

LEVELS OF PROOF INSTRUCTIONS

Reasonable Doubt is the ultimate measure by which a jury will decide your client's case. For the jurors to better understand what a reasonable doubt is, however, it has been helpful for them to understand that it is the highest measure of proof required in our law and how it is distinguished from other measures of proof, "reasonable suspicion", "probable cause", "preponderance" and "clear and convincing". These measures are can be defined for your jurors as follows:

1) A **reasonable suspicion** is what a police officer must have in order to momentarily detain a person to question them about a crime or to do a pat down of their clothing should he believe they are armed with a weapon. This measure of proof is more than a hunch or a guess. It requires "articulate facts", i.e., the officer must state the facts which gave rise to his suspicion in order to make it a reasonable one.

"Reasonable suspicion" means the officer must be able to articulate something more than an inchoate and unprioritized suspicion or hunch. It requires some minimal level of objective justification for making the stop. [U.S. v. Sokolow, 490 U.S. 109 S.Ct. 1581 (1989)/attorney court reference];

2) **Probable cause** is what a police officer must have in order to make an arrest or search a person's home or business. It is also the minimum measure of proof in order to allow a judge to issue a search or arrest warrant. **Probable cause** concerns probabilities and is decided on an objective standard based upon the training and experience of the particular officer making the arrest or search. Said another way, **probable cause** requires a reasonable person's standard of proof to justify the officer's actions in either arresting or searching, i.e., was it objectively reasonable for the officer to do what he did based upon what he actually knew and based upon his experience? The **probable cause** standard is necessary for a police officer to do a strip search of a person.

"**Probable cause**" concerns whether the facts available to the officers at the moment of the arrest would warrant a man of reasonable caution in the belief that an offense has been committed. **Probable cause** also turns on whether, at the moment the arrest was made, the officers had **probable cause** to make it and that is defined as whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the person had committed or was committing an offense. [Beck v. State of Ohio, 379 U.S. 89, 85 S.Ct. 223 (1964)/attorney court reference];

3) **Preponderance** is the measure of proof required in civil courts. It is sometimes referred to as the "51% of the evidence rule". Here, the party to a lawsuit that convinces the jury by 51% of the evidence is the winner. This is the measure that is used to take money from one party of a lawsuit and give it to another.

"**Preponderance of the evidence**" as a standard of proof in civil cases, means the greater weight and degree of credible evidence admitted in the case. That degree of proof that, when taken as a whole, shows that a fact sought to be proved is more probable than not. [Lackey v. State, 819 S.W.2d 111 (Tex.Crim.App. 1991). See also, Texas Pattern Jury Charge §1.03/attorney court reference]; and,

4) **Clear and convincing** is the measure of proof required in child custody cases and involuntary commitment cases. Our courts have defined this measure as the tier between the "reasonable doubt" standard and the "preponderance" standard. Here, the law requires that a jury be "**clearly convinced**" before it awards custody of a child to a parent, takes a child from a parent or involuntary commits a person to a mental health institution.

"**Clear and convincing**" means that measure or degree of proof that will produce in the mind of the tier of fact a firm belief or conviction as to the truth of the allegations sought to be established. This is an intermediate standard, falling between the preponderance standard of ordinary civil proceedings and the **reasonable doubt** standard of criminal proceedings. [State v. Addington, 388 S.W.2d 569 (Tex. 1979). See also, Texas Family Code §11.1(c)/attorney court reference].

Accordingly, using the Levels of Proof chart, the DWI/DUI trial lawyer can graphically and educationally walk the jury panel through the respective ascending steps of proof. Demonstrating these levels to the jury, defense counsel can make the jury visually understand that proof beyond a reasonable doubt is indeed the highest burden in our law.

Cross-examination and closing argument bonus instructions:

The Levels of Proof trial graphics can also be used, after voir dire, during the cross-examination of the arresting officer. Here, the defense lawyer uses the graphic burdens of **reasonable suspicion, probable cause and reasonable doubt** in the cross-examination of the arresting officer, i.e., the officer is asked if he understands those required levels of proof and applied the **reasonable suspicion and probable cause** burdens in his decision process in your case.

Experience teaches us that most police officers will testify that they did not form their opinion of **probable cause** until after they observed the very last intoxication fact and that it was then that they arrested your client. When this happens, leave it alone and don't ask anymore burden of proof questions. By doing so, you can argue in your closing that, even accepting all that the officer said was true, by his own words he only had **probable cause**, and, that is far short of the required proof beyond a reasonable doubt to convict.