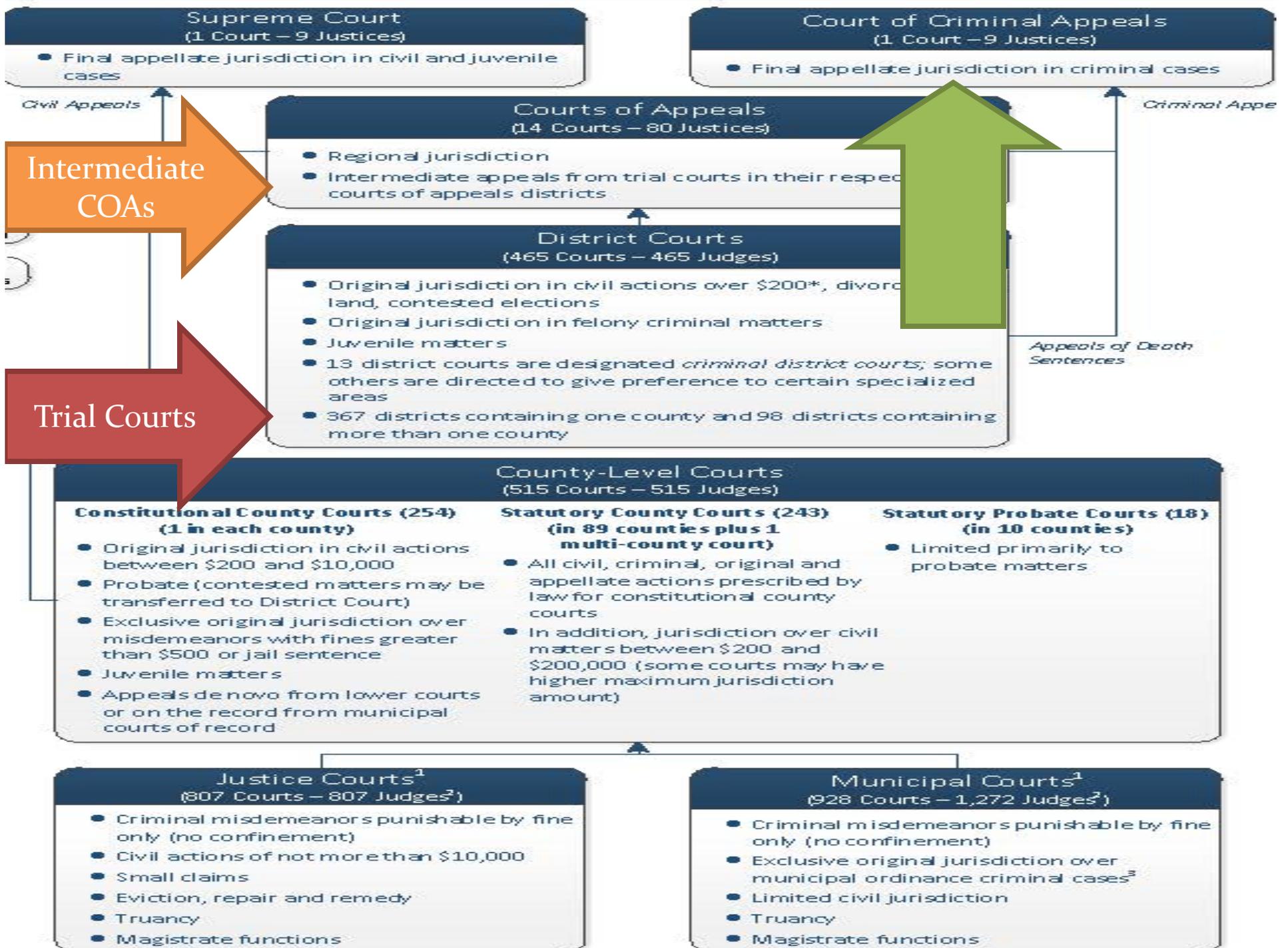


# Blood-Draw & Traffic Offense Decisions

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Stacey M. Soule  
Assistant State Prosecuting Attorney  
[stacey.soule@spa.texas.gov](mailto:stacey.soule@spa.texas.gov)

Texas Municipal Courts Education Center  
March 2016, Traffic Safety Initiative Conference



**“A Texas law that lets cops draw blood without warrant tossed by appeals court”**

The Houston Chronicle

**“Get a warrant! The CCA weighs in on mandatory blood draws ... and the news isn't good”**

TDCAA's The Prosecutor

**“Texas' high court rules warrantless blood draws unconstitutional”**

San Antonio Express-News

**“Court: Drawing DWI suspect blood without warrant unconstitutional”**

Austin American Statesman

# TEX. TRANSP. CODE § 724.012

## Mandatory Blood-Draw Provision

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When a suspect refuses to voluntarily provide a blood sample, an officer shall require the taking of a blood specimen upon arrest for an intoxication-related driving offense if:



## One

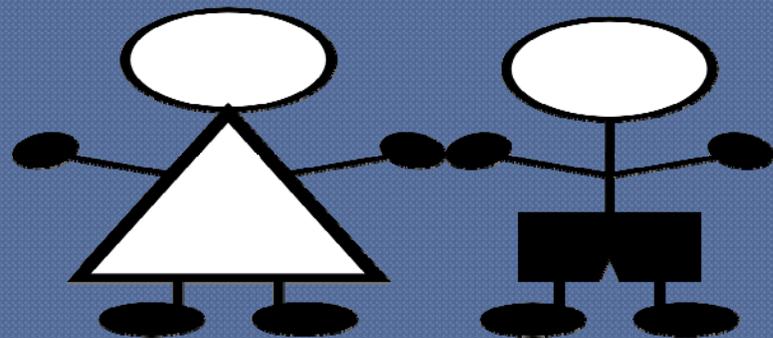
The suspect caused an accident due to intoxication and the officer reasonably believes:

- a person has died or will die;
- another person has suffered SBI; or
- another person has suffered BI and has obtained medical treatment

**Two**

The person is arrested for:

driving while intoxicated  
with a child passenger



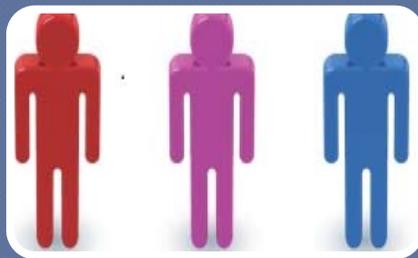
## Three

At the time of arrest, the officer has reliable information that the suspect:

- has previously been convicted of DWI with child, intoxication assault, or intoxication manslaughter; or
- has two or more convictions for DWI, FWI, BWI, assembling or operating amusement park ride while intoxicated

## *Breithaupt v. Abram*, 352 U.S. 432 (1957)

Blood draw by the treating physician of unconscious DWI suspect who's breath smelled of alcohol following a collision in which three passengers died and an empty whiskey bottle was found in the glove compartment did not violate the Due Process Clause.



Right of an individual to be free of “*so slight an intrusion*” does not outweigh:

- society’s interest in the scientific determination of intoxication
- deterrent effect due to the public knowing that an exact measurement of intoxication is available

## 4th Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

*Schmerber v. California,*  
384 U.S. 757 (1966)

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Blood draw by physician in hospital of a DWI arrestee who had been in an accident, despite his objection, did not violate the Fourth Amendment.



# *Schmerber*

## Determinative Questions

- (1) Whether the seizure of blood was justified.
- (2) Whether the **means** and **manner** respected Fourth Amendment standards of reasonableness.

# (1) Warrantless Draw Justified?

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- (A) Clear indication evidence will be found; arrest and charge of DUI supported by PC
- accident
  - smelled of alcohol
  - bloodshot, watery, glassy eyes
- (B) Exigent circumstances; delay to obtain warrant threatened destruction of evidence
- BAC diminishes
  - time to transport to hospital and investigate accident

## (2) Reasonable **Means** and **Manner** ?

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### (A) **Means**

- Blood is highly effective means to determine intoxication
- Everybody's doing it; majority no risk, trauma, or pain; no religious objection
- Minimal quantity

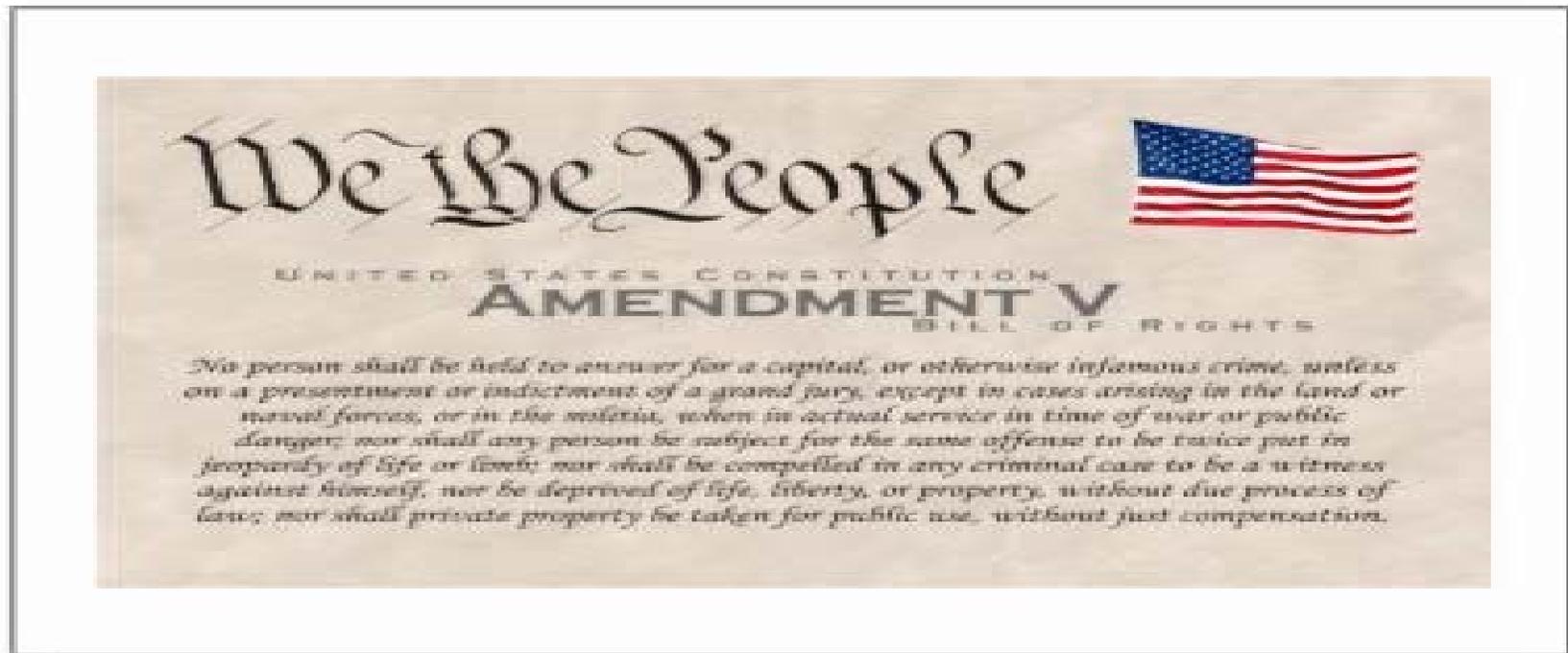
### (B) **Manner**

- Physician; acceptable medical practices



# Fifth Amendment Right Against Self-Incrimination?

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*Schmerber*, 384 U.S. at 764  
*Turpin v. State*, 606 S.W.2d 907 (Tex.  
Crim. App. 1980).

---

BAC determined from blood-draw  
is not compelled testimony or a  
communicative act or writing.

# *Aliff v. State*, 627 S.W.2d 166 (Tex. Crim. App. 1982)

- Blood-draw not intrusive;  
everyone's doing it
- Exigency;  
fast dissipation of alcohol
- PC for arrest for involuntary manslaughter



*State v. Hardy,*  
963 S.W.2d 516 (Tex. Crim. App. 1997)

---

Fourth Amendment privacy expectations are not violated when medical records containing BAC test results, created during the course of medical care, are later obtained by the State via a grand-jury subpoena.



*Beeman v. State,*  
86 S.W.3d 613 (Tex. Crim. App. 2001)

---

Two valid alternatives to obtain a blood sample:

1. Warrant
2. Statutory Implied Consent

*State v. Neesley*, 239 S.W.3d  
780 (Tex. Crim. App. 2007)

an officer shall require the taking of a blood  
*specimen* upon arrest for an intoxication-  
related driving offense if . . .

Specimen means a “useable” one



*State v. Johnston,*  
336 S.W.3d 649 (Tex. Crim. App. 2011)

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Fort Worth Court of Appeals

- No medical history and failure to follow-up
- Not recorded
- Johnston alone with officers
- Johnston restrained
- No use of force guidelines



# *Schmerber v. California*

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Whether the **means** and **manner** respected Fourth Amendment standards of reasonableness

**Means:** Is the test reasonable?

**Manner:** Was it performed in a reasonable manner?

## *Johnston* continued . . . . Court of Criminal Appeals

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- **Means:** Blood draw is presumptively reasonable
- **Manner:**
  - Experienced EMT
  - Non-medical environment permissible if safe
  - Other factors did not contribute to extra risk beyond normal
  - Reasonable use of force



# Who can take blood?

TEX. TRANS. CODE § 724.012(b)(1)(C):  
Only a physician, qualified technician, registered professional nurse, or licensed vocational nurse may take a blood sample . . .

TEX. TRANS. CODE § 724.017(c):  
qualified technician does not include EMS personnel.

*Krause v. State*, 405 S.W.3d  
82 (Tex. Crim. App. 2013)

A hospital-titled EMT-Intermediate who acts as a de facto phlebotomist is a “qualified technician.”

*Missouri v. McNeely,*  
133 S. Ct. 1552 (2013)

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Does the dissipation of alcohol from bloodstream create exigent circumstances that justify dispensing with a warrant?

| One   | Two  | Three   |
|---|--|---|
| The suspect caused an accident due to intoxication and the officer reasonably believes: | The person is arrested for                       | At the time of arrest, the officer has reliable information that the suspect:   |
| a person has died or will die;  | Driving while intoxicated with a child passenger | has previously been convicted of DWI with child, intoxication assault, or intoxication manslaughter;<br>or  |
| another person has suffered SBI; or   |  | <ul style="list-style-type: none"> <li>• has two or more convictions for DWI,</li> <li>• FWI, BWI, assembling or operating amusement park ride while intoxicated</li> </ul> |
| another person has suffered BI and has obtained medical treatment                       |  |   |

*Aliff*, 627 S.W.2d 166

---

Warrantless blood draw from a DWI suspect when there was probable cause to arrest, the draw was “unintrusive,” and blood is “quickly consumed” and “would be lost forever” was lawful.

*Beeman*, 86 S.W.3d 613

---

Two valid alternatives to obtain a blood sample:

1. Warrant
2. Statutory Implied Consent

## *McNeely*, 133 S. Ct. 1552 (2013)

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- Dissipation of alcohol does not categorically support a finding of exigency per se
- Reasonableness must be determined on a case-by-case basis.
- Metabolization and ensuing loss are factors to consider in deciding whether to get a warrant.



Warrant

Exigency

Statute

# *McNeely's* Impact on the Mandatory Blood-Draw Statute

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# *State v. Villarreal*, PD-0306-14

November 2014 5/4

\*

December 2015 5/4

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A warrantless blood-draw conducted under the repeat-offender provision to the implied consent, mandatory blood draw statute, TEX. TRANS. CODE § 724.12(b), violates the Fourth Amendment.



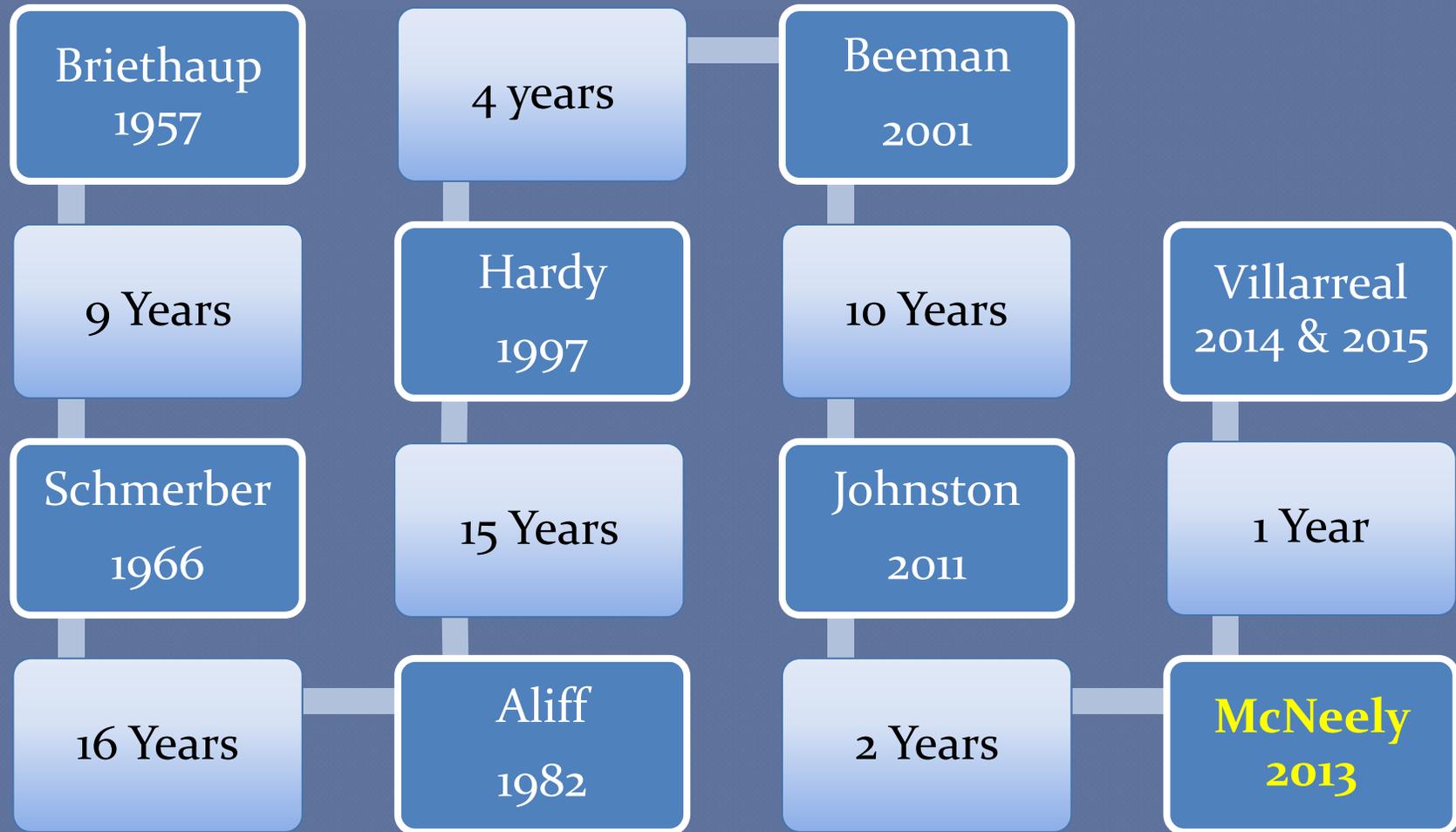
| One   | Two  | Three   |
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| another person has suffered BI and has obtained medical treatment                       |  |   |

# Next Stop . . .

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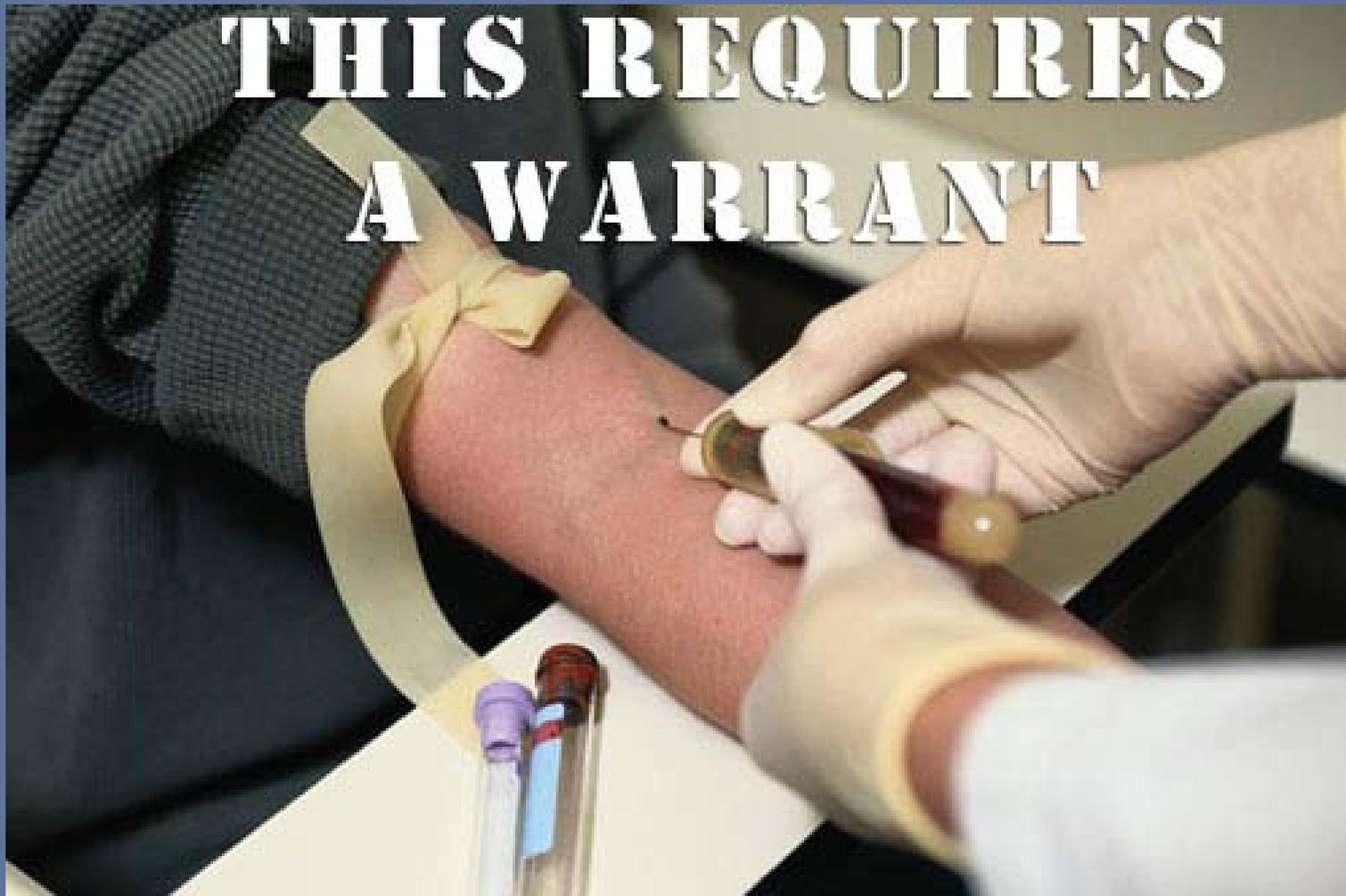


# Constitutional Law Timeline



# Best Practice

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# Three Options

Warrant

Exigent  
Circumstances

Consent

Preponderance

Clear and  
Convincing

Schmerber

- Investigation
- Transport to Hospital
- 1966 Technology

Other

- Serious accident
- Directing traffic
- No magistrate
- Few officers on duty
- Medical treatment

## AFFIDAVIT FOR SEARCH WARRANT

THE STATE OF TEXAS {  
COUNTY OF BRAZORIA {

The undersigned Affiant, being a peace officer under the laws of Texas and being duly sworn, on oath makes the following statements and accusations:

My name is \_\_\_\_\_, I am a peace officer employed by the following law enforcement agency: \_\_\_\_\_

1. There is in Brazoria County, Texas a suspected person ("suspect") described as follows:  
Name: \_\_\_\_\_  
Race: \_\_\_\_\_ Sex: \_\_\_\_\_ DOB: \_\_\_\_\_  
Height: \_\_\_\_\_ Weight: \_\_\_\_\_ lbs Hair color: \_\_\_\_\_
2. Suspect is presently in custody of a law enforcement agency, namely the \_\_\_\_\_, which will present the suspect to execute the warrant requested herein.
3. The suspect has possession of and is concealing human blood, which constitutes evidence that the suspect committed the offense described in paragraph 4 below.
4. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, the suspect did then and there operate a motor vehicle in a public place in Brazoria County, Texas while intoxicated by not having the normal use of mental or physical faculties by reason of the introduction of alcohol, controlled substance, drug, or a dangerous drug into the suspect's body.
5. The suspect was operating a motor vehicle in a public place in Brazoria County, Texas on the above date based on the following facts:  
\_\_\_\_ A. I observed the suspect doing so.  
\_\_\_\_ B. The suspect admitted to me that the suspect had been operating a motor vehicle in a public place in Brazoria County, Texas just \_\_\_\_\_ minutes prior to my arrival.  
\_\_\_\_ C. A witness, (name & address) \_\_\_\_\_  
\_\_\_\_\_ told me that he/she witnessed the suspect operating a motor vehicle in a public place in Brazoria County, Texas just \_\_\_\_\_ minutes prior to my arrival.

# Pending Cases



*Cole*, PD-0077-15: Exigency and Methamphetamine

*Ruiz*, PD-1362-15: whether blood taken under Section 724.014, which implies consent for an unconscious person who is incapable of withdrawing, violates the Fourth Amendment.

*Huse*, PD-0433-14: Does the Health Insurance Portability and Accountability Act (HIPPA) give a person a right to privacy in medical records created by a hospital for medical purposes?





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**TEX. TRANSP. CODE § 544.004:  
A driver shall comply with an applicable  
traffic control device if the device is in  
a proper position and sufficiently  
legible to an ordinarily observant  
person.**

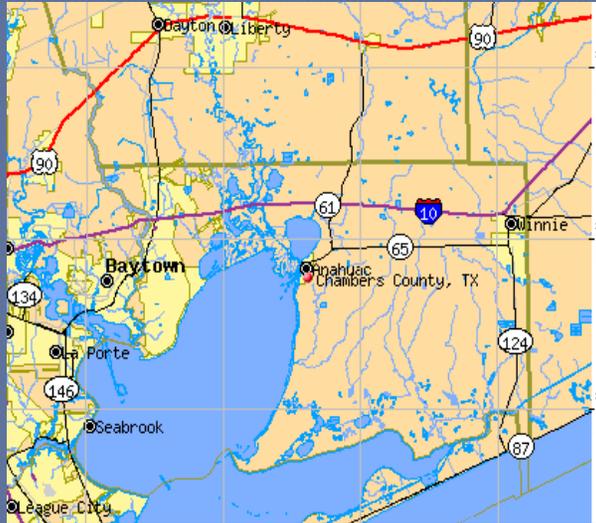
*Abney v. State,*  
394 S.W.3d 542 (Tex. Crim. App. 2013)

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There is no violation of a “left lane for passing only sign” if there is no evidence that driver passed the sign before being stopped.



# *Jaganathan v. State, PD-1189-14*



Stop supported by reasonable suspicion when the Trooper observed Appellant driving in the left-hand lane, without passing any vehicles in the middle lane, for approximately 15-20 seconds after passing a “Left Lane for Passing only” sign.



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“[A] defense would matter only if the facts establishing it were so obvious that an objective officer viewing the situation would be unreasonable in failing to realize that the person’s conduct was allowed by the law.”

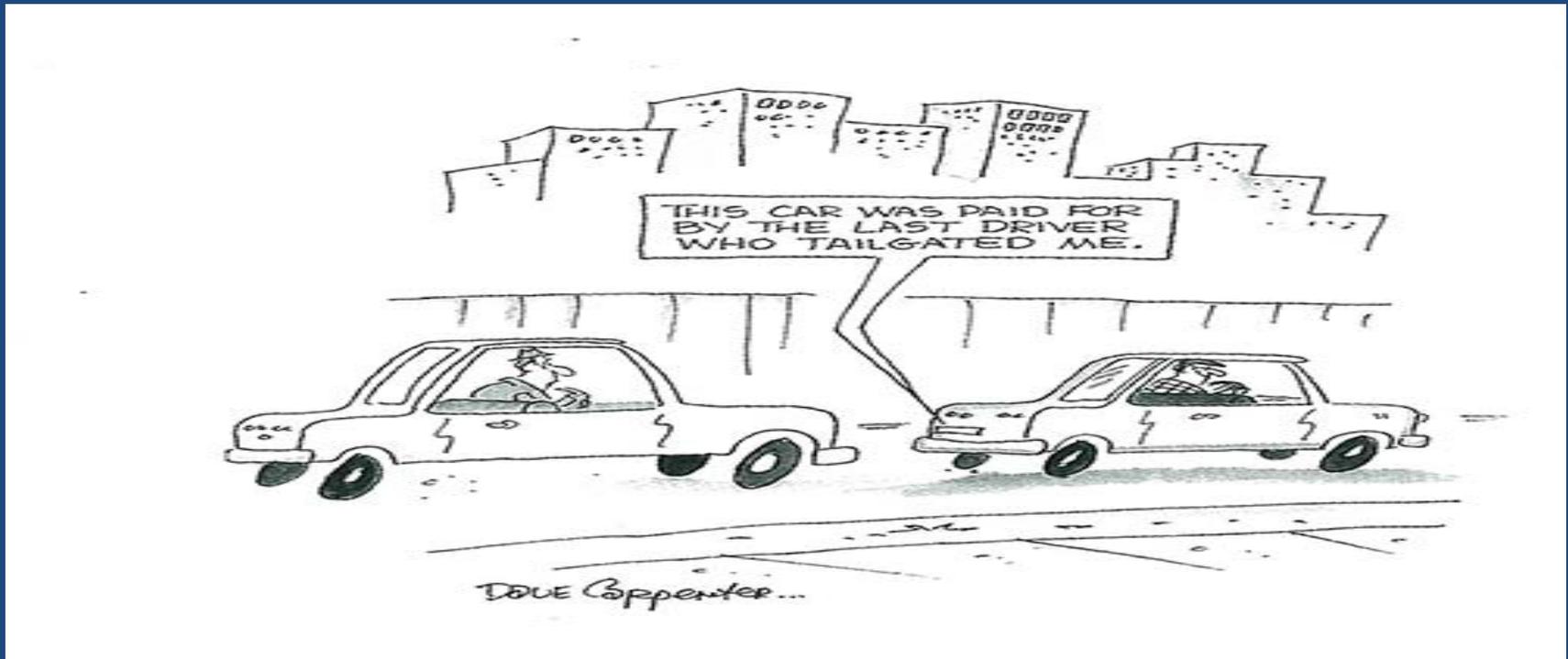


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**TEX. TRANSP. CODE § 545.363:**  
**A driver may not drive so slowly as to impede the normal and reasonable movement of traffic, except when a reduced speed is required for safety or compliance with the law.**

*Delafuente v. State,*  
414 S.W.3d 173 (Tex. Crim. App. 2013)

Officer's report stating that Delafuente was traveling 13 miles below the speed limit in the left, fast lane, causing "moderate" traffic congestion in a single lane of a multi-lane freeway, provided reasonable suspicion of a traffic violation.



TEX. TRANSP. CODE § 545.062(a):

A driver shall maintain an assured clear distance between two vehicles, considering speed, traffic, highway conditions, to ensure safe stopping without colliding into another vehicle, object, or person.

*Ford v. State,*  
158 S.W.3d 488 (Tex. Crim. App. 2005)

---

Officer's statement that Ford was “following too close behind” another vehicle on a highway did not provide sufficient evidence to support reasonable suspicion of a violation of the traffic law.





TEX. TRANSP. CODE § 502.404(a):  
It is an offense to operate a vehicle on a  
public highway that does not display  
two license plates, one at the **front**  
and the **rear**.

*Spence v. State,*  
325 S.W.3d 646 (Tex. Crim. App. 2010)

Front means the “beginning or foremost part of the vehicle, most commonly the front bumper.”





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**TEX. TRANSP. CODE § 545.104(a):**  
**A driver shall signal to indicate an intention to turn, change lanes, or start from a parked position.**

**TEX. TRANSP. CODE § 545.103:**  
**A driver may not turn a vehicle to enter a private road or driveway, otherwise turn the vehicle from direct course, or move right or left on a roadway unless it can be done safely.**

*Mahaffey v. State,*  
316 S.W.3d 633  
(Tex. Crim. App. 2010)



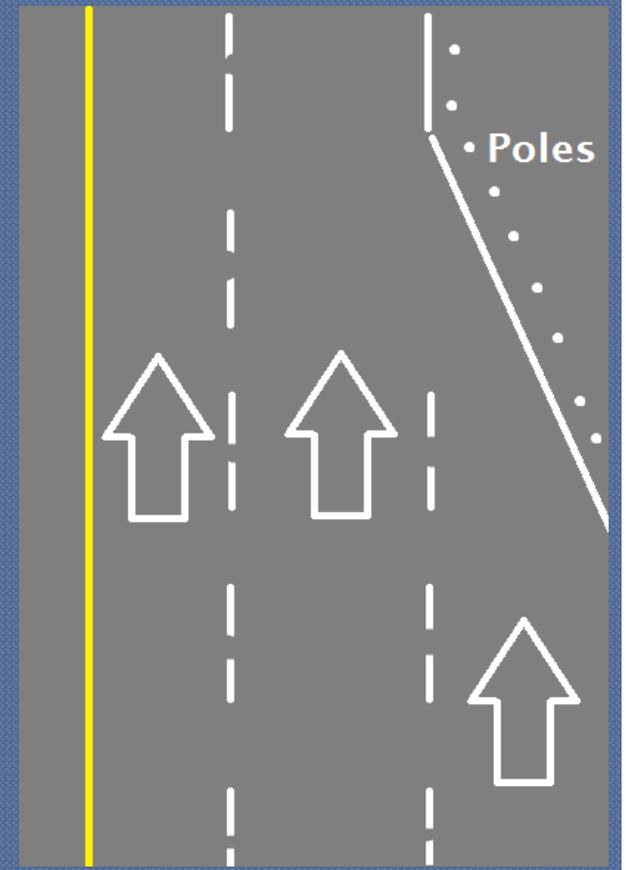
## PART ONE

A driver must signal when turning right or left out of the “direct course” of the road.

*Mahaffey v. State*, 364 S.W.3d  
908 (Tex. Crim. App. 2012)

PART TWO

On laned roadways,  
when two lanes become one,  
there is no lane change.





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**TEX. TRANSP. CODE § 545.058:**  
**A driver may drive on an improved right shoulder**  
**if necessary and it can be done safely but only to:**

- 1. Stop, stand, or park**
- 2. To accelerate before entering the main road**
- 3. To decelerate before turning right**
- 4. To pass a car slowing or stopping, disabled or preparing to turn left**
- 5. To allow a faster vehicle to pass**
- 6. As permitted by a traffic control device**
- 7. To avoid a collision**

*Lothrop v. State,*  
372 S.W.3d 187 (Tex. Crim. App. 2012)

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If an officer sees a person driving on an improved shoulder and it was necessary to accomplish one of the seven things, and it is being done safely, then no offense has occurred.

# Vehicle as a Deadly Weapon

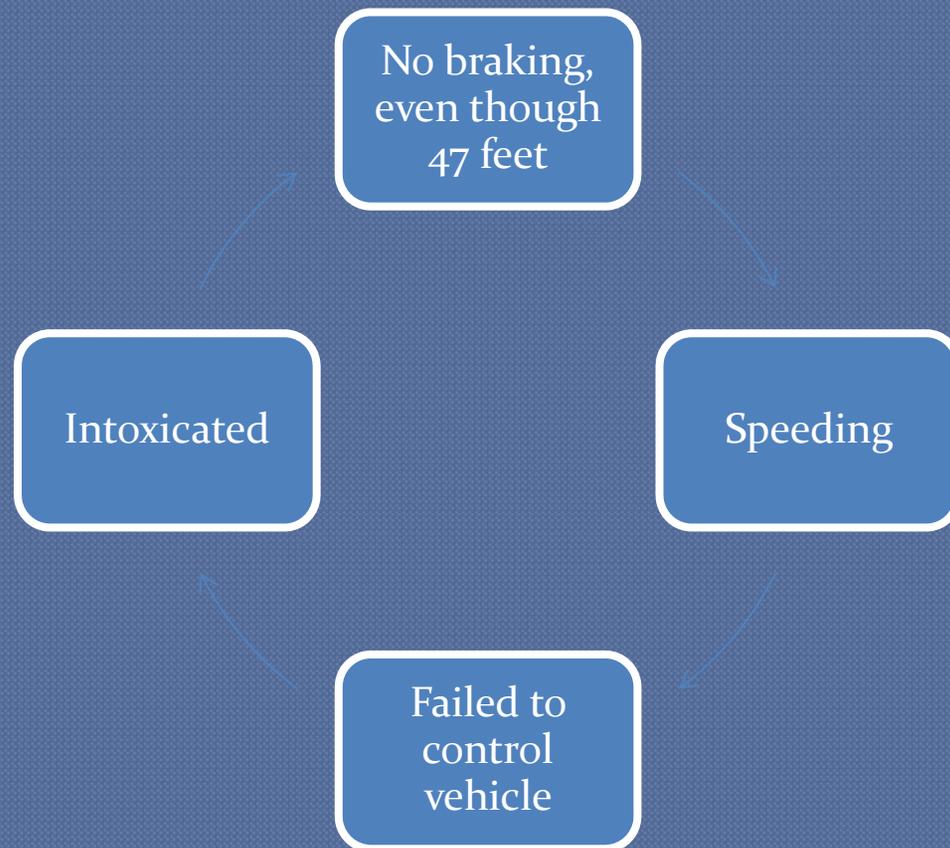
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TEX. PENAL CODE § 1.07(a)(17)(B).

“A deadly weapon is anything that in the manner of its actual or intended use is capable of causing death or serious bodily injury.”



*Sierra v. State*, 280 S.W.3d  
250 (Tex. Crim. App. 2009)



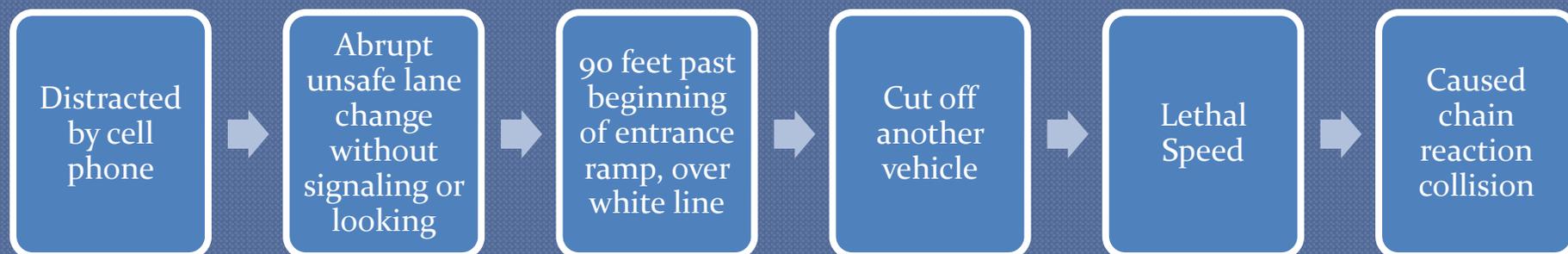
# Criminally Negligent Homicide

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## TEX. PENAL CODE § 19.05:

- **Caused death of an individual**
- **Aware of substantial and unjustifiable risk of death from conduct**
- **Failure to perceive risk constitutes a gross deviation from the standard of care an ordinary person would exercise**

*Montgomery v. State,*  
369 S.W.3d 188 (Tex. Crim. App. 2012)



*Leming, PD-0072-15*  
(pending)

TEX. TRANSP. CODE § 545.060(a): A driver shall drive as nearly as practical entirely within a single lane and may not move from the lane unless that movement can be made safely.

Is it a violation to swerve from side-to-side within a lane and cross-over road stripes with tires?

*Queeman*, PD-0215-16  
(pending)

“Is failing to maintain a safe speed and keep a proper distance the sort of ‘unexplained failure’ that this Court suggested in *Tello v. State*, 180 S.W.3d 150 (Tex. Crim. App. 2005), would be unworthy of criminal sanction?”

Drive Safely!

Thank you.

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Stacey M. Soule  
[stacey.soule@spa.texas.gov](mailto:stacey.soule@spa.texas.gov)