in Texas fulfill its responsibility to the citizens of the State of Texas. This study will hopefully play a significant role in assisting us to correct deficiencies that exist in the criminal justice system as it exists today.

Deferred Adjudication Defined

The Texas “deferred adjudication” statute is set forth in Article 42.12 Section 5 of the Texas Code of Criminal Procedure. It states:

PART I--CODE OF CRIMINAL PROCEDURE OF 1965

Code of Criminal Procedure

CHAPTER FORTY-TWO--JUDGMENT AND SENTENCE

Art. 42.12. [781d] Community supervision.

Sec. 5. Deferred Adjudication; Community Supervision.

(a) Except as provided by Subsection (d) of this section, when in the judge's opinion the best interest of society and the defendant will be served, the judge may, after receiving a plea of guilty or plea of nolo contendere, hearing the evidence, and finding that it substantiates the defendant's guilt, defer further proceedings without entering an adjudication of guilt, and place the defendant on community supervision. A judge may place on community supervision under this section a defendant charged with an offense under Section 21.11, 22.011, or 22.021, Penal Code, regardless of the age of the victim, or a defendant charged with a felony described by Section 13B(b) of this article, only if the judge makes a finding in open court that placing the defendant on community supervision is in the best interest of the victim. The failure of the judge to find that deferred adjudication is in the best interest of the victim is not grounds for the defendant to set aside the plea, deferred adjudication, or any subsequent conviction or sentence. After placing the defendant on community supervision under this section, the judge shall inform the defendant orally or in writing of the possible consequences under Subsection (b) of this section of a violation of community supervision. If the information is provided orally, the judge must record and maintain the judge's statement to the defendant. The failure of a judge to inform a defendant of possible consequences under Subsection (b) of this section is not a ground for reversal unless the defendant shows that he was harmed by the failure of the judge to provide the information. In a felony case, the period of community supervision may not exceed 10 years. For a defendant charged with a felony under Section 21.11, 22.011, or 22.021, Penal Code, regardless of the age of the victim, and for a defendant charged with a felony described by Section 13B(b) of this article, the period of community supervision may not be less than five years. In a misdemeanor case, the period of community supervision may not exceed two years. A judge may increase the maximum period of community supervision in the manner provided by Section 22(c) or 22A of this article. The judge may impose a fine applicable to the offense and require any reasonable conditions of community supervision, including mental health treatment under Section 11(d) of this article, that a judge could impose on a defendant placed on community supervision for a conviction that was probated and suspended, including confinement. The provisions of Section 15 of this article specifying whether a defendant convicted of a state jail felony is to be confined in a county jail or state jail felony facility and establishing the minimum and maximum terms of confinement as a condition of community supervision apply in the same manner to a defendant placed on community supervision after pleading guilty or nolo contendere to a state jail felony. However, upon written motion of the defendant requesting final adjudication filed within 30 days after entering such plea and the deferment of adjudication, the judge shall proceed to final adjudication as in all other cases.

(b) On violation of a condition of community supervision imposed under Subsection (a) of this section, the defendant may be arrested and detained as provided in Section 21 of this article. The defendant is entitled to a hearing limited to the determination by the court of whether it proceeds with an adjudication of guilt on the original charge. No appeal may be taken from this determination. After an adjudication of guilt, all proceedings, including assessment of punishment, pronouncement of sentence, granting of community supervision, and defendant's appeal continue as if the adjudication of guilt had not been deferred. A court assessing punishment after an adjudication of guilt of a defendant charged with a state jail felony may suspend the imposition of the sentence and place the defendant on community supervision or may order the sentence to be executed, regardless of whether the defendant has previously been convicted of a felony.

(c) On expiration of a community supervision period imposed under Subsection (a) of this section, if the judge has not proceeded to adjudication of guilt, the judge shall dismiss the proceedings against the defendant and discharge him. The judge may dismiss the proceedings and discharge a defendant, other than a defendant charged with an offense described by Section 13B(b) of this article, prior to the expiration of the term of community supervision if in the judge's opinion the best interest of society and the defendant will be served. The judge may dismiss the proceedings and discharge a defendant charged with a felony described by Section 13B(b) of this article only if in the judge's opinion the best interest of society and the defendant will be served and the defendant has successfully completed at least two-thirds of the period of community supervision. Except as provided by Section 12.42(g), Penal Code, 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. For any defendant who receives a dismissal and discharge under this section:

(1) upon conviction of a subsequent offense, the fact that the defendant had previously received community supervision with a deferred adjudication of guilt shall be admissible before the court or jury to be considered on the issue of penalty;

(2) if the defendant is an applicant for a license or is a licensee under Chapter 42, Human Resources Code, the Texas Department of Human Services may consider the fact that the defendant previously has received community supervision with a deferred adjudication of guilt under this section in issuing, renewing, denying, or revoking a license under that chapter; and

(3) if the defendant is a person who has applied for registration to provide mental health or medical services for the rehabilitation of sex offenders, the Interagency Council on Sex Offender Treatment may consider the fact that the defendant has received community supervision under this section in issuing, renewing, denying, or revoking a license or registration issued by that council.

(d) In all other cases the judge may grant deferred adjudication unless:

(1) the defendant is charged with an offense:

(A) under Section 49.04, 49.05, 49.06, 49.07, or 49.08, Penal Code; or

(B) for which punishment may be increased under Section 481.134(c), (d), (e), or (f), Health and Safety Code, if it is shown that the defendant has been previously convicted of an offense for which punishment was increased under any one of those subsections; or

(2) the defendant:

(A) is charged with an offense under Section 21.11, 22.011, or 22.021, Penal Code, regardless of the age of the victim, or a felony described by Section 13B(b) of this article; and

(B) has previously been placed on community supervision for any offense under Paragraph (A) of this subdivision.

Sec. 5 amended by Acts 1981, 67th Leg., p. 155, ch. 69

Sec. 20. Reduction or Termination of Community Supervision.

(a) At any time, after the defendant has satisfactorily completed one-third of the original community supervision period or two years of community supervision, whichever is less, the period of community supervision may be reduced or terminated by the judge. Upon the satisfactory fulfillment of the conditions of community supervision, and the expiration of the period of community supervision, the judge, by order duly entered, shall amend or modify the original sentence imposed, if necessary, to conform to the community supervision period and shall discharge the defendant. If the judge discharges the defendant under this section, the judge may set aside the verdict or permit the defendant to withdraw his plea, and shall dismiss the accusation, complaint, information or indictment against the 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:

(1) proof of the conviction or plea of guilty shall be made known to the judge should the defendant again be convicted of any criminal offense; and

(2) if the defendant is an applicant for a license or is a licensee under Chapter 42, Human Resources Code, the Texas Department of Human Services may consider the fact that the defendant previously has received community supervision under this article in issuing, renewing, denying, or revoking a license under that chapter.

(b) This section does not apply to a defendant convicted of an offense under Sections 49.04-49.08, Penal Code, or a defendant convicted of an offense punishable as a state jail felony.

The Criminal Justice Policy Council defines “deferred adjudication” as:

Deferred Adjudication: a postponement of entering a finding of guilt, where the offender undergoes a term of community supervision that, if completed successfully, will prevent a final conviction from appearing on the offender’s record.

Glossary of Common Adult System Terms

Source: Sourcebook of Texas Adult Justice Population Statistics, Criminal Justice Policy Council, November 1999

The Texas Department of Criminal Justice defines “deferred adjudication” as:

Deferred Adjudication. A type of community supervision. If the conditions of supervision are met for the time period set by the court, not to exceed two years, no record of the crime will be made.

Source: Texas Department of Criminal Justice Website

URL: <http://www.tdcj.state.tx.us/definitions/definitions-home.htm>

Even the Texas Comptroller of Public Accounts has provided a definition of “deferred adjudication”:

Carole Keeton Rylander

Texas Comptroller of Public Accounts

Texas Performance Review

Challenging the Status Quo Toward Smaller, Smarter Government

Chapter 7: Public Safety

Under deferred adjudication, however, once the community supervision period expires, the case is dismissed, and the offender is not subject to the "disqualifications or disabilities imposed by law for conviction of an offense," such as the loss of the right to vote.

Source: Window on State Government, Texas Comptroller of Public Accounts Website

URL: <http://www.window.state.tx.us/tpr/tpr5/7ps/ps07.html>

What is also very important to the discussion of the definition of “deferred adjudication” is the existence of an Attorney General’s Opinion from the Office of the Attorney General of the State of Texas, written to the Chairman of the Jurisprudence Committee of the Texas Senate, dated December 22, 1997, and included in the Local Revenue Funds Audit Manual (Rev. 09/99) issued by the Texas Comptroller of Public Accounts; this Opinion styled as DM-464. In this opinion, Attorney General Dan Morales dealt with the question as to whether or not “deferred adjudication” can be represented as the criminal conviction of any person who has been convicted of a misdemeanor or felony crime. The Attorney General cited several court opinions in providing a definitive ruling as to whether or not “deferred adjudication” could be considered to be the same as a conviction. The text from the Opinion that applies to this study reads as such:

“Deferred adjudication under section 5 of article 42.12, Code of Criminal Procedure, means that the court, after receiving a plea of guilty or nolo contendere, has found that it is in the "best interest of society and the defendant" to "defer further proceedings without entering an adjudication of guilt, and place the defendant on community supervision." Code Crim. Proc. art. 42.12, § 5(a). When a defendant is discharged after successfully completing community supervision under deferred adjudication, such "dismissal and discharge . . . may not be deemed a conviction for the purposes of disqualifications or disabilities imposed by law for conviction of an offense," except for certain circumstances not relevant here. Id. § 5(c).

In Rodriguez v. State, 680 S.W.2d 585 (Tex. App. -- Corpus Christi 1984, no writ), the court stated that "[a] defendant whose adjudication of guilt is deferred does not have a final conviction and may not appeal unless he proceeds to a final adjudication." Rodriguez, 680 S.W.2d at 587. Likewise, in Triplett v. State, 686 S.W.2d 342, 345 (Tex. App. -- Houston [1st Dist.] 1985, writ ref'd), the court said that "[d]eferred adjudication means that a defendant has been indicted of a offense, rather than convicted." Probation under deferred adjudication is different from probation that is granted after a sentence by suspending the sentence assessed. Reed v. State, 702 S.W.2d 738, 740 (Tex. App. -- San Antonio 1985, no writ). See generally McNew v. State, 608 S.W.2d 166 (Tex. Crim. App. [Panel Op.] 1978); Attorney General Opinion DM-349 (1995)."

Therefore, it is A FINDING AND CONCLUSION OF THIS REPORT THAT: A GRANT OF DEFERRED ADJUDICATION IS NOT A CONVICTION, AND THAT SO LONG AS THE DEFENDANT HAS SUCCESSFULLY COMPLETED THE TERM OF DEFERRED ADJUDICATION, OR IF THE JUDGE HAS DETERMINED THAT IT IS IN THE BEST INTERESTS OF SOCIETY AND THE DEFENDANT TO END THE TERM OF DEFERRED ADJUDICATION, THAT UPON AN EXPIRATION OF THE TERM OF DEFERRED ADJUDICATION OR THE ORDER OF THE JUDGE DISCHARGING THE DEFENDANT, THAT THE CASE IS DISMISSED, AND THAT THE OFFICIAL RECORD OF THE COURT'S FINAL DIPOSITION OF THE CASE IS THAT THE CASE IS DISMISSED, REQUIRING THAT SAME DISPOSITION BE ENTERED INTO THE OFFICIAL RECORDS OF THE MATTER, AND THAT SAME DISPOSITION BE TRANSMITTED TO THE OFFICIAL DEPOSITORY OF CRIMINAL HISTORY RECORD INFORMATION FOR THE STATE OF TEXAS WHICH IS THE TEXAS DEPARTMENT OF PUBLIC SAFETY.

ANSWERING THE STUDY QUESTIONS

“Deferred adjudication” is what type of agreement?

On numerous occasions, the appellate courts have ruled that “deferred adjudication” is a *contract*, and as such, not only does the Texas Code of Criminal Procedure have applicable jurisdiction; so does the Business and Commerce Code of the State of Texas, also referred to as the “Uniform Commercial Code”. The most significant ruling defining this agreement as a contract is noted below:

**Speth v State
6 S.W.3d 530
December 1, 1999
No. 425-98**

Majority opinion by Judge Meyers

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. 425-98

LAWRENCE EDWARD SPETH, Appellant

v.

THE STATE OF TEXAS

ON STATE’S PETITION FOR DISCRETIONARY REVIEW

FROM THE FOURTEENTH COURT OF APPEALS

HARRIS COUNTY

Meyers, J., delivered the opinion of the Court, joined by Mansfield, Price, Johnson, and Keasler., J.J.. Womack, J., filed a concurring opinion, joined by McCormick, P.J., Keller, and Holland, J.J..

O P I N I O N

Adjudication of appellant’s guilt for the offense of aggravated assault of a peace officer was deferred and he was awarded five years probation. While on probation, appellant was indicted for indecency with a child. Appellant was acquitted by a jury on the indecency charges, the trial court in the aggravated assault case found the allegations concerning the indecency offense true and concluded appellant had thereby violated his probation. Appellant’s guilt was adjudicated and the trial court granted ten years probation, subject to five conditions which related to the indecency charges.(1) Appellant did not object to the conditions at trial, but complained about them for the first time on direct appeal. The State argued appellant had procedurally defaulted his claim by failing to make a trial objection. The Court of Appeals rejected that contention on the ground that appellant could raise “a defect in his sentence” even though he had not objected to it at trial.” Speth v. State, 965 S.W.2d 13, 15 (Tex. App.--Houston [14th Dist.] 1998). We granted review to decide “whether a defendant can challenge conditions of probation for the first time on appeal.

The Court of Appeals’ holding and appellant’s arguments turn on a line of cases which hold that “if a punishment is not authorized by law, that portion of the sentence imposing that punishment is void.” Heath v. State, 817 S.W.2d 335, 336 (Tex. Crim. App. 1991)(opinion on original submission)(portion of sentence granting probation where defendant not eligible for probation under controlling statute held void and could be raised at any time)(2); see also Hern v. State, 892 S.W.2d 894, 896 (Tex. Crim. App. 1994)(“conviction was void because the sentence exceeded the maximum allowed for a third degree felony, of which [the defendant] had been convicted”), cert. denied, 515 U.S. 1105 (1995); Ex parte Johnson, 697 S.W.2d 605, 606-607 (Tex. Crim. App. 1985)(imposition of fine in addition to prison term not “authorized by law” and therefore void); Wilson v. State, 677 S.W.2d 518, 524 (Tex. Crim. App. 1984)(where punishment was assessed at four years confinement, but statutory minimum was five years

confinement, judgment of conviction was void). Nearly every case that has held a sentence not “authorized by law” or void (such that the alleged defect could be raised for the first time on appeal) involved the trial court’s assessment of a punishment that was not applicable to the offense under the controlling statutes. That is, “the punishment assessed was not within the universe of punishments applicable to the offense.” Johnson, 697 S.W.2d at 607. These cases are inapposite here because they involve the imposition of a sentence not authorized by statute, while community supervision is not a sentence or even a part of a sentence.

The Code of Criminal Procedure defines community supervision as involving a suspension of the sentence.**(3)** In other words, community supervision is an arrangement in lieu of the sentence, not as part of the sentence. Tex. Code Crim. Proc. art. 42.12 § 3(a)(providing that a judge, after conviction or plea “may suspend the imposition of the sentence and place the defendant on community supervision”); see also fn.3, supra.

The sentence and the conditions of community supervision are each separate parts of the “judgment.”**(4)** The Code lists twenty-six items the judgment should reflect, including “the length of community supervision, and the conditions of community supervision” and “[t]he term of the sentence.” Id. at § 1(10) & (15). That community supervision is not viewed as part of the sentence is further evidenced by the fact that these terms are listed as separate items in the “judgment.” So, while community supervision is part of the judgment, it is not part of the “sentence,” as those terms are defined in the Code of Criminal Procedure. Cf. State v. Ross, 953 S.W.2d 748 (Tex. Crim. App. 1997).

Moreover, imposition of a sentence is profoundly different from the granting of community supervision. The above cases suggest that a defendant has an absolute and nonwaivable right to be sentenced within the proper range of punishment established by the Legislature.**(5)** The granting of community supervision is a privilege, not a right. See Flores v. State, 904 S.W.2d 129, 130 (Tex. Crim. App. 1995)(plurality opinion)(“there is no fundamental right to receive probation; it is within the discretion of the trial court to determine whether an individual defendant is entitled to probation”), cert. denied, 516 U.S. 1050 (1996); Burns v. State, 561 S.W.2d 516, 517 (Tex. Crim. App. 1978)(court’s discretion to deny or grant community supervision to eligible defendant if jury waived or jury not elected to determine punishment is absolute and unreviewable). The decision whether to grant probation is wholly discretionary and nonreviewable. Flournoy v. State, 589 S.W.2d 705, 707 (Tex. Crim. App. 1979)(citing Saldana v. State, 493 S.W.2d 778 (Tex. Crim. App. 1973). To even be eligible for jury recommended probation, a defendant bears the burden of pleading and proving that he has no prior felony convictions. Tex. Code crim. Proc. art. 42.12 § 4(d) & (e). We have likened the granting of probation to an extension of clemency that is contractual in nature:

When probation is granted, the trial court “extends clemency” and creates a relationship that is, “in a way, contractual that is, the court agrees with the convict that clemency by way of probation will be extended if he will keep and perform certain requirements and conditions, the violation of which will authorize the revocation of the probation.” Wilson v. State, 156 Tex.Cr.R. 228, 240 S.W.2d 774, 775 (1951), Gossett v. State, 162 Tex.Cr.R. 52, 282 S.W.2d 59, 60 (1955), Bradley v. State, 564 S.W.2d 727, 729 (1978).

Flournoy, 589 S.W.2d at 707 (footnotes omitted).

Consistent with its broad discretionary powers in deciding whether to grant community supervision, a trial court likewise has broad discretion in determining the conditions to be imposed. The trial court “shall” determine the conditions of community supervision,⁶ but the description of allowable conditions is prefaced with the permissive term “may”: “The judge may impose any reasonable condition that is designed to protect or restore the community, protect or restore the victim, or punish, rehabilitate, or reform the defendant.”**(7)** Tex. Code Crim. Proc. art. 42.12 § 11(a); see also Chacon v. State, 558 S.W.2d 874, 875 (Tex. Crim. App. 1977)(condition of probation must be “a reasonable one”). The broadly discretionary language characteristic of this provision is markedly different from the sentencing provisions in which the legislature has established the allowable range of punishment for a given offense. Under those schemes, every option available to the court is narrowly identified on the face of the statute. Because Section 11 is so broadly discretionary, it does not establish a narrowly identifiable “universe or punishments applicable to the offense” in the same manner as the statutory sentencing schemes at issue in the above cases.**(8)**

An award of community supervision is not a right, but a contractual privilege, and conditions thereof are terms of the contract entered into between the trial court and the defendant. Therefore, conditions not objected to are affirmatively accepted as terms of the contract. Thus, by entering into the contractual relationship without objection, a defendant affirmatively waives any rights encroached upon by the terms of the contract. A defendant who benefits from the contractual privilege of probation, the granting of which does not involve a systemic right or prohibition, must complain at trial to conditions he finds objectionable.**(9)** A trial objection allows the trial court the opportunity

to either risk abusing his discretion by imposing the condition over objection(10) or reconsider the desirability of the contract without the objectionable condition.

Appellant did not object at trial to the imposition of the conditions. See fn.13, supra. The Court of Appeals erred in holding appellant could complain about the community supervision conditions for the first time on appeal.(11) The judgment of the Court of Appeals is reversed.

MEYERS, J.
Delivered December 1, 1999
Publish

(1) As conditions of his probation in his aggravated assault of a peace officer case, appellant was required to: (1) register as a sex offender; (2) pay for counseling needed by the complainants in the indecency with a child case; (3) refrain from working as chiropractor during the probationary period; (4) participate in sex offender counseling and take a polygraph; (5) refrain from contact with any minor girls for the duration of probation.

(2) The Court of Appeals relied on one of its own decisions, *Martinez v. State*, 874 S.W.2d 267, 268 (Tex. App.--Houston [14th Dist.] 1994), which in turn relied on *Heath v. State*, 817 S.W.2d 335 (Tex. Crim. App. 1991), for the proposition that the defendant was not “barred from raising a defect in his sentence for the first time on appeal.”

(3) Probation is referred to in the Code of Criminal Procedure as “community supervision.” We use the terms probation and community supervision interchangeably in this opinion. Community supervision is defined in the Code as:

[T]he placement of a defendant by a court under a continuum of programs and sanctions, with conditions imposed by the court for a specified period of time during which:

(A) criminal proceedings are deferred without an adjudication of guilt; or

(B) a sentence of imprisonment or confinement, imprisonment and fine, or confinement and fine, is probated and the imposition of sentence is suspended in whole or in part.

Tex. Code Crim. Proc. art. 42.12 § 2(2)(emphasis added).

(4) “Sentence” is defined as “that part of the judgment, or order revoking a suspension of the imposition of a sentence, that orders that the punishment be carried into execution in the manner prescribed by law.” Tex. Code Crim. Proc. art. 42.02. The Code defines “judgment” as

the written declaration of the court signed by the trial judge and entered of record showing the conviction or acquittal of the defendant. The sentence served shall be based on the information contained in the judgment.

Id. at art. 42.01.

(5) We generally view our adversarial system as including three kinds of “rights”: (1) absolute systemic requirements and prohibitions that are nonwaivable, (2) rights of litigants that must be implemented unless expressly waived, and (3) rights that must be insisted upon at trial or nothing is presented for review. *Marin v. State*, 851 S.W.2d 275, 278-80 (Tex. Crim. App. 1993), overruled on other grounds, *Cain v. State*, 947 S.W.2d 262, 265 (Tex. Crim. App. 1997)(holding failure to admonish defendant concerning deportation consequences of plea subject to harmless error analysis).

While not expressed in these terms, the case law discussed above involving “void” sentences has viewed legislatively defined sentencing schemes that are explicit about the applicable range or category of punishment as absolute, systemic features of the system, such that their application cannot be waived. That is, a defendant’s “right” to be sentenced to a term within the defined “universe of punishments applicable to the offense” is absolute and nonwaivable. The question presented in this case is whether Section 11, governing the imposition of conditions of probation, creates a “universe of punishments” applicable to an offense which is absolute and nonwaivable.

(6) The definition of community supervision includes the imposition of conditions:

“Community supervision” means the placement of a defendant by a court under a continuum of programs and sanctions, with conditions imposed by the court for a specified period . . .

Tex. Code Crim. Proc. art. 42.12 § 2(2) (emphasis added).

(7) Section 11 further provides a nonexclusive list of examples of conditions that a court “may” impose. Tex. Code Crim. Proc. art. 42.12 § 11(a).

(8) There are two exceptions to Section 11's permissive tone--a provision prohibiting the imposition of certain payments, Tex. Code Crim. Proc. art. 42.12 § 11 (b), and another provision prohibiting a requirement that a defendant undergo an orchiectomy, id. at 42.12 § 11(f). By treating these matters in prohibitory terms, the Legislature has provided that they are per se unreasonable. But a defendant can affirmatively waive unreasonable terms by entering into the probation contract containing such terms, without objection. Cf. *Proctor v. State*, 967 S.W.2d 840, 844 (Tex. Crim. App. 1998)(holding statutes of limitations no longer viewed as systemic nonwaivable features in part because they operate as a defense and therefore the defendant “ought to have the burden of asserting that defense or losing it”); *Ex parte McJunkins*, 954 S.W.2d 39, 40 (Tex. Crim. App. 1997)(because, per Code of Criminal Procedure article 21.24, State has option whether or not to join offenses in single criminal action, and defendant has option (in event State chooses joinder) whether or not to demand severance, then Penal Code section 3.03 mandating that sentences in such consolidated cases run concurrently, is “a right of a litigant rather than an absolute requirement or prohibition which cannot be waived or forfeited”).

(9) This assumes the probationer knew what the conditions were in time to object at trial. In the instant case, appellant was questioned about potential conditions, was orally informed by the trial court of the conditions assessed, and signed a written version of the conditions at the punishment hearing following adjudication of guilt. Some of the questioning at the hearing demonstrates appellant’s willingness to accept the conditions as part of the bargain by which he would benefit from the privilege of probation:

Q.[Defense counsel] Are you willing to attend sex offender counseling?

A. If that’s what the Judge says.

Q. Are you willing to do that?

A. Yes.

Q. Are you asking the Court to let you stay with the family [appellant’s wife and children]?

A. Yes.

* * *

Q.[Prosecutor] What are you asking the Court to do?

A. . . . I just want to have some time with my family and be able to work things out. If she wants me to go to counseling, fine.

Q. . . . Do you think you need [sex offender] counseling?

A. I didn’t do it but I’m willing to go through counseling, yes.

Q. You would do anything to stay out of the penitentiary?

THE COURT: You have to answer the question.

A. Yes.

In closing argument on punishment, defense counsel argued to the court:

. . . If you require that he be sent to sex offender therapy, he’ll do it. In the past he’s done whatever he’s been required to do. . . . It’s not a case where he should go to the penitentiary. We ask that you not send him to the penitentiary. . . .

(10) We do not hold that a trial court does not abuse its discretion by imposing conditions that are unreasonable or violate constitutional rights or statutory provisions. But such defects must be timely objected to in order to be raised on appeal.

(11) In holding the probation conditions rendered the judgment void, the Court of Appeals also relied on *Gordon v. State*, 707 S.W.2d 626 (Tex. Crim. App. 1986), which held the trial court could not impose restitution relating to criminal conduct for which the defendant had been acquitted. *Speth*, 965 S.W.2d at 15. *Gordon* is inapplicable, however, as there was no question of procedural default presented in that case.

It is A FINDING AND CONCLUSION OF THIS REPORT THAT: THE TYPE OF AGREEMENT THAT IS REPRESENTED BY DEFERRED ADJUDICATION IS A “CONTRACT”.

Who are the parties to the agreement?

It is A FINDING AND CONCLUSION OF THIS REPORT THAT: THE PARTIES TO THE AGREEMENT ARE THE DEFENDANT, THE DISTRICT ATTORNEY OF THE COUNTY WHERE THE CRIMINAL COMPLAINT IS ORIGINALLY FILED, THE PRESIDING JUDGE IN THE CASE, THE DISTRICT CLERK OF THE COUNTY RESPONSIBLE FOR RECORDING THE COURT’S DECISIONS, RULINGS, ORDERS, AND OTHER RECORDS OF THE CASE, AND THE DIRECTOR OF THE COMMUNITY SUPERVISION AND CORRECTIONS DEPARTMENT RESPONSIBLE FOR SUPERVISING THE DEFENDANT, DURING THE PERIOD OF DEFERRED ADJUDICATION, WHOSE RESPONSIBILITIES ARE DETERMINED PURSUANT TO THE TEXAS CODE OF CRIMINAL PROCEDURE.

What are the terms of the agreement?

This study finds that, through a preponderance of evidence, the terms of the contract are quite varied. The length of the contract is not a fixed length. During the time that the contract is in force, the length and mutually agreeable terms can be modified almost at will, and that so long as the defendant fulfills his obligation of the terms of the contract, the defendant has a constitutionally valid assurance that the original charge will be dismissed. During the length of the contract, the defendant agrees to relinquish certain civil liberties guaranteed by the Texas Constitution as specified in the contract, and agrees that if he fails to fulfill his obligations as stated in the contract, he shall be subject to incarceration, loss of civil rights, and other penalties as the court may see fit to impose. Therefore it is A FINDING AND CONCLUSION OF THIS REPORT THAT: THE TERMS OF THE AGREEMENT ARE DEFINED BY THE DISTRICT ATTORNEY’S OFFICE OF THE COUNTY WHERE THE ORIGINAL COMPLAINT IS FILED, LIMITED ONLY BY THE PROVISIONS CONTAINED IN THE TEXAS CODE OF CRIMINAL PROCEDURE, AND REQUIRE THE DEFENDANT TO AGREE TO SUBMIT TO THE DIRECT SUPERVISION OF THE COURT, AND THAT SO LONG AS THE DEFENDANT DOES NOT BREACH THE AGREEMENT, THE CASE WILL, UPON THE EXPIRATION OF THE TERM OF THE AGREEMENT, OR UPON THE ORDER OF THE PRESIDING JUDGE IN THE JURISDICTION OF COMPETENT AUTHORITY, BE DISMISSED AND RECORDED IN THE OFFICIAL RECORD OF THE COURT AS DISMISSED, AND THAT THE COURT’S SUPERVISION WILL END ON THE EXPIRATION OF THE AGREEMENT, OR THE ORDER OF THE PRESIDING JUDGE IN THE JURISDICTION OF COMPETENT AUTHORITY THAT THE TERM OF THE AGREEMENT HAS EXPIRED, OR WHO HAS DISCHARGED THE DEFENDANT, AND THAT UPON THE EXPIRATION OF THE AGREEMENT, OR THE ORDER OF THE PRESIDING JUDGE IN THE JURISDICTION OF COMPETENT AUTHORITY THAT THE TERM OF THE AGREEMENT HAS EXPIRED, ANY CIVIL RIGHTS RELINQUISHED BY THE DEFENDANT DURING THE TERM OF THE AGREEMENT SHALL BE FULLY RESTORED AS THEY EXISTED PRIOR TO THE ESTABLISHMENT OF THE AGREEMENT, WITHOUT EXCEPTION.

Which laws determine the penalties for failure to perform, or fulfill, the terms of the agreement?

There are numerous laws that determine the penalties for failure to perform or fulfill the agreement. In regards to the defendant, the following provisions of Texas law specify the procedure and rules that determine a defendant's punishment for failing to perform, or fulfill, the terms of the agreement:

PART I--CODE OF CRIMINAL PROCEDURE OF 1965

Code of Criminal Procedure

CHAPTER FORTY-TWO--JUDGMENT AND SENTENCE

Art. 42.12. [781d] Community supervision.

Sec. 5. Deferred Adjudication; Community Supervision.

(b) On violation of a condition of community supervision imposed under Subsection (a) of this section, the defendant may be arrested and detained as provided in Section 21 of this article. The defendant is entitled to a hearing limited to the determination by the court of whether it proceeds with an adjudication of guilt on the original charge. No appeal may be taken from this determination. After an adjudication of guilt, all proceedings, including assessment of punishment, pronouncement of sentence, granting of community supervision, and defendant's appeal continue as if the adjudication of guilt had not been deferred. A court assessing punishment after an adjudication of guilt of a defendant charged with a state jail felony may suspend the imposition of the sentence and place the defendant on community supervision or may order the sentence to be executed, regardless of whether the defendant has previously been convicted of a felony.

Sec. 21. Violation of Community Supervision: Detention and Hearing.

(a) At any time during the period of community supervision the judge may issue a warrant for violation of any of the conditions of the community supervision and cause a defendant convicted under Section 43.02, Penal Code, or under Chapter 481, Health and Safety Code, or Sections 485.031 through 485.035, Health and Safety Code, or placed on deferred adjudication after being charged with one of those offenses, to be subject to the control measures of Section 81.083, Health and Safety Code, and to the court-ordered- management provisions of Subchapter G, Chapter 81, Health and Safety Code.

(b) At any time during the period of community supervision the judge may issue a warrant for violation of any of the conditions of the community supervision and cause the defendant to be arrested. Any supervision officer, police officer or other officer with power of arrest may arrest such defendant with or without a warrant upon the order of the judge to be noted on the docket of the court. A defendant so arrested may be detained in the county jail or other appropriate place of confinement until he can be taken before the judge. Such officer shall forthwith report such arrest and detention to such judge. If the defendant has not been released on bail, on motion by the defendant the judge shall cause the defendant to be brought before the judge for a hearing within 20 days of filing of said motion, and after a hearing without a jury, may either continue, extend, modify, or revoke the community supervision. A judge may revoke the community supervision of a defendant who is imprisoned in a penal institution without a hearing if the defendant in writing before a court of record in the jurisdiction where imprisoned waives his right to a hearing and to counsel, affirms that he has nothing to say as to why sentence should not be pronounced against him, and requests the judge to revoke community supervision and to pronounce sentence. In a felony case, the state may amend the motion to revoke community supervision 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 judge may continue the hearing for good cause shown by either the defendant or the state.

(c) In a community supervision revocation hearing at which it is alleged only that the defendant violated the conditions of community supervision by failing to pay compensation paid to appointed counsel, community supervision fees, court costs, restitution, or reparations, the inability of the defendant to pay as ordered by the judge is an affirmative defense to revocation, which the defendant must prove by a preponderance of evidence.

(d) A defendant has a right to counsel at a hearing under this section.

Sec. 22. Continuation or Modification.

(a) If after a hearing under Section 21 of this article a judge continues or modifies community supervision after determining that the defendant violated a condition of community supervision, the judge may impose any other conditions the judge determines are appropriate, including:

(1) a requirement that the defendant perform community service for a number of hours specified by the court under Section 16 of this article, or an increase in the number of hours that the defendant has previously been required to perform under those sections in an amount not to exceed double the number of hours permitted by Section 16;

(2) an increase in the period of community supervision, in the manner described by Subsection (b) of this section;

(3) an increase in the defendant's fine, in the manner described by Subsection (d) of this section; or

(4) the placement of the defendant in a substance abuse felony punishment program operated under Section 493.009, Government Code, if:

(A) the defendant is convicted of a felony other than:

(i) a felony under Section 21.11, 22.011, or 22.021, Penal Code; or

(ii) criminal attempt of a felony under Section 21.11, 22.011, or 22.021, Penal Code; and

(B) the judge makes an affirmative finding that:

(i) drug or alcohol abuse significantly contributed to the commission of the crime or violation of community supervision; and

(ii) the defendant is a suitable candidate for treatment, as determined by the suitability criteria established by the Texas Board of Criminal Justice under Section 493.009(b), Government Code.

(b) If the judge imposes a sanction under Subsection (a)(4) of this section, the judge shall also impose a condition requiring the defendant on successful completion of the program to participate in a drug or alcohol abuse continuum of care program.

(c) The judge may extend a period of community supervision under this section as often as the judge determines is necessary, but the period of community supervision in a first, second, or third degree felony case may not exceed 10 years and, except as otherwise provided by this subsection, the period of community supervision in a misdemeanor case may not exceed three years. The judge may extend the period of community supervision in a misdemeanor case for any period the judge determines is necessary, not to exceed an additional two years beyond the three-year limit, if the defendant fails to pay a previously assessed fine, costs, or restitution and the judge determines that extending the period of supervision increases the likelihood that the defendant will fully pay the fine, costs, or restitution. A court may extend a period of community supervision under this section at any time during the period of supervision or, if a motion for revocation of community supervision is filed before the period of supervision ends, before the first anniversary of the date on which the period of supervision expires.

(d) A judge may impose a sanction on a defendant described by Subsection (a)(3) of this section by increasing the fine imposed on the defendant. The original fine imposed on the defendant and an increase in the fine imposed under this subsection may not exceed the maximum fine for the offense for which the defendant was sentenced. The judge shall deposit money received from an increase in the defendant's fine under this subsection in the special fund of the county treasury to be used for the same purposes for which state aid may be used under Chapter 76, Government Code.

Sec. 22A. Extending Supervision Period for Sex Offenders.

(a) If a defendant is placed on community supervision after receiving a grant of deferred adjudication for or being convicted of an offense under Section 21.11, 22.011, or 22.021, Penal Code, at any time during the period of community supervision, the judge may extend the period of community supervision as provided by this section.

(b) If at a hearing at which the defendant is provided the same rights as are provided a defendant at a hearing under Section 21 the judge determines that the defendant has not sufficiently demonstrated a commitment to avoid future criminal behavior and that the release of the defendant from supervision would endanger the public, the judge may extend the period of supervision for a period not to exceed 10 additional years.

(c) A judge may extend a period of community supervision under this section only once; however, the judge may extend a period of community supervision for a defendant under both Section 22(c) and this section, and the prohibition in Section 22(c) against a period of community supervision in a felony case exceeding 10 years does not apply to a defendant for whom community supervision is increased under this section or under both Section 22(c) and this section.

Sec. 23. Revocation.

(a) If community supervision is revoked after a hearing under Section 21 of this article, the judge may proceed to dispose of the case as if there had been no community supervision, or if the judge determines that the best interests of society and the defendant would be served by a shorter term of confinement, reduce the term of confinement originally assessed to any term of confinement not less than the minimum prescribed for the offense of which the defendant was convicted. The judge shall enter the amount of restitution or reparation owed by the defendant on the date of revocation in the judgment in the case.

(b) No part of the time that the defendant is on community supervision shall be considered as any part of the time that he shall be sentenced to serve. The right of the defendant to appeal for a review of the conviction and punishment, as provided by law, shall be accorded the defendant at the time he is placed on community supervision. When he is notified that his community supervision is revoked for violation of the conditions of community supervision and he is called on to serve a sentence in a jail or in the institutional division of the Texas Department of Criminal Justice, he may appeal the revocation.

A few of the provisions of Texas law that set forth the standards for imposing penalties for failing to perform, or fulfill the agreement by District Attorneys, District Clerks, judges in the presiding court of competent jurisdiction, and Community Supervision and Correction Department Directors and Officers include, but are not limited to:

PART I--CODE OF CRIMINAL PROCEDURE OF 1965

Code of Criminal Procedure

CHAPTER 60--CRIMINAL HISTORY RECORD SYSTEM

Art. 60.06. Duties of agencies.

(a) Each criminal justice agency shall:

(1) compile and maintain records needed for reporting data required by the Texas Department of Criminal Justice and the Department of Public Safety;

(2) transmit to the Texas Department of Criminal Justice and the Department of Public Safety, when and in the manner the Texas Department of Criminal Justice and the Department of Public Safety direct, all data required by the Texas Department of Criminal Justice and the Department of Public Safety;

(3) give the Department of Public Safety and the Texas Department of Criminal Justice or their accredited agents access to the agency for the purpose of inspection to determine the completeness and accuracy of data reported;

(4) cooperate with the Department of Public Safety and the Texas Department of Criminal Justice so that the Department of Public Safety and the Texas Department of Criminal Justice may properly and efficiently perform their duties under this chapter; and

(5) cooperate with the Department of Public Safety and the Texas Department of Criminal Justice to identify and eliminate redundant reporting of information to the criminal justice information system.

(b) Information on an individual that consists of an identifiable description and notation of an arrest, detention, indictment, information, or other formal criminal charge and a disposition of the charge, including sentencing, correctional supervision, and release that is collected and compiled by the Department of Public Safety and the Texas Department of Criminal Justice from criminal justice agencies and maintained in a central location is not subject to public disclosure except as authorized by federal or state law or regulation.

(c) Subsection (b) of this section does not apply to a document maintained by a criminal justice agency that is the source of information collected by the Department of Public Safety or the Texas Department of Criminal Justice. Each criminal justice agency shall retain documents described by this subsection.

(d) An optical disk or other technology may be used instead of microfilm as a medium to store information if allowed by the applicable state laws or regulations relating to the archiving of state agency information.

(e) An official of an agency may not intentionally conceal or destroy any record with intent to violate this section.

(f) The duties imposed on a criminal justice agency under this article are also imposed on district court and county court clerks.

Added by Acts 1989, 71st Leg., ch. 785, Sec. 6.01, eff. Sept. 1, 1989. Amended by Acts 1990, 71st Leg., 6th C.S., ch. 25, Sec. 28, eff. June 18, 1990; Subsec. (a) amended by Acts 1995, 74th Leg., ch. 750, Sec. 1, eff. Aug. 28, 1995.

Art. 60.08. Reporting.

(a) The Department of Public Safety and the Texas Department of Criminal Justice shall, by rule, develop reporting procedures that:

(1) ensure that the offender processing data is reported from the time an offender is arrested until the time an offender is released; and

(2) provide measures and policies designed to identify and eliminate redundant reporting of information to the criminal justice information system.

(b) The arresting agency shall prepare a uniform incident fingerprint card and initiate the reporting process for each offender charged with a felony or a misdemeanor not punishable by fine only.

(c) The clerk of the court exercising jurisdiction over a case shall report the disposition of the case to the Department of Public Safety.

(d) Except as otherwise required by applicable state laws or regulations, information or data required by this chapter to be reported to the Texas Department of Criminal Justice or the Department of Public Safety shall be reported promptly but not later than the 30th day after the date on which the information or data is received by the agency responsible for reporting it except in the case of an arrest. An offender's arrest shall be reported to the Department of Public Safety not later than the seventh day after the date of the arrest.

(e) A court that orders the release of an offender under Section 6(a), Article 42.12, of this code at a time when the offender is under a bench warrant and not physically imprisoned in the institutional division shall report the release to the institutional division of the Texas Department of Criminal Justice not later than the seventh day after the date of the release.

Added by Acts 1989, 71st Leg., ch. 785, Sec. 6.01, eff. Sept. 1, 1989. Amended by Acts 1990, 71st Leg., 6th C.S., ch. 25, Sec. 28, eff. June 18, 1990; Subsec. (a) amended by Acts 1995, 74th Leg., ch. 750, Sec. 2, eff. Aug. 28, 1995.

Penal Code

CHAPTER 39. ABUSE OF OFFICE

Sec. 39.06. Misuse of Official Information

(a) A public servant commits an offense if, in reliance on information to which he has access by virtue of his office or employment and that has not been made public, he:

(1) acquires or aids another to acquire a pecuniary interest in any property, transaction, or enterprise that may be affected by the information;

(2) speculates or aids another to speculate on the basis of the information; or

(3) as a public servant, including as a principal of a school, coerces another into suppressing or failing to report that information to a law enforcement agency.

(b) A public servant commits an offense if with intent to obtain a benefit or with intent to harm or defraud another, he discloses or uses information for a nongovernmental purpose that:

(1) he has access to by means of his office or employment; and

(2) has not been made public.

(c) A person commits an offense if, with intent to obtain a benefit or with intent to harm or defraud another, he solicits or receives from a public servant information that:

(1) the public servant has access to by means of his office or employment; and

(2) has not been made public.

(d) In this section, "information that has not been made public" means any information to which the public does not generally have access, and that is prohibited from disclosure under Chapter 552, Government Code.

(e) Except as provided by Subsection (f), an offense under this section is a felony of the third degree.

(f) An offense under Subsection (a)(3) is a Class C misdemeanor.

Acts 1973, 63rd Leg., p. 883, ch. 399, Sec. 1, eff. Jan. 1, 1974. Amended by Acts 1983, 68th Leg., p. 3243, ch. 558, Sec. 9, eff. Sept. 1, 1983; Acts 1987, 70th Leg., ch. 30, Sec. 1, eff. Sept. 1, 1987; Acts 1987, 70th Leg., 2nd C.S., ch. 43, Sec. 3, eff. Oct. 20, 1987; Acts 1989, 71st Leg., ch. 927, Sec. 1, eff. Aug. 28, 1989. Renumbered from Sec. 39.03 and amended by Acts 1993, 73rd Leg., ch. 900, Sec. 1.01, eff. Sept. 1, 1994.

Amended by Acts 1995, 74th Leg., ch. 76, Sec. 5.95(90), eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 76, Sec. 14.52, eff. Sept. 1, 1995

PART I--CODE OF CRIMINAL PROCEDURE OF 1965

Code of Criminal Procedure

CHAPTER 61--COMPILATION OF INFORMATION PERTAINING TO A CRIMINAL COMBINATION

Art. 61.03. Release of information.

(a) A criminal justice agency that maintains criminal information under this chapter may release the information on request to:

(1) another criminal justice agency;

(2) a court; or

(3) a defendant in a criminal proceeding who is entitled to the discovery of the information under Chapter 39.

(b) A criminal justice agency or court may use information received under this article only for the administration of criminal justice. A defendant may use information received under this article only for a defense in a criminal proceeding.

(c) A local criminal justice agency may not send information collected under this chapter to a statewide database.

(d) A local criminal justice agency may send information collected under this chapter to a regional database.

Added by Acts 1995, 74th Leg., ch. 671, Sec. 1, eff. Aug. 28, 1995. Subsec. (d) added by Acts 1997, 75th Leg., ch. 898, Sec. 1, eff. Sept. 1, 1997.

Art. 61.05. Unauthorized use or release of criminal information.

(a) A person commits an offense if the person knowingly:

(1) uses criminal information obtained under this chapter for an unauthorized purpose; or

(2) releases the information to a person who is not entitled to the information.

(b) An offense under this article is a Class A misdemeanor.

Added by Acts 1995, 74th Leg., ch. 671, Sec. 1, eff. Aug. 28, 1995.

Penal Code

CHAPTER 39. ABUSE OF OFFICE

Sec. 39.03. Official Oppression

(a) A public servant acting under color of his office or employment commits an offense if he:

(1) intentionally subjects another to mistreatment or to arrest, detention, search, seizure, dispossession, assessment, or lien that he knows is unlawful;

(2) intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, power, or immunity, knowing his conduct is unlawful; or

(3) intentionally subjects another to sexual harassment.

(b) For purposes of this section, a public servant acts under color of his office or employment if he acts or purports to act in an official capacity or takes advantage of such actual or purported capacity.

(c) In this section, "sexual harassment" means unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, submission to which is made a term or condition of a person's exercise or enjoyment of any right, privilege, power, or immunity, either explicitly or implicitly.

(d) An offense under this section is a Class A misdemeanor.

Acts 1973, 63rd Leg., p. 883, ch. 399, Sec. 1, eff. Jan. 1, 1974. Amended by Acts 1989, 71st Leg., ch. 1217, Sec. 1, eff. Sept. 1, 1989; Acts 1991, 72nd Leg., ch. 16, Sec. 19.01(34), eff. Aug. 26, 1991. Renumbered from Sec. 39.02 by Acts 1993, 73rd Leg., ch. 900, Sec. 1.01, eff. Sept. 1, 1994.

Therefore it is A FINDING AND CONCLUSION OF THIS REPORT THAT: THE LAWS THAT DETERMINE THE PENALTIES FOR FAILURE TO PERFORM, OR FULFILL, THE TERMS OF THE AGREEMENT, INCLUDE THE TEXAS PENAL CODE, THE TEXAS GOVERNMENT CODE, THE TEXAS ADMINISTRATIVE CODE, THE TEXAS CODE OF CRIMINAL PROCEDURE, AND THE BUSINESS AND COMMERCE CODE OF THE STATE OF TEXAS. IT IS ALSO A FINDING AND CONCLUSION OF THIS REPORT THAT: THE PENALTIES FOR FAILURE TO PERFORM, OR FULFILL, THE TERMS OF THE AGREEMENT ARE DISPROPORTIONANT, AND DO NOT EXTEND THE SAME PROTECTION AND GUARANTEE OF DUE PROCESS TO DEFENDANTS AS THE PROTECTIONS THAT ARE EXTENDED TO DISTRICT ATTORNEYS, DISTRICT CLERKS, PRESIDING JUDGES IN THE COURTS OF COMPETENT JURISDICTION, AND COMMUNITY SUPERVISION AND CORRECTION DEPARTMENT DIRECTORS AND OFFICERS.

Are the provisions of the agreement binding on all parties entering into the agreement?

The Universal Commercial Code determines the binding nature of a contract under Texas law. This statute states:

Business and Commerce Code

TITLE 1. UNIFORM COMMERCIAL CODE

CHAPTER 1. GENERAL PROVISIONS

SUBCHAPTER A. SHORT TITLE, CONSTRUCTION, APPLICATION AND SUBJECT MATTER OF THE TITLE

This title may be cited as Uniform Commercial Code.

Acts 1967, 60th Leg., p. 2343, ch. 785, Sec. 1, eff. Sept. 1, 1967.

Sec. 1.102. Purposes; Rules of Construction; Variation by Agreement.

- (a) This title shall be liberally construed and applied to promote its underlying purposes and policies.
- (b) Underlying purposes and policies of this title are
 - (1) to simplify, clarify and modernize the law governing commercial transactions;
 - (2) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
 - (3) to make uniform the law among the various jurisdictions.
- (c) The effect of provisions of this title may be varied by agreement, except as otherwise provided in this title and except that the obligations of good faith, diligence, reasonableness and care prescribed by this title may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.
- (d) The presence in certain provisions of this title of the words "unless otherwise agreed" or words of similar import does not imply that the effect of other provisions may not be varied by agreement under Subsection (c).
- (e) In this title unless the context otherwise requires
 - (1) words in the singular number include the plural, and in the plural include the singular;
 - (2) words of the masculine gender include the feminine and the neuter, and when the sense so indicates words of the neuter gender may refer to any gender.

Acts 1967, 60th Leg., p. 2343, ch. 785, Sec. 1, eff. Sept. 1, 1967.

Sec. 1.103. Supplementary General Principles of Law Applicable.

Unless displaced by the particular provisions of this title, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

Acts 1967, 60th Leg., p. 2343, ch. 785, Sec. 1, eff. Sept. 1, 1967.

Sec. 1.104. Construction Against Implicit Repeal.

This title being a general body of law intended as a unified coverage of its subject matter, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction can reasonably be avoided.

Acts 1967, 60th Leg., p. 2343, ch. 785, Sec. 1, eff. Sept. 1, 1967.

Sec. 1.105. Territorial Application of the Title; Parties' Power to Choose Applicable Law.

(a) Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this title applies to transactions bearing an appropriate relation to this state.

(b) Where one of the following provisions of this title specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:

Rights of creditors against sold goods. Section 2.402.

Applicability of the chapter on Leases. Sections 2A.105 and 2A.106.

Applicability of the chapter on Bank Deposits and Collections. Section 4.102.

Governing law in the chapter on Funds Transfers. Section 4A.507.

Applicability of the chapter on Investment Securities. Section 8.110.

Perfection provisions of the chapter on Secured Transactions. Section 9.103.

(c) If a transaction that is subject to this title is a qualified transaction," as defined in Section 35.51 of this code, then except as provided in Subsection (b) of this section, Section 35.51 governs the effect of an agreement by the parties that the law of a particular jurisdiction governs an issue relating to the transaction or that the law of a particular jurisdiction governs the interpretation or construction of an agreement relating to the transaction or a provision of the agreement.

Acts 1967, 60th Leg., p. 2343, ch. 785, Sec. 1, eff. Sept. 1, 1967. Amended by Acts 1973, 63rd Leg., p. 997, ch. 400, Sec. 1, eff. Jan. 1, 1974; Acts 1993, 73rd Leg., ch. 570, Sec. 2, eff. Sept. 1, 1993.

Amended by Acts 1995, 74th Leg., ch. 962, Sec. 15, eff. Sept. 1, 1995.

Sec. 1.106. Remedies to be Liberally Administered.

(a) The remedies provided by this title shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this title or by other rule of law.

(b) Any right or obligation declared by this title is enforceable by action unless the provision declaring it specifies a different and limited effect.

Acts 1967, 60th Leg., p. 2343, ch. 785, Sec. 1, eff. Sept. 1, 1967.

Sec. 1.107. Waiver or Renunciation of Claim or Right After Breach.

Any claim or right arising out of an alleged breach can be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party.

Acts 1967, 60th Leg., p. 2343, ch. 785, Sec. 1, eff. Sept. 1, 1967.

Sec. 1.108. Severability.

If any provision or clause of this title or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the title which can be given effect without the invalid provision or application, and to this end the provisions of this title are declared to be severable.

Acts 1967, 60th Leg., p. 2343, ch. 785, Sec. 1, eff. Sept. 1, 1967.

Sec. 1.109. Section Captions.

Section captions are parts of this title.

Acts 1967, 60th Leg., p. 2343, ch. 785, Sec. 1, eff. Sept. 1, 1967.

SUBCHAPTER B. GENERAL DEFINITIONS AND PRINCIPLES OF INTERPRETATION

Sec. 1.201. General Definitions.

Subject to additional definitions contained in the subsequent chapters of this title which are applicable to specific chapters or subchapters thereof, and unless the context otherwise requires, in this title:

(1) "Action" in the sense of a judicial proceeding includes recoupment, counterclaim, set-off, suit in equity and any other proceedings in which rights are determined.

(2) "Aggrieved party" means a party entitled to resort to a remedy.

(3) "Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this title (Sections 1.205 and 2.208). Whether an agreement has legal consequences is determined by the provisions of this title, if applicable; otherwise by the law of contracts (Section 1.103). (Compare "Contract".)

(4) "Bank" means any person engaged in the business of banking and solely for the purposes of Sections 3 and 4 of this Act includes any depository institution as defined by federal law.

(5) "Bearer" means the person in possession of an instrument, document of title, or certificated security payable to bearer or indorsed in blank.

(6) "Bill of lading" means a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods, and includes an airbill. "Airbill" means a document serving for air transportation as a bill of lading does for marine or rail transportation, and includes an air consignment note or air waybill.

(7) "Branch" includes a separately incorporated foreign branch of a bank.

(8) "Burden of establishing" a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its non-existence.

(9) "Buyer in ordinary course of business" means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. All persons who sell minerals or the like (including oil and gas) at wellhead or minehead shall be deemed to be persons in the business of selling goods of that kind. "Buying" may be for cash or by exchange of other property or on secured or unsecured

credit and includes receiving goods or documents of title under a pre-existing contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

(10) "Conspicuous": A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: Non-Negotiable Bill of Lading) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous". Whether a term or clause is "conspicuous" or not is for decision by the court.

(11) "Contract" means the total legal obligation which results from the parties' agreement as affected by this title and any other applicable rules of law. (Compare "Agreement".)

(12) "Creditor" includes a general creditor, a secured creditor, a lien creditor and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity and an executor or administrator of an insolvent debtor's or assignor's estate.

(13) "Defendant" includes a person in the position of defendant in a cross-action or counterclaim.

(14) "Delivery" with respect to instruments, documents of title, chattel paper, or certificated securities means voluntary transfer of possession.

(15) "Document of title" includes bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers. To be a document of title a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.

(16) "Fault" means wrongful act, omission or breach.

(17) "Fungible" with respect to goods or securities means goods or securities of which any unit is, by nature or usage of trade, the equivalent of any other like unit. Goods which are not fungible shall be deemed fungible for the purposes of this title to the extent that under a particular agreement or document unlike units are treated as equivalents.

(18) "Genuine" means free of forgery or counterfeiting.

(19) "Good faith" means honesty in fact in the conduct or transaction concerned.

(20) "Holder" with respect to a negotiable instrument means the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession. "Holder" with respect to a document of title means the person in possession if the goods are deliverable to bearer or to the order of the person in possession.

(21) To "honor" is to pay or to accept and pay, or where a credit so engages to purchase or discount a draft complying with the terms of the credit.

(22) "Insolvency proceedings" includes any assignment for the benefit of creditors or other proceedings intended to liquidate or rehabilitate the estate of the person involved.

(23) A person is "insolvent" who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of the federal bankruptcy law.

(24) "Money" means a medium of exchange authorized or adopted by a domestic or foreign government and includes a monetary unit of account established by an intergovernmental organization or by agreement between two or more nations.

(25) A person has "notice" of a fact when

(A) he has actual knowledge of it; or

(B) he has received a notice or notification of it; or

(C) from all the facts and circumstances known to him at the time in question he has reason to know that it exists.

A person "knows" or has "knowledge" of a fact when he has actual knowledge of it. "Discover" or "learn" or a word or phrase of similar import refers to knowledge rather than to reason to know. The time and circumstances under which a notice or notification may cease to be effective are not determined by this title.

(26) A person "notifies" or "gives" a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it. A person "receives" a notice or notification when

(A) it comes to his attention; or

(B) it is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications.

(27) Notice, knowledge or a notice or notification received by an organization is effective for a particular transaction from the time when it is brought to the attention of the individual conducting that transaction, and in any event from the time when it would have been brought to his attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless such communication is part of his regular duties or unless he has reason to know of the transaction and that the transaction would be materially affected by the information.

(28) "Organization" includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal or commercial entity.

(29) "Party", as distinct from "third party", means a person who has engaged in a transaction or made an agreement within this title.

(30) "Person" includes an individual or an organization (See Section 1.102).

(31) "Presumption" or "presumed" means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its non-existence.

(32) "Purchase" includes taking by sale, discount, negotiation, mortgage, pledge, lien, issue or reissue, gift or any other voluntary transaction creating an interest in property.

(33) "Purchaser" means a person who takes by purchase.

(34) "Remedy" means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.

(35) "Representative" includes an agent, an officer of a corporation or association, and a trustee, executor or administrator of an estate, or any other person empowered to act for another.

(36) "Rights" includes remedies.

(37)(A) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (Section 2.401) is limited in effect to a reservation of a "security interest." The term also includes any interest of a buyer of accounts or chattel paper which is subject to Chapter 9. The special property interest of a buyer of goods on identification of such goods to a contract for sale under Section 2.401 is not a "security interest", but a buyer may also acquire a "security interest" by complying with Chapter 9. Unless a consignment is intended

as security, reservation of title thereunder is not a "security interest" but a consignment in any event is subject to the provisions on consignment sales (Section 2.326).

(B) Whether a transaction creates a lease or security interest is determined by the facts of each case; however, a transaction creates a security interest if the consideration the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee, and:

(i) the original term of the lease is equal to or greater than the remaining economic life of the goods;

(ii) the lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods;

(iii) the lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement; or

(iv) the lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement.

(C) A transaction does not create a security interest merely because it provides that:

(i) the present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the goods is substantially equal to or is greater than the fair market value of the goods at the time the lease is entered into;

(ii) the lessee assumes risk of loss of the goods or agrees to pay taxes, insurance, filing, recording, or registration fees or service or maintenance costs with respect to the goods;

(iii) the lessee has an option to renew the lease or to become the owner of the goods;

(iv) the lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market rent for the use of the goods for the term of the renewal at the time the option is to be performed; or

(v) the lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed.

(D) For the purposes of this subdivision, additional consideration is nominal if it is less than the lessee's reasonably predictable cost of performing under the lease agreement if the option is not exercised. Additional consideration is not nominal if:

(i) when the option to renew the lease is granted to the lessee, the rent is stated to be the fair market rent for the use of the goods for the term of the renewal determined at the time the option is to be performed; or

(ii) when the option to become the owner of the goods is granted to the lessee, the price is stated to be the fair market value of the goods determined at the time the option is to be performed.

(E) For the purposes of this subdivision, "reasonably predictable" and "remaining economic life of the goods" are to be determined with reference to the facts and circumstances at the time the transaction is entered into.

(F) For the purposes of this subdivision, "present value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain. The discount is determined by the interest rate specified by the parties if the rate is not manifestly unreasonable at the time the transaction is entered into. Otherwise, the discount is determined by a commercially reasonable rate that takes into account the facts and circumstances of each case at the time the transaction was entered into.

(38) "Send" in connection with any writing or notice means to deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and in the case of an instrument to an address specified thereon or otherwise agreed, or if there be none to any address

reasonable under the circumstances. The receipt of any writing or notice within the time at which it would have arrived if properly sent has the effect of a proper sending.

(39) "Signed" includes any symbol executed or adopted by a party with present intention to authenticate a writing.

(40) "Surety" includes guarantor.

(41) "Telegram" includes a message transmitted by radio, teletype, cable, any mechanical method of transmission, or the like.

(42) "Term" means that portion of an agreement which relates to a particular matter.

(43) "Unauthorized" signature means one made without actual, implied, or apparent authority and includes a forgery.

(44) "Value". Except as otherwise provided with respect to negotiable instruments and bank collections (Sections 3.303, 4.210, and 4.211) a person gives "value" for rights if he acquires them:

(A) in return for a binding commitment to extend credit or for the extension of immediately available credit whether or not drawn upon and whether or not a charge-back is provided for in the event of difficulties in collection;

(B) as security for or in total or partial satisfaction of a pre-existing claim;

(C) by accepting delivery pursuant to a pre-existing contract for purchase; or

(D) generally, in return for any consideration sufficient to support a simple contract.

(45) "Warehouse receipt" means a receipt issued by a person engaged in the business of storing goods for hire.

(46) "Written" or "writing" includes printing, typewriting or any other intentional reduction to tangible form.

Acts 1967, 60th Leg., p. 2343, ch. 785, Sec. 1, eff. Sept. 1, 1967. Amended by Acts 1973, 63rd Leg., p. 997, ch. 400, Sec. 2, Jan. 1, 1974; Acts 1983, 68th Leg., p. 1535, ch. 290, Sec. 12, eff. Aug. 29, 1983; Acts 1983, 68th Leg., p. 2575, ch. 442, Sec. 12, eff. Sept. 1, 1983; Acts 1989, 71st Leg., ch. 846, Sec. 1, eff. Sept. 1, 1989.

Amended by Acts 1995, 74th Leg., ch. 921, Sec. 2, eff. Jan. 1, 1996.

Sec. 1.202. Prima Facie Evidence by Third Party Documents.

A document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher's or inspector's certificate, consular invoice, or any other document authorized or required by the contract to be issued by a third party shall be prima facie evidence of its own authenticity and genuineness and of the facts stated in the document by the third party.

Acts 1967, 60th Leg., p. 2343, ch. 785, Sec. 1, eff. Sept. 1, 1967.

Sec. 1.203. Obligation of Good Faith.

Every contract or duty within this title imposes an obligation of good faith in its performance or enforcement.

Acts 1967, 60th Leg., p. 2343, ch. 785, Sec. 1, eff. Sept. 1, 1967.

Sec. 1.204. Time; Reasonable Time; "Seasonably".

(a) Whenever this title requires any action to be taken within a reasonable time, any time which is not manifestly unreasonable may be fixed by agreement.

(b) What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action.

(c) An action is taken "seasonably" when it is taken at or within the time agreed or if no time is agreed at or within a reasonable time.

Acts 1967, 60th Leg., p. 2343, ch. 785, Sec. 1, eff. Sept. 1, 1967.

Sec. 1.205. Course of Dealing and Usage of Trade.

(a) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(b) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.

(c) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.

(d) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

(e) An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.

(f) Evidence of a relevant usage of trade offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter.

Acts 1967, 60th Leg., p. 2343, ch. 785, Sec. 1, eff. Sept. 1, 1967.

Sec. 1.206. Statute of Frauds for Kinds of Personal Property Not Otherwise Covered.

(a) Except in the cases described in Subsection (b) of this section a contract for the sale of personal property is not enforceable by way of action or defense beyond \$5,000 in amount or value of remedy unless there is some writing which indicates that a contract for sale has been made between the parties at a defined or stated price, reasonably identifies the subject matter, and is signed by the party against whom enforcement is sought or by his authorized agent.

(b) Subsection (a) of this section does not apply to contracts for the sale of goods (Section 2.201) nor of securities (Section 8.113) nor to security agreements (Section 9.203).

Acts 1967, 60th Leg., p. 2343, ch. 785, Sec. 1, eff. Sept. 1, 1967.

Amended by Acts 1995, 74th Leg., ch. 962, Sec. 16, eff. Sept. 1, 1995.

Sec. 1.207. Performance or Acceptance Under Reservation of Rights.

(a) A party who, with explicit reservation of rights, performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as "without prejudice", "under protest", or the like are sufficient.

(b) Subsection (a) does not apply to an accord and satisfaction.

Acts 1967, 60th Leg., p. 2343, ch. 785, Sec. 1, eff. Sept. 1, 1967.

Amended by Acts 1995, 74th Leg., ch. 921, Sec. 3, eff. Jan. 1, 1996.

Sec. 1.208. Option to Accelerate at Will.

A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when he deems himself insecure" or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised.

Acts 1967, 60th Leg., p. 2343, ch. 785, Sec. 1, eff. Sept. 1, 1967

Therefore it is A FINDING AND CONCLUSION OF THIS REPORT THAT: THE TERMS OF THE AGREEMENT ENTERED INTO AND DEFINED AS "DEFERRED ADJUDICATION" ARE BINDING UPON ALL PARTIES, AND THAT ANY PARTY MAY SEEK A REDRESS OF A GRIEVANCE IN THE CIVIL COURTS OF THE STATE OF TEXAS TO ENFORCE ANY PROVISION OF THE AGREEMENT DEFINED AS "DEFERRED ADJUDICATION" UNDER THE PROVISIONS OF THE BUSINESS AND COMMERCE CODE OF THE STATE OF TEXAS.

What constitutes satisfactory performance in complying with the terms of the agreement?

It is a FINDING AND CONCLUSION OF THIS REPORT THAT: SATISFACTORY PERFORMANCE IN COMPLYING WITH THE TERMS OF THE AGREEMENT IS DETERMINED BY THE JUDGE IN THE CASE ACKNOWLEDGING AND RECORDING THE FACT THAT THE TERM OF COMMUNITY SUPERVISION HAS EXPIRED OR HAS BEEN ENDED BY THE ORDER OF THE JUDGE IN THE CASE, AND THAT THESE FACTS ARE ENTERED INTO THE COURT'S RECORD OF THE CASE, AND THAT THIS INFORMATION IS COMMUNICATED TO THE GOVERNMENTAL BODIES RESPONSIBLE FOR KEEPING A RECORD OF SUCH FACTS WITHIN THE TIME FRAME ESTABLISHED BY STATUTE, AND THAT THE ACKNOWLEDGED LEGAL STATUS OF THE CASE AND THE DEFENDANT IN THE CASE IS DISMISSED BY THE STATE OF TEXAS, AND THAT THIS ACKNOWLEDGED LEGAL STATUS IS ENTERED INTO THE COURT'S RECORD OF THE CASE, AND THAT THIS INFORMATION IS COMMUNICATED TO THE GOVERNMENTAL BODIES RESPONSIBLE FOR KEEPING A RECORD OF SUCH FACTS WITHIN THE TIME FRAME ESTABLISHED BY STATUTE, AND THAT UPON THE EXPIRATION OF THE AGREEMENT, OR THE ORDER OF THE PRESIDING JUDGE IN THE JURISDICTION OF COMPETENT AUTHORITY THAT THE TERM OF THE AGREEMENT HAS EXPIRED, ANY CIVIL RIGHTS RELINQUISHED BY THE DEFENDANT DURING THE TERM OF THE AGREEMENT SHALL BE FULLY RESTORED AS THEY EXISTED PRIOR TO THE ESTABLISHMENT OF THE AGREEMENT, WITHOUT EXCEPTION.

How many of these agreements have been completely fulfilled by all parties to the agreement?

It is a FINDING AND CONCLUSION OF THIS REPORT THAT: IN THE MATTER OF THE 102,598 DEFENDANTS LISTED IN THE RECORDS PROVIDED BY THE TEXAS DEPARTMENT OF PUBLIC SAFETY WITH FELONY CASES, WHO COMPLETELY FULFILLED THEIR OBLIGATIONS UNDER THE "DEFERRED ADJUDICATION" CONTRACT ENTERED INTO WITH VARIOUS DISTRICT ATTORNEYS, JUDGES PRESIDING IN THE COURT OF COMPETENT JURISDICTION, DISTRICT CLERKS RESPONSIBLE FOR THE OFFICIAL RECORDING OF THE COURT'S RECORD, AND COMMUNITY SUPERVISION AND CORRECTION DEPARTMENT DIRECTORS AND OFFICERS, ONLY 3,932 DEFENDANTS, OR 3.83% OF THE TOTAL NUMBER OF DEFENDANTS WERE PARTICIPANTS IN A "DEFERRED ADJUDICATION" CONTRACT IN WHICH THE REMAINING PARTIES TO THE AGREEMENT, NAMELY, THE VARIOUS DISTRICT ATTORNEYS, JUDGES PRESIDING IN THE COURT OF COMPETENT JURISDICTION, DISTRICT CLERKS RESPONSIBLE FOR THE OFFICIAL RECORDING OF THE COURT'S RECORD, AND COMMUNITY SUPERVISION AND CORRECTION DEPARTMENT DIRECTORS AND OFFICERS, COMPLETELY FULFILLED THEIR OBLIGATIONS UNDER THE "DEFERRED ADJUDICATION" CONTRACT ENTERED INTO WITH THESE DEFENDANTS.

Is the agreement a public record once the defendant has completed his obligations under the agreement?

The Texas Department of Public Safety provided a copy of a page from its Policy and Procedures Manual, which includes section 4.2.18 (SPECIAL CASES: 1. and 2.) located on page 4-3, that dictates the procedure by which a court's disposition of a successfully completed term of a "deferred adjudication" contract, which results in a discharge of the defendant from the court's jurisdiction and the dismissal of the charge or charges, or the order of a

judge which orders the expiration of a term of a successfully completed term of a “deferred adjudication” contract which results in a discharge of the defendant from the court’s jurisdiction and the dismissal of the charge or charges, should be entered into the State of Texas’ Official Repository of Criminal History Record Information by personnel attached to the Criminal Records Service of the Texas Department of Public Safety. These procedures are listed below verbatim:

SPECIAL CASES: 1. states the following:

1. Upon receipt of official letter notifying that a subject’s prior conviction has been changed to Dismissed status, a 4213 canned message will be utilized. This use of CPL field must be in format: (4213) (date) (space) (court). The following canned message will then be reproduced on Rap sheets. “Case dismissed by (court) on (date). Guilt finding set aside. Articles 42.12 Sec. 7 or 42.13 Sec. 7(b) CCP allows use for limited purposes only.”

SPECIAL CASES: 2. states the following:

2. If by judicial decree a court dismisses a case this will be noted in CPL field. If a court date is not given, write out “Dismissed” in CPL. If a court date is given, format is (412) (date) (space) (court). The following canned message will be produced on the Rap sheet. This is to be used only with drug related charges. “Case dismissed by (court) on (date). This conviction or proceeding is a non-public record and is not to be used for any purpose except as outlined in Sec. 4.12 of Art. 4476-15 VCS.” In both cases, only required data will be entered in the CPL field. Nothing will be entered in the CPN field. If something has been entered, delete it.

Chapter 552 of the Texas Government Code Section 552.022 (17) defines a category of information contained that is public information as, “information that is also contained in a public court record”. Once a defendant has completed their obligations under a “deferred adjudication” contract, the official record of the disposition of the court should read “dismissed”. Based upon this information and prevailing statutes, it is A FINDING AND CONCLUSION OF THIS REPORT THAT: THE “DEFERRED ADJUDICATION” CONTRACT, AND ANY REFERENCES TO THE “DEFERRED ADJUDICATION” CONTRACT, INCLUDING ANY MODIFICATIONS TO THE CONTRACT, COURT FILINGS AND ORDERS OF THE COURT DURING ITS TERM, UPON THE EXPIRATION OF THE TERM OF THE CONTRACT, IS NOT PUBLIC INFORMATION AS DEFINED BY TEXAS GOVERNMENT CODE CHAPTER 552, SECTION 552.022 (17), ALTHOUGH THE DISMISSAL OF THE CHARGE OR CHARGES INVOLVED IN THE “DEFERRED ADJUDICATION” CONTRACT IS A PUBLIC RECORD, THE OFFICIAL COURT ENTRY OF THE DISMISSAL AS THE FINAL DISPOSITION OF THE COURT IS THE ONLY OFFICIAL RECORD THAT, UNDER EXISTING TEXAS LAW, MAY BE RELEASED TO THE PUBLIC UNDER THE PROVISIONS OF CHAPTER 552 OF THE TEXAS GOVERNMENT CODE.

Are there any agreements that have been misrepresented, or been recorded inaccurately?

It is A FINDING AND CONCLUSION OF THIS REPORT THAT: THOUSANDS OF DEFENDANTS WHO HAVE SUCCESSFULLY FULFILLED THEIR OBLIGATIONS AS REQUIRED UNDER THE TERMS OF THEIR INDIVIDUAL “DEFERRED ADJUDICATION” CONTRACTS, ACCORDING TO THE RECORDS PROVIDED BY THE TEXAS DEPARTMENT OF PUBLIC SAFETY, HAVE PUBLIC RECORDS AVAILABLE FOR RELEASE TO THE GENERAL PUBLIC UNDER THE PROVISIONS OF CHAPTER 552 OF THE TEXAS GOVERNMENT CODE THAT STATE THAT THEY ARE STILL UNDER THE SUPERVISION OF THE COURT UNDER THE TERMS OF THEIR INDIVIDUAL “DEFERRED ADJUDICATION” CONTRACTS, OR THAT THEY HAVE BEEN CONVICTED OF CHARGES WHEN A CONVICTION HAS NOT OCCURRED, AND OTHER SIGNIFICANT BREACHES OF CONTRACT BY THE REMAINING PARTIES TO THE AGREEMENT, NAMELY, THE VARIOUS DISTRICT ATTORNEYS, JUDGES PRESIDING IN THE COURT OF COMPETENT JURISDICTION, DISTRICT CLERKS RESPONSIBLE FOR THE OFFICIAL RECORDING OF THE COURT’S RECORD, AND COMMUNITY SUPERVISION AND CORRECTION DEPARTMENT DIRECTORS AND OFFICERS, THAT HAVE RESULTED IN A VIOLATION OF THE CIVIL RIGHTS OF THE DEFENDANTS THROUGH VIOLATION OF ARTICLE I, SECTIONS 3A, 13, AND 19 OF THE CONSTITUTION OF THE STATE OF TEXAS AND THAT THOUSANDS OF THESE “DEFERRED ADJUDICATION” CONTRACTS HAVE BEEN MISREPRESENTED AND RECORDED INACCURATELY.

TEXAS DEPARTMENT OF PUBLIC SAFETY ISSUES

The Texas Department of Public Safety has issued an OFFICIAL STATEMENT CONCERNING ITS RESPONSIBILITY IN INSURING THE ACCURACY OF THE INFORMATION IT RETAINS OF CRIMINAL HISTORY RECORD INFORMATION:

The Texas Department of Public Safety is the repository of criminal history records in the state of Texas, as provided by Article 60, Code of Criminal Procedure. The ultimate responsibility for the accuracy of criminal history records lies with the agency submitting the records. The Department employs computer edits, field service representatives, and other reasonable controls to assist agencies in ensuring the accuracy of submitted records.

The Texas Department of Public Safety also provided additional information concerning its staff, budget, and ability to perform its assigned responsibilities in regards the compilation and storage of Criminal History Record Information submitted to it by criminal justice agencies, courts, County and District Clerks, and other governmental bodies authorized to submit such information. To wit:

1. Of the 286.5 people employed by the Crime Records Service, 179 are currently associated in some manner with the maintenance of criminal history records. They are assigned as follows:

Data Entry section – 55

Fingerprint section – 68

Support (mail room, correspondence, image archival) – 30

Criminal Justice Information System (“CJIS”) section – 19

Expunction section – 7

2. The AFIS/CJIS section of the Crime Records Service has a budget for the current fiscal year of \$1,758,742 and the Fingerprint and Records Bureau of the Crime Records Service has a budget for the current fiscal year of \$4,416,182.

3. The projected revenue from criminal history record requests is approximately \$3,400,000 per year.

4. The Department has not yet established its budget priorities for the next legislative session, so it is unknown at this time whether a budget increase for the Crime Records Service will be requested.

5. Current staffing levels are not adequate to handle the backlog of records to be entered and provide quality control; however, it is anticipated that ongoing improvements in the automation of record submission will continue to increase the timeliness of reporting, the accuracy of the records submitted, and our ability to eliminate backlogs and remain current in our processing.

It is A FINDING AND CONCLUSION OF THIS REPORT THAT: THE TEXAS DEPARTMENT OF PUBLIC SAFETY HAS NOT BEEN PROVIDED WITH ADEQUATE RESOURCES NECESSARY TO FULFILL ITS STATUTORY OBLIGATIONS AND THAT IT IS ABSOLUTELY NECESSARY TO INCREASE THE AGENCY’S ALLOCATED FUNDING FOR RECORDS MANAGEMENT FUNCTIONS SIGNIFICANTLY FOR THE NEXT BIENNIAL FISCAL SPENDING PERIOD IN ORDER TO PERMIT THE TEXAS DEPARTMENT OF PUBLIC SAFETY TO IMPROVE ITS OPERATIONS, AND TO CONTINUE THE PROCESS OF MODERNIZING THE DATA STORAGE AND RETRIEVAL SYSTEMS OF THE AGENCY, HIRE QUALIFIED PERSONNEL, AND MEET THE INCREASING DEMAND FOR CRIMINAL HISTORY INFORMATION PLACED ON THE AGENCY BY THE PUBLIC AND OTHER GOVERNMENTAL BODIES.