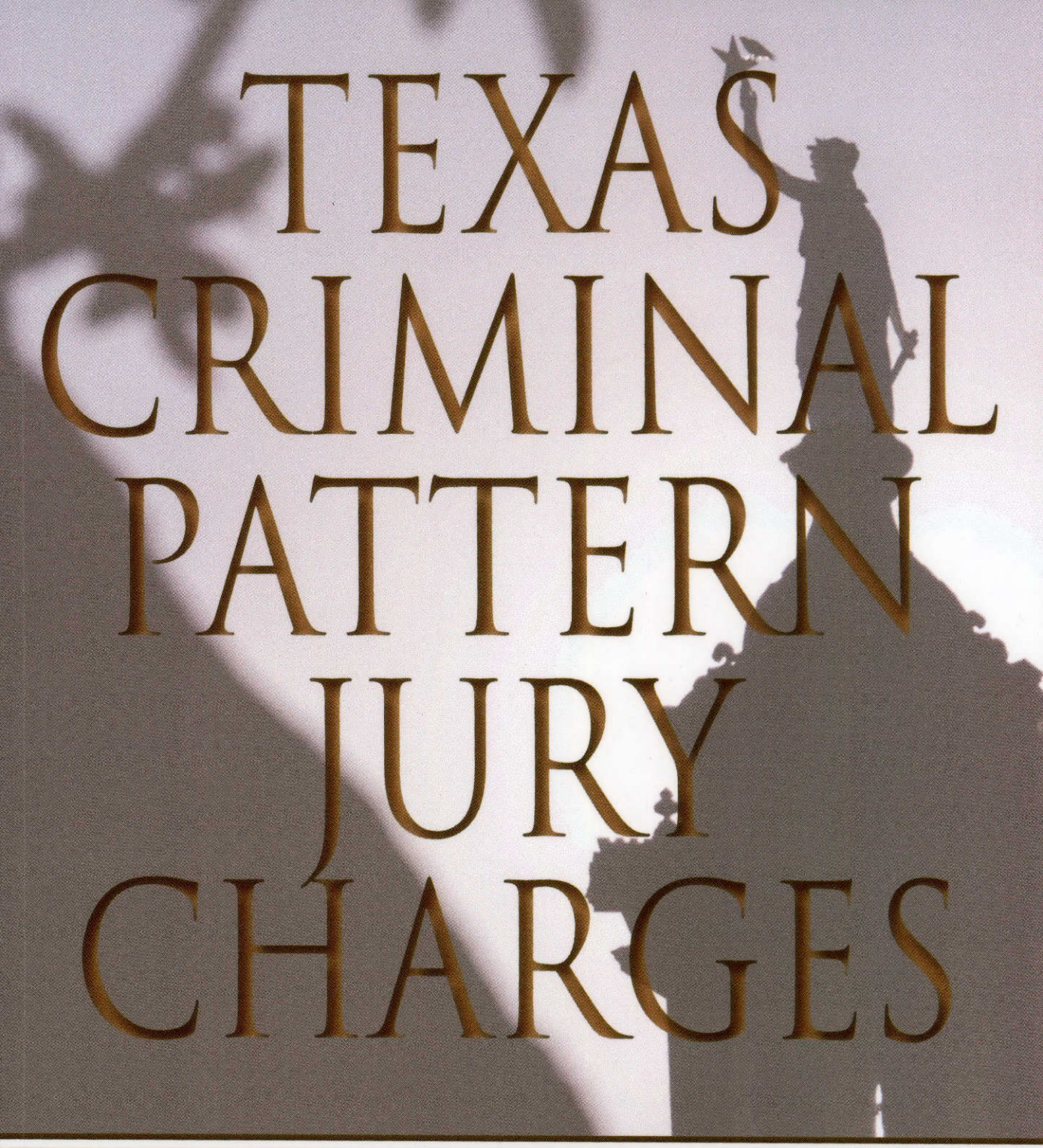

TEXAS CRIMINAL PATTERN JURY CHARGES

GENERAL, EVIDENTIARY & ANCILLARY INSTRUCTIONS

2018 EDITION

TEXAS CRIMINAL
PATTERN JURY CHARGES

General, Evidentiary &
Ancillary Instructions

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PATTERN JURY CHARGES

General, Evidentiary &
Ancillary Instructions

Prepared by the
COMMITTEE
on
PATTERN JURY CHARGES—CRIMINAL
of the
STATE BAR OF TEXAS

Austin 2018

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PREFACE

The Pattern Jury Charges Committee—Criminal was first formed in 2005 with the goal of drafting criminal instructions in plain language. The Committee was challenged with addressing both the need to state the law in statutory terms and the need to provide charges in language juries could understand. To this end, the Committee designed an outline for the charges that explicitly states the relevant statutes and legal definitions and then applies the law to the facts in commonsense language. Each section is clearly identified, and the format was designed to enhance readability for the jury.

When an effective template was developed, the Committee drafted the first volume: *Texas Criminal Pattern Jury Charges—Intoxication and Controlled Substances.* The Committee was then able to produce four more volumes at a rapid pace. However, the evolutionary nature of the process resulted in some issues with the organization. For example, to make the first volume a complete, stand-alone set of instructions, a general charge, special instructions, and punishment instructions were included with the charges on driving while intoxicated, possession, and the like. In the original *Crimes against Persons* volume, chapters on transferred intent and party liability were included to make the volume more useful, but those instructions—like the general charge, special instructions, and punishment instructions—apply in trials for other crimes than just those covered in that volume.

As the Committee's leadership began planning for additional material, it became clear that a better organization of the charges would improve the value of the series enormously. To accomplish this, the Committee began to both update and reorganize the series for greater utility and greater potential for expansion. The Committee therefore took content from various volumes of the original series and added new subject matter to create the new *Texas Criminal Pattern Jury Charges*, released in 2015 and 2016. The series will continue to be updated and expanded. This latest edition of the *General, Evidentiary & Ancillary Instructions* volume contains statutory updates and includes new commentary and instructions on the corpus delicti rule, a slow plea, and an *Allen* charge.

As with the initial set of volumes, the Committee has provided a significant amount of material on the underlying law to aid practitioners in using the charges. This varies from the style of the civil charges. But precisely because the Committee's approach is significantly different from that of more traditional criminal charges, the Committee felt it was important to ensure the attorney had all the information needed to use the charges with confidence.

This work could not have been completed without the commitment, dedication, and experience of many Committee members, both past and present. In particular, the Committee would like to thank Alan Levy for his leadership as the Committee's inaugural chair and to Judge Cathy Cochran for her participation and support as liaison to the Texas Court of Criminal Appeals until her retirement from the Committee. We are also indebted to numerous other lawyers and judges who read the drafts and offered ideas for

improvement—ranging from matters of substantive law to those having to do with style, format, and utility. In addition, we would like to thank the staff of TexasBarBooks, who provide invaluable support and assistance in bringing these volumes to print.

Finally, the Committee would like to express its profound gratitude to Professor George Dix, whose dedication and contributions to this Committee from its earliest days have made this project possible. The Committee came to rely on his hard work, insightfulness, and leadership as the Committee's chair. Not only that, his sense of humor and wit both enlivened and enlightened our discussions, and for this and more, the Committee remains in his debt.

—Wendell Odom, Jr., *Chair*, and Emily Johnson-Liu, *Vice-Chair*

INTRODUCTION

1. Purpose of Publication

The purpose of this volume is to assist the bench and bar in preparing the court's charge in jury cases. It provides instructions not specific to a particular charge. These include the general charge; evidentiary instructions for out-of-court statements, exclusionary rule issues, and confessions; instructions for ancillary issues such as lesser included charges, transferred intent, party liability, and presumptions; and punishment instructions. The jury instructions are suggestions and guides to be used by a trial court if they are applicable and proper in a specific case. Of course, the exercise of professional judgment by the attorneys and the judge is necessary in every case.

2. Scope of Pattern Charges

A charge should conform to the pleadings and evidence of the particular case. Occasions will arise for the use of instructions not specifically addressed herein. Even for the specific instructions that are addressed in this volume, trial judges and practitioners should recognize that the Committee may have erred in its perceptions and that its recommendations may be affected by future appellate decisions and statutory changes.

3. Principles of Style

a. *Basic philosophy.* This volume embodies the Committee's recommendation that several basic and reasonable changes can and should be made to how juries are instructed in criminal trials. Although they are the result of long and careful consideration by members drawn from the bench, prosecutors' offices, defense practice, and academia, the jury instructions in this volume have no official status. Appellate courts are unlikely to regard trial judges' refusal to use the Committee's jury instructions as reversible error. These instructions will be used, then, only if trial judges are willing to exercise their considerable discretion to adopt them in particular cases.

b. *Simplicity.* Criminal litigation by its nature often raises difficult questions for juries to resolve. Compound that difficulty with the current practice of drafting instructions almost verbatim from the statutes, occasionally inherently ambiguous themselves, and an onerous task lies ahead of juries. The Committee concluded that plain language in criminal jury instructions is both desirable and permissible and has therefore sought to be as brief as possible and to use language that is simple and easy to understand.

c. *Bracketed material.* Several types of bracketed material appear in the jury instructions. In a bracketed statement such as "[indictment/information]," the user must choose between the terms or phrases within the brackets. The choices are separated by forward slash marks. Alternative letters or phrases may also be indicated by the use of brackets. For example, "county[ies]" indicates a choice between the words "county" and "counties." In a bracketed statement such as "[*name of accomplice*]," the user is to substitute the name of the accomplice rather than retaining the bracketed material verbatim.

Material such as "[*include if applicable*: . . .]" and "[*describe purpose*]" provides guidelines for completing the finished jury instruction and should not be retained verbatim in the document.

d. *Use of masculine gender.* For simplicity, the jury instructions in this volume use masculine pronouns. These pronouns are not enclosed in brackets, but the user should, when drafting jury instructions for a particular case, replace the pronouns with feminine versions wherever appropriate. The jury instructions in this volume do, however, use disjunctive pairs of masculine and feminine pronouns when the identity of a person will not be known at the time the instructions are given to the jury (for example, "have your foreperson sign his or her name").

4. Comments and Citations of Authority

The discussions and comments accompanying each jury instruction provide a ready reference to the law that serves as a foundation for the instruction. The primary authorities cited in this volume are the Texas Penal Code, the Texas Code of Criminal Procedure, and Texas case law.

5. Using the Pattern Charges

For general guidelines on drafting a criminal jury charge, refer to the section titled "Quick Guide to Drafting a Jury Charge," which follows this introduction. For matters specific to any instruction included in this volume, refer to the commentary in chapter 1 of this volume, any general commentary that begins the chapter containing the instruction in question, and the commentary specific to and following the instruction itself. Finally, preparation of a proper charge requires careful legal analysis and sound judgment.

6. Installing the Digital Download

The complimentary downloadable version of *Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions* (2018 edition) contains the entire text of the printed book. To install the digital download—

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7. Future Revisions

The contents of the jury instructions depend on the underlying substantive law relevant to the case. The Committee expects to publish updates as needed to reflect changes and new developments in the law.

QUICK GUIDE TO DRAFTING A JURY CHARGE

The Main Charge

- Examine the indictment to determine the relevant Texas Penal Code provisions.
- Compare the language of the offense or offenses charged in the indictment with the language of the relevant Penal Code provisions. In general, the indictment should track the statutory language, alleging all the elements of a particular offense or offenses.
- For each count in the indictment, determine what the elements of the offense are. Even if the indictment does not allege all the elements of an offense, the jury charge must do so. If the indictment alleges *more* than the Penal Code provision requires, it may be possible to omit the unnecessary language in the jury charge.
- With few exceptions, all offenses require both forbidden **conduct** and one or more **culpable mental states**. Some offenses also require a certain **result**—for example, homicide, which requires that the defendant's **conduct** cause a **result**, death (*see* Tex. Penal Code § 19.01). Still other offenses include a **circumstance surrounding conduct**. For example, aggravated assault of a public servant under Tex. Penal Code § 22.02(b)(2)(B) requires that the person assaulted be a public servant, **a circumstance surrounding conduct**, as well as requiring the forbidden **conduct** and a proscribed **result**.

  For each offense you submit to the jury, then, you must ask:

  1. What is the forbidden **conduct**?
  2. Does the offense require a certain **result**?
  3. Does the offense include one or more **circumstances surrounding conduct**?

- Next determine what **culpable mental states** are required to commit the offense. A **culpable mental state** may be required as to **conduct**, a **result**, a **circumstance surrounding conduct**, or all these elements. For example, in the case of aggravated assault of a public servant, when bodily injury is alleged, the defendant must intentionally, knowingly, or recklessly cause a **result**, bodily injury. The statute also requires, however, that the state prove that the defendant *knew* the victim was a public servant—a **circumstance surrounding conduct**. In most cases, the statutory provision itself will indicate which **culpable mental states** apply, but sometimes case law will dictate that a **culpable mental state** not expressly included in the statute is also required. Finally, you must be careful to confine each **culpable mental state** to the element to which it applies. For example, in the case of injury to a child, the relevant **culpable mental states** apply to the **result**, not the **conduct** (*see* Tex. Penal Code § 22.04(a); *Haggins v. State*, 785 S.W.2d 827 (Tex. Crim. App. 1990)).

- Many offenses may be committed in more than one statutory manner. For example, injury to a child may be committed by either an affirmative act—for example, hitting the child—or by an omission—for example, failing to provide medical care (*see* Tex. Penal Code § 22.04(a)). For each offense in the indictment, you must ask whether the state has alleged alternative statutory theories of how the offense was committed. If so, you will submit these theories to the jury in the disjunctive. The jurors must be unanimous that the state has proved the offense, but they need not be unanimous about the specific statutory manner. Do *not*, however, submit a theory to the jury if it (1) is not alleged in the indictment or (2) is not supported by the evidence adduced at trial.

- Other offenses define distinct statutory acts or results, and the jury must be unanimous on the specific act or result. For example, simple assault may be committed by causing bodily injury or by threatening another with imminent bodily injury (*see* Tex. Penal Code § 22.01(a)(1), (2)). These are separate and distinct criminal acts, so the jury must be unanimous about which act the defendant committed. You should not submit these acts in the disjunctive unless you also inform the jury that it must be unanimous about one specific act.

- If the indictment contains multiple counts, determine whether the state is seeking a conviction on each count or has alleged them in the alternative—for example, capital murder under Tex. Penal Code § 19.03 in the first count and murder under Tex. Penal Code § 19.02 in the second count. The jury must not be allowed to convict the defendant for two offenses when one is a lesser included offense of the other.

- Determine which unanimity instruction to give. In general, the rule is that when the state is alleging that the defendant committed *one* offense in one of two or more ways, the jury need not be unanimous—for example, sexual assault by penetration with the penis *or* a finger. In contrast, when the state is alleging that the defendant committed *one* of two or more acts, each of which could constitute a separate offense, the jury must be unanimous as to which act was committed—for example, sexual assault by penetration of the sexual organ *or* the anus of the victim (*see* Tex. Penal Code § 22.011(a)(1)(A)).

Defensive Matters and Lesser Included Offenses

- On request, determine if any **defenses** or **affirmative defenses** apply in the case. If so, include them, taking care to explain to the jury which party has the burden of proof.

- On request, determine if any lesser included offense instructions should be given. Ask the party who is requesting the lesser included offense instruction to explain what evidence raises that instruction.

Use of Evidence Instructions and Special Instructions

- On request, give a limiting instruction if extraneous offenses or bad acts have been introduced. Be careful to specifically identify the particular purpose for which the evidence was offered. *Do not* give a laundry-list instruction—for example, "intent, knowledge, scheme, plan, opportunity, or motive."
- Determine if any special instructions, such as an instruction on accomplice witnesses or on the law of parties, should be given.
- Determine if any special issue instructions, such as a deadly weapon finding, should be included in the guilt/innocence phase instructions.

Putting the Charge Together

- Give general instructions to be included in every case and, if applicable, an instruction on the defendant's failure to testify.
- If multiple defendants are on trial, give a complete set of instructions for each defendant.
- Attach appropriate verdict forms. There should be one verdict form for each separate count or indictment that is submitted to the jury.
- Submit the proposed charge to each party for objections or special requests and modify the charge if appropriate.

CPJC 1.1 General Matters

While considering how best to approach drafting pattern jury instructions for criminal litigation, the Pattern Jury Charges—Criminal Committee encountered a number of difficulties. Its resolution of these is, of course, reflected in the specific instructions developed by the Committee, but because these issues were of pervasive significance, the Committee concluded that some preliminary general discussion of them would be helpful in evaluating the specific recommendations. This chapter presents that discussion.

CPJC 1.2 Jury Instructions in Criminal Cases—Terminology and Structure

"Charge" vs. "Instruction." The Texas Code of Criminal Procedure directs that before counsel argue to the jury in a criminal trial, "the judge shall . . . deliver to the jury . . . a written charge distinctly setting forth the law applicable to the case." Tex. Code Crim. Proc. art. 36.14.

In practice, the document submitted to the jury is generally styled a "charge" and is referred to as such by lawyers and judges.

The Committee concluded that attempting to communicate with juries using this "legalese" would only increase the already high risk of confusion. Consequently, the Committee decided to abandon the traditional term "charge" and instead refer to the document to be read and provided to the jury as the "instruction."

Abstract Statement of Law and Application to Facts. Jury instructions in criminal trials have long included both abstract recitations of the applicable law and application of that law to the facts of the particular case. The Texas court of criminal appeals explained:

> Our Legislature has made clear that a trial judge's charge to the jury must set forth "the law applicable to the case." Relying on that statute, we have held that "[a] trial court is required to fully instruct the jury on the law applicable to the case and to apply that law to the facts presented." It is not enough for the charge to merely incorporate the allegation in the charging instrument. Instead, it must also apply the law to the facts adduced at trial. This is because "[t]he jury must be instructed 'under what circumstances they should convict, or under what circumstances they should acquit'." Jury charges which fail to apply the law to the facts adduced at trial are erroneous.

Gray v. State, 152 S.W.3d 125, 127–28 (Tex. Crim. App. 2004) (alterations in original) (footnotes omitted) (citations omitted).

Application of the law to the facts is required because only by providing the jury with this framework can the courts respect the rights of the parties to a fair determination of the issues. Explaining the rule that an unapplied abstract presentation of a theory of liability does not authorize a jury to convict on that theory, the court of criminal appeals noted:

> This rationale is founded upon the notion that a charge which contains an abstract paragraph on a theory of law, but does not apply the law to the facts, deprives the defendant of "a fair and impartial trial." *Harris v. State*, 522 S.W.2d 199, 202 (Tex.Cr.App.1975), citing *Fennell v. State*, 424 S.W.2d 631 (Tex.Cr.App.1968). This type of error "in the charge goes to the very

> basis of the case so that the charge fails to state and apply the law under which the accused is prosecuted." *Harris*, 522 S.W.2d at 202, and cases cited therein.

Jones v. State, 815 S.W.2d 667, 670 (Tex. Crim. App. 1991).

Defensive and Other Matters. The requirement of application of abstract law to the situation before the jury applies not only to the elements of the charged offense and theories of liability but also to defensive matters. *E.g., Stewart v. State*, 77 S.W. 791, 792 (Tex. Crim. App. 1903) (trial court erred in failing to apply abstract law of insanity "to the particular offense for which [the defendant] was being tried").

It also applies to other matters left to the jury, such as the need for corroboration of the testimony of an accomplice. *E.g., Armstrong v. State*, 26 S.W. 829, 830 (Tex. Crim. App. 1894) ("The instructions upon [accomplice testimony] should be like all others. They should be applied to the facts bearing upon the issue.").

Committee's Approach. The Committee agreed that current law clearly and appropriately requires that the jury instructions for criminal trials both set out the law in the abstract and apply that law to the facts of the case. The Committee attempted to continue this approach and also attempted to make the purpose of the various portions of the instructions clearer.

With regard to defensive matters, the Committee considered two possible approaches. Some members wanted to incorporate those defensive matters on which the state has the burden of proof into a penultimate application paragraph that would make negation of the defensive matter essentially an element of the offense.

The Committee finally opted for the approach used in the instructions as presented in this and the other volumes in this series. This approach embodies the following:

1. When a defensive matter is raised, the application portion of the instructions on the charged offense directs the jury, if it finds the state has proved all elements, to then consider the defensive matter.

2. The defensive matter is presented first in the abstract and second in an additional application paragraph.

The Committee concluded that this approach would distinguish between the elements of the offense and defensive matters but still make clear that in certain cases a defensive matter, like an element of the offense, establishes things that the prosecution must prove to permit conviction.

CPJC 1.3 Prohibition against Commenting on Evidence, Summarizing Testimony, and Discussing Facts

The task of instructing Texas juries in criminal cases is complicated by statutory limits on the judge's actions. Tex. Code Crim. Proc. art. 36.14 provides in part:

> [T]he judge shall . . . deliver to the jury . . . a written charge distinctly setting forth the law applicable to the case; not expressing any opinion as to the weight of the evidence, not summing up the testimony, discussing the facts or using any argument in his charge calculated to arouse the sympathy or excite the passions of the jury.

This language is substantively unchanged from that in articles 594 and 595 of the 1856 Code of Criminal Procedure. Quite likely, the position embodied in this language reflects a legislative reaction to the Texas Supreme Court's approval, two years earlier, of jury charges calling the attention of jurors to particular facts "for the purpose of directing the jury to the rules of law that must govern them in arriving at the truth. . . . All that is required of the Judge is, that he should neither decide upon the facts, nor endeavor to influence the jury in their decision on the facts." *Jones v. State*, 13 Tex. 168, 175 (1854).

The legislature rejected the approach of *Jones*. *See* Tex. Code Crim. Proc. art. 36.14. "Thus one of the rights accorded to a judge at common law—that is, the right to advise the jury with reference to the facts—has been expressly denied by a statute of this State." *Randel v. State*, 219 S.W.2d 689, 697 (Tex. Crim. App. 1949).

The statutory provision dramatically affects both what matters can be addressed in jury instructions and, when matters can be addressed, how the instructions must discuss those matters. Case law has developed several distinguishable aspects of the statutory limit on jury instructions.

Need to Avoid Assuming Facts. Under Tex. Code Crim. Proc. art. 36.14, a jury instruction must carefully avoid assuming the truth of a fact that the state must prove. Thus a trial court erred in referring to "the place where the offense was committed," because this phraseology assumed that in fact an offense had been committed. *Richardson v. State*, 390 S.W.2d 773, 773 (Tex. Crim. App. 1965).

From the outset, however, the statutory language has been construed as going considerably beyond this.

Prohibition against Advising Jury on Reasoning. Tex. Code Crim. Proc. art. 36.14 has been construed as imposing significant limits on the extent to which jury instructions can advise jurors on the inferences they may draw from the evidence. Essentially, it has become a prohibition on suggesting to jurors certain reasoning they may wish to use.

Shortly after the original statutes were enacted, the Texas Supreme Court noted:

> If the court should undertake to instruct, or even advise, the jury, as to the proper process of reasoning upon the facts, or as to the precautionary considerations to be borne in mind in coming to a proper conclusion upon the facts, by a dissertation, however it may be shaped, upon the nature and effect of evidence, his opinion upon the weight of the evidence may be infused into his charge upon the subject, and really influence the jury, by that mode of communicating it, as effectually, and sometimes more so, than a direct expression of it.

Brown v. State, 23 Tex. 195, 201–02 (1859). *Accord Harrell v. State*, 40 S.W. 799, 800–801 (Tex. Crim. App. 1897) (error to charge jury that "in determining the credibility of the witnesses, you may consider the age, intelligence, interest in the case, apparent bias or prejudice, if any, and all other circumstances in the case").

A charge that jurors should use caution in evaluating the credibility of the testimony of a witness whose memory had been hypnotically enhanced, therefore, is a prohibited comment on the evidence. *Zani v. State*, 758 S.W.2d 233, 245 (Tex. Crim. App. 1988).

In *Brown v. State*, 122 S.W.3d 794 (Tex. Crim. App. 2003), the court held that a trial court errs in telling a jury that "intent or knowledge may be inferred by acts done or words spoken." An appellate court may assume a convicting jury drew such an inference. A jury may in fact draw such an inference. Apparently the lawyers may argue to the jurors that they can and should draw such an inference. But the trial court cannot instruct jurors that they may draw such an inference, no matter how careful the trial court is to make clear that the court is not suggesting jurors should draw that inference.

If the applicable law "specifically assigns to jurors the task of deciding whether certain evidence may be considered [by them], as it does under article 38.23," an instruction may be given although it "may have the incidental effect of emphasizing certain evidence to the jury." *Atkinson v. State*, 923 S.W.2d 21, 25 (Tex. Crim. App. 1996), *overruled on other grounds by Motilla v. State*, 78 S.W.3d 352 (Tex. Crim. App. 2002).

If the law permits jurors to consider certain evidence but only in particular ways, Texas courts have permitted instructions explaining to jurors what limits the law places on the use they may make of that evidence. *Barnes v. State*, 28 Tex. Ct. App. 29, 30, 11 S.W. 679, 679 (1889) ("[I]t was nevertheless the imperative duty of the court, in its charge, to so limit and restrict such evidence to the purposes for which alone it was admissible as that the jury might not use it improperly . . . .").

Drawing Jury's Attention to Selected Matters and Instruction on Defensive Contentions. As the court of criminal appeals construes what is now Tex. Code Crim. Proc. art. 36.14, a trial judge may not instruct juries on certain defensive matters.

Giesberg v. State, 984 S.W.2d 245 (Tex. Crim. App. 1998), held that the trial court did not err in refusing the defendant's request for the following alibi instruction:

> The defense . . . set up by the defendant in this case is what is known as an alibi at the time of the killing, the defendant was at another and different place, was not and could not have been the person who committed the offense. If you have a reasonable doubt as to the presence of the defendant at the place where the offense was committed at the time the offense was committed, then you will find the defendant not guilty.

Giesberg, 984 S.W.2d at 245–46. The court explained:

> A defensive issue which goes no further than to merely negate an element of the offense alleged by the State in its indictment does not place a burden of proof upon a defendant to establish it. The burden of proof is upon the State to prove those allegations. An alibi only traverses those allegations and casts doubt upon whether the State has met its burden. As a result, an alibi is sufficiently embraced in a general charge to the jury that the defendant is presumed innocent until he or she is proven guilty beyond a reasonable doubt. There is ample room within that instruction for a defendant to effectively argue his defense of alibi to a jury.
>
> Since a defensive issue of alibi is adequately accounted for within a general charge to the jury, a special instruction for the issue of alibi would needlessly draw a jury's attention to the evidence which raised alibi. Therefore, we conclude a special instruction on alibi would constitute an unwarranted comment on the weight of the evidence by the trial court.

Giesberg, 984 S.W.2d at 250 (citations omitted). Simply referring to particular evidence without expressing any view as to its weight or significance is impermissible, then, because that reference might be taken by the jury as indicating some judgment by the judge about the weight or significance of the evidence.

This proposition was reaffirmed in *Walters v. State*, 247 S.W.3d 204 (Tex. Crim. App. 2007), in which the court summarized the law as follows:

> [G]enerally speaking, neither the defendant nor the State is entitled to a special jury instruction relating to a statutory offense or defense if that instruction (1) is not grounded in the Penal Code, (2) is covered by the general charge to the jury, and (3) focuses the jury's attention on a specific type of evidence that may support an element of an offense or a defense. In such a case, the non-statutory instruction would constitute a prohibited comment on the weight of the evidence.

Walters, 247 S.W.3d at 212.

Bartlett v. State, 270 S.W.3d 147 (Tex. Crim. App. 2008), applied this approach to condemn as error an instruction informing the jury that it *could* consider evidence that the defendant refused to submit to the taking of a breath or blood sample to determine

whether he was intoxicated. The neutral character of the instruction did not save it. The court explained:

> Such an instruction, while neutral, does not inform the jury of anything it does not already know. . . . [I]t did nothing to clarify the law. It served no function other than to improperly "tend to emphasize" the evidence of the appellant's refusal to submit to a breath test "by repetition or recapitulation." It had the potential to "obliquely or indirectly convey some [judicial] opinion on the weight of the evidence by singling out that evidence and inviting the jury to pay particular attention to it."

Bartlett, 270 S.W.3d at 154 (second alteration in original) (footnotes omitted) (citations omitted).

Committee's Approach. The Committee did not address the wisdom of existing law. It did, however, approach the task of drafting pattern instructions with care to avoid violating the limits imposed by existing law. It also encountered considerable difficulty in ascertaining what those limits are or will eventually be held to be.

The Committee was sensitive to the fact that under the Texas courts' interpretation of Tex. Code Crim. Proc. art. 36.14, the state as well as the defendant has the right to have the trial court avoid comment on and summary and discussion of the facts. As a practical matter, the state seldom has any recourse from comments favorable to the accused. Nevertheless, the law makes clear the trial judge's duty to avoid violating the statute. The Committee kept this in mind as it approached specific problems in drafting instructions.

CPJC 1.4 Analyses from Appellate Opinions

Major issues for the Committee were determining which analyses in appellate opinions were strictly off-limits as possible jury instructions and, for those that were not off-limits, determining the extent to which those analyses should be incorporated into instructions.

The court of criminal appeals has made it clear that appellate decisions contain some analyses that should not be included in trial court jury instructions. This exclusion is at least in part because including certain analyses would constitute a statutorily prohibited comment on the evidence.

Further, for example, "[t]he 'presumption' of intent to commit theft arising from non-consensual nighttime entry is an appellate vehicle employed to review the sufficiency of the evidence, not a trial vehicle used to prove an element of the State's case," the court of criminal appeals noted without explanation in *Aguilar v. State*, 682 S.W.2d 556, 558 (Tex. Crim. App. 1985) (footnote omitted). Clearly, jury instructions should not include this presumption.

Aguilar and similar cases, the court explained in *Brown v. State*, 122 S.W.3d 794 (Tex. Crim. App. 2003), apply the prohibition against comment on the evidence as imposing a strict rule: "Texas courts are forbidden from instructing the jury on any presumption or evidentiary sufficiency rule that does not have a statutory basis." *Brown*, 122 S.W.3d at 799.

Brown suggested the prohibition bars jury instructions on not only presumptions but also other "non-statutory . . . 'vehicles employed to review the sufficiency of evidence.'" *Brown*, 122 S.W.3d at 799 (quoting *Aguilar*, 682 S.W.2d at 558).

Other appellate opinions, however, particularly those resolving challenges to the sufficiency of the evidence, contain discussions that might help jurors address sufficiency of the evidence as an initial matter. Thus, Judge Chuck Miller, author of the *Aguilar* opinion, suggested in another case that appellate discussions or rules defining the minimal evidence required to convict should be communicated to juries. *See Golden v. State*, 851 S.W.2d 291, 296 (Tex. Crim. App. 1993) (Miller, J., concurring).

CPJC 1.5 Definitions of Terms

The members of the Committee differed in opinion on the extent to which the Committee should attempt to define terms if the statutes do not provide clearly applicable definitions.

General Limited Need to Define Terms in Jury Instructions. Part of the applicable law is quite clear. In 1983, the court of criminal appeals observed that "in the more recent past this Court has subscribed to the rule that if a word, term, or phrase had not at the time of trial been statutorily defined, there is no requirement to define that word, term, or phrase in the court's charge." *Andrews v. State*, 652 S.W.2d 370, 375 (Tex. Crim. App. 1983).

Twenty years later, the court explained:

> As a general rule, terms need not be defined in the charge if they are not statutorily defined. But terms which have a technical legal meaning may need to be defined. This is particularly true when there is a risk that the jurors may arbitrarily apply their own personal definitions of the term or where a definition of the term is required to assure a fair understanding of the evidence.

Middleton v. State, 125 S.W.3d 450, 454 (Tex. Crim. App. 2003).

Trial Court's Discretion to Define Terms. That a trial court is not *required* to define a term does not mean that it cannot or should not do so. One court of appeals observed:

> Generally, trial courts do not define words in the charge unless the legislature or the courts have given the words a special definition or meaning. This practice does not result so much from a prohibition against doing so as from a general permission not to do so.

Mori v. State, No. 05-97-00166-CR, 1999 WL 57764, at *5 (Tex. App.—Dallas Feb. 9, 1999, pet. ref'd) (not designated for publication).

In *Andrews*, the court of criminal appeals addressed whether the trial court erred in failing to define "prurient interest." Although holding that "we are unable to conclude that the lack of a definition for the term caused appellant to be denied and deprived of a fair and impartial trial by jury," the court added, "it would not have been error had the trial court given a definition for the term." *Andrews*, 652 S.W.2d at 377.

Courts of appeals have held—consistent with *Andrews*—that a trial court has discretion to define terms as long as the definitions are correct. *See Walls v. State*, No. 01-99-00714-CR, 2001 WL 83548, at *7–8 (Tex. App.—Houston [1st Dist.] Feb. 1, 2001, pet. ref'd, untimely filed) (not designated for publication) (trial court did not err in instructing jury on definition of "fiduciary" taken from *Black's Law Dictionary*); *Mori*, 1999 WL 57764, at *4–5 (trial court did not err in instructing jury, "'Normal use' as

used herein means the manner in which a normal non-intoxicated person would be able to use his mental or physical faculties.").

Definitions Approved. In several other contexts, the court of criminal appeals appears to have at least implicitly approved of jury instructions containing definitions going beyond the statutory language that is explicitly a part of or incorporated into the definition of the offense.

For example, in prosecutions for the offense of escape, the court held that the jury is not free to employ any meaning that is "acceptable in common parlance" for the term *arrest*. *Warner v. State*, 257 S.W.3d 243, 247 (Tex. Crim. App. 2008); *Medford v. State*, 13 S.W.3d 769 (Tex. Crim. App. 2000). This certainly suggests that the instructions in such cases should contain an acceptable definition of *arrest*.

Further, in *Grotti v. State*, 273 S.W.3d 273 (Tex. Crim. App. 2008), the court approved use of the definition of *death* from Tex. Health & Safety Code § 671.001(a), (b) in appellate review of evidence sufficiency in homicide cases. This leaves little doubt that jury instructions in such cases would properly cover this definition.

Definitions from Appellate Evidence Sufficiency Analyses. The court of criminal appeals, in *Kirsch v. State*, 357 S.W.3d 645 (Tex. Crim. App. 2012), has recently drawn a clear distinction between defining terms in assessing the sufficiency of evidence on appeal and instructing a jury at trial. "[A]lthough an appellate court may articulate a definition of a statutorily undefined, common term in assessing the sufficiency of the evidence on appellate review, a trial court's inclusion of that definition in a jury charge may constitute an improper comment on the weight of the evidence." *Kirsch*, 357 S.W.3d at 651.

Committee's Approach. Some Committee members believed strongly that the Committee should consider when definitions of terms would, as a general matter, be useful and then formulate definitions for those terms. They concluded that the law allows this and that sound criminal justice policy supports it.

A majority of the Committee, however, opted in favor of more restraint. The majority's position was based in part on the difficulty of providing accurate definitions and the costs involved if the Committee were to suggest a definition later disapproved by the appellate courts. In addition, the majority's view was based on the perception that the spirit, if not the actual letter, of the prohibition against commenting on the evidence militated against aggressive development of definitions. Definitions are seldom fully neutral, the majority reasoned, and thus would implicitly adopt a view on potentially contested issues and communicate that view to juries.

CPJC 1.6 Burden of Proof

Since article 626 of the original Code of Criminal Procedure was enacted in 1856, Texas statutory law has required that the jury verdict be either "guilty" or "not guilty." The task of the jury, however, is not to determine whether the accused is in fact "not guilty." Rather, the jury is to determine only whether the accused has not been proved guilty beyond a reasonable doubt.

This situation poses the question of how to explain to juries matters on which the state has the burden of proof while complying with the Code's requirement that the ultimate verdict be either "guilty" or "not guilty."

"Reasonable Doubt" Approach. The practice developed early of describing controlling matters and then instructing the jury to acquit if it found those matters in favor of the defendant or had a reasonable doubt regarding them. *See Jenkins v. State*, 41 Tex. 128 (1874) ("If . . . you are of opinion that Jenkins is not guilty of murder in the first degree, or if you have a reasonable doubt thereof, you will then inquire if Jenkins is guilty of murder in the second degree.").

This was applied to what are often regarded as "defenses" or defensive matters. In *Boddy v. State*, 14 Tex. Ct. App. 528 (1883), for example, the self-defense instruction first told the jury in detail when the law permitted an attacked person to protect himself "by his own arm." It then added, "If the defendant was attacked by Charles Burns in such a manner that it produced in the defendant's mind a reasonable expectation or fear of death, or of some serious bodily injury, and you so find or have a reasonable doubt thereof, you will acquit him." *Boddy*, 14 Tex. Ct. App. at 539.

This approach, then, first sets out the law in abstract terms that suggest—but do not actually state—that the burden of persuasion is on the person invoking the doctrine. At the end, it attempts to accommodate the actual placement of the burden of proof by telling the jurors to acquit the defendant if they affirmatively find the defendant acted within the legal requirements or "have a reasonable doubt thereof."

The drafting approach used in *Boddy* has been uncritically followed up to the present. It has apparently been used because of the need to tell the jury that its task is to choose between "guilty" and "not guilty," even though it need not actually conclude that the accused is "not guilty" to return that verdict.

To some extent, this approach has been embodied in the Penal Code. Section 2.03 implicitly makes clear that with regard to "defenses" in the Penal Code and other grounds of defense in penal law, the burden of proof is on the state. This is explicitly reflected in the statutory directive that "the court shall charge that a reasonable doubt on the issue requires that the defendant be acquitted." Tex. Penal Code § 2.03(d).

Committee's Approach. The Committee concluded that the above approach to phrasing the analysis required by juries is unnecessarily confusing. Moreover, it tends to emphasize the question of whether the jury finds the accused "not guilty" over the

question of whether it has a reasonable doubt whether the defendant has been proved guilty.

This is particularly important regarding defensive matters. If a defendant raises a matter that under chapter 2 of the Penal Code is treated as a defense, it has the effect of adding to those things the prosecution must prove beyond a reasonable doubt.

The Committee therefore attempted to draft instructions that specified clearly and precisely, for those situations in which a defensive matter has been raised, what the state must prove beyond a reasonable doubt to be entitled to prevail.

CPJC 1.7 Culpable Mental States

The Committee encountered significant problems created by the Texas Penal Code's provisions for culpable mental states.

Penal Code Section 6.02. When an offense requires a culpable mental state, as most do, a full definition of the offense requires deciding to which of the nonmental elements that culpable mental state applies. Determining this is a particularly difficult matter under Texas law.

The 1974 Texas Penal Code adopted a modified version of the approach of the American Law Institute's Model Penal Code. Like the Model Penal Code, the Texas Code undertook to define with increased specificity the mental states required for crimes. It also adopted the Model Penal Code's approach of distinguishing four levels of culpable mental state. These levels of culpable mental state—intent, knowledge, recklessness, and negligence—were defined in section 6.03. *See* Tex. Penal Code § 6.03.

Texas courts have categorized the nonmental elements of offenses into three types: (1) the nature of the conduct, (2) the result of the conduct, and (3) the circumstances surrounding the conduct. *McQueen v. State*, 781 S.W.2d 600, 603 (Tex. Crim. App. 1989). All offenses require some element of type 1. Some require elements of one or both of types 2 and 3.

But to which elements, or which types of elements in a particular crime, does a required culpable mental state apply?

The problem is illustrated by unauthorized use of a vehicle as defined in Tex. Penal Code § 31.07(a). This crime explicitly requires that the accused acted "intentionally or knowingly." The statutory language does not, however, make clear whether this applies to only the conduct (requiring that the accused intentionally or knowingly operated a vehicle) or whether it alternatively or also applies to lack of owner consent (requiring that the accused intended that the owner not consent or knew that the owner did not consent).

In Tex. Penal Code § 6.02, the Texas legislature provided general rules for construing criminal statutes' culpability requirements. But these rules differ from the analogous provisions in the Model Penal Code.

As a general matter, the Texas legislature chose to rely less than does the Model Penal Code on general principles such as those in section 6.02. Instead, it tried to provide, in the definitions of particular crimes, the culpable mental states required for those crimes. Nevertheless, as section 31.07(a) illustrates, the legislature's provisions fail to make completely clear what is required for some offenses. A rule for construing the legislature's terminology is clearly needed.

The Model Penal Code adopted what is often called an "elemental" approach. This approach assumes that a crime requires a culpable mental state regarding each non-mental element of the crime—each unit of conduct by the accused that must be proved, each result that the accused must have caused, and each circumstance that must have existed. Section 2.02(4) of the Model Penal Code implemented this with a constructional rule stating that required culpability "shall apply to all the material elements of the offense, unless a contrary [legislative] purpose plainly appears."

The general principles of section 6.02 of the Texas Penal Code do not explicitly reject the Model Penal Code's approach. The Model Penal Code's constructional rule that implemented the Model Penal Code's elemental approach was not incorporated into the Texas Penal Code. The Texas legislature, however, provided no alternative constructional rule.

Determining to Which Elements "Culpable Mental State" Applies. The basic problem the Committee encountered with Tex. Penal Code § 6.02 is that it provides no guidance for determining, when a crime requires a culpable mental state, to which elements of that crime the culpable mental state applies. The history of section 6.02 suggests that the Model Penal Code's approach—a rigorous "elemental" approach applying the culpable mental state to each substantive element of the crime—was not intended by the legislature. But neither the history nor the terms of the statute provide a substitute.

The problem arises with the many crimes that explicitly require a culpable mental state, such as unauthorized use of a vehicle, as discussed above. Case law has addressed some specific offenses. The courts' discussions, however, fail to provide a principled approach that can be consistently applied to all or most crimes.

The court in *McQueen*, for example, held that the culpable mental state for unauthorized use of a vehicle applies to the circumstance element (the lack of owner consent) as well as the nature-of-conduct element (operating a vehicle). Why this is the case is not entirely clear. The discussion did suggest the court reached this result because "what separates lawful operation of another's motor vehicle from unauthorized use is the actor's knowledge of a 'crucial circumstance surrounding the conduct'—that such operation is done without the effective consent of the owner." *McQueen*, 781 S.W.2d at 604 (quoting *McClain v. State*, 687 S.W.2d 350, 354 (Tex. Crim. App. 1985)).

This statutory construction problem also arises with crimes for which a culpable mental state of at least recklessness is required by section 6.02. Section 6.02 makes clear that a culpable mental state is required and that what is required is recklessness (*see* Tex. Penal Code § 6.02(b), (c)), but section 6.02 does not go beyond this and address to which elements of the crime recklessness applies.

A required culpable mental state, *McQueen* suggests, applies to those elements that separate lawful conduct from criminal conduct. Whatever the merits of such an

approach, it has not been recognized by the Texas courts as the generally appropriate analysis under Texas law.

In *Huffman v. State*, 267 S.W.3d 902, 905 (Tex. Crim. App. 2008), the court of criminal appeals suggested that in analyzing offenses it will look first to which element or elements—including conduct, results, and circumstances—are the "focus" or "gravamen" of the offense. A required culpable mental state is then likely to apply to those elements. *Huffman* did not, however, make clear how the court will determine which element or combination of elements is the focus or gravamen of a particular crime.

Current Jury Instruction Practice. Current practice, the Committee concluded, too often ignores and even obscures the problem. Jury instructions are drafted in the statutory terminology, which simply passes the uncertainty of present law along to juries. Juries are essentially instructed in the language of the statute defining the crime and then given what the trial court regards as the applicable portions of the definitions in Tex. Penal Code § 6.03.

The appellate courts have addressed jury instruction issues primarily in response to contentions that the instructions improperly included inapplicable parts of section 6.03's definitions.

A leading case, *Alvarado v. State*, 704 S.W.2d 36 (Tex. Crim. App. 1985), illustrates the analysis used in the case law and the Committee's concern. Alvarado was prosecuted under a statute providing that a person commits an offense "if he intentionally [or] knowingly . . . engages in conduct that causes serious bodily injury . . . to a child." The culpable mental state (intent or knowledge), the court held, applied to the result, causing serious bodily injury to a child, rather than to the conduct (any "conduct"). *Alvarado*, 704 S.W.2d at 37 (quoting Tex. Penal Code § 22.04).

Under existing practice, *Alvarado*'s holding is not followed by explicitly telling a jury that it must find the state has proved the defendant intended to cause serious bodily injury to the child or knew her actions were reasonably certain to cause that result. Rather, the holding is treated as simply requiring that the jury be given only those parts of the abstract statutory definitions of the mental states involved—intent and knowledge—that apply the mental states to result elements.

A jury is expected to recognize that the culpable mental state applies to the result element—and proof is required that the defendant intended the injury or knew it would occur—from the fact that it is given only the definitions of "intentionally" and "knowingly" as those terms are applied to result elements.

The *Alvarado* trial court, then, was not held to have erred because it failed to translate the culpable mental state requirement of the charged offense into specific but accurate terms for the jury. Rather, it erred only because it instructed the jury regarding the definitions of "intentionally" and "knowingly" as applied to conduct elements as well as the definitions as applied to result elements.

Existing case law does not explicitly require trial judges to eschew jury instruction containing specific statements of what culpable mental state the law requires. It does, however, make clear that by following current practice a trial judge minimizes the risk of being found to have erred. Because of the uncertainty in the substantive law concerning exactly what culpable mental states are required, a trial judge who abandons the current approach and drafts specific instructions runs a considerable risk of being wrong regarding what the appellate courts will find the Penal Code requires.

Even error in failing to properly draft the instructions under this current approach frequently triggers no appellate reversal given the doctrine of harmless error. Inclusions of unnecessary portions of section 6.03's definitions are often held harmless. *E.g., Hill v. State*, 265 S.W.3d 539 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd) (in compelling prostitution case, trial court erred in failing "to tailor the definition of 'knowingly' to result of conduct," but error was harmless).

Under current practice, drafting and review of jury instructions is focused on whether the abstract portion of the instructions contains the appropriate portions of section 6.03's definitions and *only* the appropriate portions of them. Little or no attention is paid to crafting instructions that specify how those abstract definitions apply to the statutory elements of the crime as narrowed by the allegations in the charging instrument.

Trial judges, to avoid appellate reversal, too often do not need to confront and resolve the sometimes difficult questions about what culpable mental states a crime requires. As a result, jury instructions too often do not reflect a clear and complete explanation of what the charged offense requires.

In part as a consequence, discussion and litigation often ignore the underlying difficulty noted earlier. Neither the Penal Code nor the case law provide a clear criterion for resolving the substantive law issues posed by *Alvarado* and similar cases: To which elements of a crime did the legislature intend a required culpable mental state to apply?

Problems Created by Section 6.03's Specific Definitions. A related problem the Committee encountered is created by Tex. Penal Code § 6.03, which contains definitions of the terms used in prescribing culpable mental states: *intentionally*, *knowingly*, *recklessly*, and *with criminal negligence*.

Tex. Penal Code § 6.03(b) provides definitions of *knowingly* for application of this term to elements consisting of the nature of the prohibited conduct, results of that conduct, and circumstances. Tex. Penal Code § 6.03(a) provides definitions of *intentionally*, however, for application only to elements consisting of the nature of the prohibited conduct and results of that conduct. Tex. Penal Code § 6.03(c), (d) provides definitions of *recklessly* and *with criminal negligence* for application only to elements consisting of the result of conduct and circumstances.

Does this mean that the legislature intended no construction of any criminal statute that would involve applying a culpable mental state in a way for which section 6.03 provided no definition? This would mean, for example, that a crime specifying that the accused must be proved to have acted recklessly could not be construed as to require recklessness to apply to an element describing the nature of the prohibited conduct.

For example, the offense of possession of marijuana is statutorily required to have been committed intentionally or knowingly. One element of the offense is a circumstance—the substance possessed must be marijuana. The approach outlined above would mean the culpable mental state could not be construed as applicable to that circumstance element, as section 6.03(a) provides no definition of *intentionally* as it applies to a circumstance element.

Committee's Approach. The Committee concluded that existing practice too often avoids or obscures the difficult questions of what the law requires. Moreover, when the law's requirements are accurately identified, existing practice too often fails to convey the substance of these requirements to jurors.

Consequently, the Committee set out to do two things. First, it tried to specify completely in each charge what culpable mental states the law requires for the crime at issue. Given the case law, this sometimes required speculation about what results the courts would reach.

Second, the Committee attempted to define specifically and completely those culpable mental states required. The abstract definitions of Tex. Penal Code § 6.03 are often relatively meaningless. Consequently, the Committee attempted to develop instructions that apply the applicable abstract definitions to the terms of the particular crime.

For example, the offense of injury to a child as charged in *Alvarado*, and as clarified on appeal should be explained to jurors in a manner considerably different than under current practice. The instructions should explain explicitly to jurors that the state must prove the accused either consciously desired to cause the injury actually caused or that the accused was aware that what he was doing was reasonably certain to cause that injury.

In addition, the Committee addressed the section 6.03 definition problem and attempted to respect the legislature's apparent decisions reflected therein. Thus the Committee avoided construing specific crimes as including culpable mental state requirements for which section 6.03 provides no definitions.

CPJC 1.8 Causation

The Committee had considerable difficulty formulating an acceptable approach to causation.

The Penal Code purports to provide for causation in criminal cases in section 6.04:

> A person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient.

Tex. Penal Code § 6.04(a).

"Causation" vs. Responsibility. As an initial matter, Tex. Penal Code § 6.04's terminology invites confusion. Despite the title—"Causation: Conduct and Results"—it does not explicitly provide for "causation." Rather, it provides for what it terms criminal responsibility for a result.

The Committee considered the possibility that instructions on the law established by Tex. Penal Code § 6.04(a) might be put in terms of responsibility for a result rather than in terms of causing that result. It rejected this possibility because of concern that this would unnecessarily complicate the use of this law to explain requirements described by the Penal Code as ones of causation. For example, the basic provision for murder in section 19.02(b)(1) defines the offense as committed when a person "causes the death of an individual." *See* Tex. Penal Code § 19.02(b)(1). The Committee thought it would be unwise to attempt to explain to juries that whether an accused has caused the death of an individual is determined by a body of law defining when an accused is "criminally responsible" for a result such as the death of an individual.

Pre-1974 Causation Law. Before the 1974 Penal Code, Texas statutes made no general reference to causation. Since the 1856 Penal Code, however, specific statutory provisions addressed the major problems of causation in homicide cases. The reported decisions involved almost exclusively homicide prosecutions and generally involved applications of the specific statutory provisions.

The major statutory provision, designated article 1202 before its repeal by the 1974 Code and reproduced in *Wright v. State*, 388 S.W.2d 703 (Tex. Crim. App. 1965), stated the following:

> The destruction of life must be complete by such act, agency, procurement or omission; but although the injury which caused death might not under other circumstances have proved fatal, yet if such injury be the cause of death, without its appearing that there has been any gross neglect or manifestly improper treatment of the person injured, it is homicide.

Wright, 388 S.W.2d at 706. Despite the arguable meaning of some of the statute's terms, the Texas courts read the statute as consistent with a general rule that a defen-

dant's act was "the cause of [the victim's] death" even if it was only one of several contributing causes of that death. *Wright*, 388 S.W.2d at 706 ("The destruction of life must have been occasioned by the act of appellant, but appellant is responsible if his act of shooting contributed to the death, though there were other concurring causes.").

Article 1202 and its predecessors were recognized as "undoubtedly chang[ing] the rule of the common law, the theory of which was that he who caused the first injury should be held guilty, upon the theory that without the first injury no other would have followed, as resulting from the first." *Brown v. State*, 38 Tex. 482, 487 (1873).

Under this new provision, juries were told that homicide defendants were to be acquitted if the juries found that, after the defendant inflicted the injury on which the prosecution was based, there was "gross neglect or manifestly improper treatment of the person injured" and that this, rather than the injury inflicted by the defendant, was "the" cause of death.

The Texas courts' pre-1974 discussions used terms such as *proximate causation*, *concurrent causes*, and *intervening causes*, although these terms were not employed by the statutes. "[G]ross neglect or manifestly improper treatment of the person injured" was regarded as an intervening cause that, when it operated, eliminated proximate causation between the defendant's conduct and the victim's death. *See, e.g., Wright*, 388 S.W.2d at 706.

1974 Penal Code's Approach. The legislature adopted what is now Tex. Penal Code § 6.04(a) instead of a proposal of a State Bar Committee that would have followed an approach similar to that of the Model Penal Code. *See* State Bar Committee on Revision of the Penal Code, *Texas Penal Code: A Proposed Revision* § 6.07 (Final Draft Oct. 1970). The Model Penal Code's provision was the only statutory attempt in this country to articulate complete rules for causation. It did not purport to reflect existing law, however, but offered a fresh approach.

The Texas legislature's 1974 approach was apparently based on language offered in the Final Report of the National Commission on Reform of Federal Criminal Laws in 1971 (hereinafter "Final Report"). That language first appeared in the Commission's 1970 study draft.

The National Commission's provision was clearly not offered as a comprehensive statement of causation law. Rather, it was designed to deal with only the limited situation of "concurrent causation"—when there is more than one cause of an occurrence, none of the causes is necessary, and more than one cause is sufficient. The National Commission's working paper written by Harvard professor Lloyd Weinreb described the type of problems targeted by this product of the Commission's efforts:

> The paradigm is a situation in which each of two or more persons engages in conduct that fully satisfies the definition of a crime but in which there is only "one" harmful consequence.

> [For example,] A and B simultaneously shoot at X, both intending to kill him. The bullets enter X's body at the same time. Each wound is sufficient to cause death and would alone cause death in the same amount of time. X dies from the joint effect of both wounds.

Lloyd Weinreb, *Comment on Basis of Criminal Liability; Culpability; Causation; Chapter 3; Section 610, in* 1 Working Papers of the National Commission on Reform of Federal Criminal Laws 105, 145 (1970).

The Commission apparently sought to articulate an approach to these "concurrent causation" situations that avoided the Model Penal Code's emphasis on "but for" causation as sufficient.

The Commission's draft would provide that in these "concurrent causation" situations causation *may* be found "unless the concurrent cause was clearly sufficient to produce the result and the conduct of the accused clearly insufficient." Final Report section 305.

The Comment to the National Commission's proposal notes that the proposed section "may not be useful in all cases where causation must be explained, [but] it is intended to be an aid to uniformity and clarification whenever it does apply." Final Report section 305. The Commission's working paper noted that an early draft of the Final Report's approach "at best, offers no guidance in the case of sequential, as opposed to concurrent causes." Weinreb at 146.

Apparently three other jurisdictions adopted the Final Report's approach of providing that, in these concurrent situations, causation *may* be found. *See* Ark. Code § 5-2-205; Me. Rev. Stat. tit. 17-A, § 33; N.D. Cent. Code § 12.1-02-05.

The Texas legislature took the language of section 305 of the National Commission's final draft and used it in what became a provision much different from the commission's section 305. The Texas legislature added a general rule at the beginning: "A person is criminally responsible if the result would not have occurred but for his conduct . . . ." Tex. Penal Code § 6.04(a). It then, in the second portion of section 6.04(a), used the final draft's section 305 language to provide for when—in certain concurrent causation situations—a person would be criminally responsible for a result.

Unlike the Final Report's section 305 and provisions in most other jurisdictions based on section 305, section 6.04(a) purports to be a comprehensive causation provision. Apparently the only other jurisdiction to take this approach is Alabama. *See* Ala. Code § 13A-2-5(a).

Section 6.04(a) as Exclusive "Causation Law." The initial question for the Committee was whether Tex. Penal Code § 6.04(a) constitutes the only causation law applicable to causation issues presented in criminal litigation.

Section 6.04(a) might be treated as addressing only limited situations—those in which two causes operate concurrently in bringing about a result. In *Hutcheson v.*

State, 899 S.W.2d 39 (Tex. App.—Amarillo 1995, pet. ref'd), for example, the evidence showed that the victim was struck by two shots, one fired by Hutcheson and the other by a police officer. Expert testimony was that "either wound sufficed to cause death." The court of appeals held that the evidence did show the necessary "but for" causation. Further, no jury instruction under section 6.04(a)'s concurrent causation provision was necessary, because no evidence showed that the defendant's conduct was clearly insufficient to produce the result—the victim's death. *Hutcheson*, 899 S.W.2d at 42.

So section 6.04(a) might be read as simply a directive that, in most concurrent causation cases such as *Hutcheson*, the only real question for the jury is whether the evidence proves "but for" causation. Seldom will the evidence permit a conclusion that the cause attributable to the accused is clearly insufficient alone to produce the result.

But the court of criminal appeals appears to have held that section 6.04(a) and only the law in that provision governs situations that involve what the National Commission's working paper calls "sequential causation."

In *Thompson v. State*, 93 S.W.3d 16 (Tex. Crim. App. 2001), it was found that Thompson shot the victim in the tongue. Testimony indicated that without medical attention, the wound would have been fatal. The victim did receive medical attention in the form of surgery. During the surgery, the physicians failed to secure Thompson's airway, and she slipped into a coma. She became brain dead and died several days after life support was removed.

At trial, the *Thompson* jury was instructed in rather general terms under section 6.04(a). The instruction did not specify any possible concurrent cause but did tell the jury to acquit Thompson if it found "the concurrent cause was clearly sufficient to produce the result and the conduct of the defendant clearly insufficient." *Thompson*, 93 S.W.3d at 22. On appeal, Thompson claimed error in "denying his requested charge 'on the law of intervening medical care as a cause of death.'" *Thompson*, 93 S.W.3d at 21. Rejecting Thompson's reliance on pre-1974 case law, the court found no error. The "controlling statute," it explained, is section 6.04(a), "governing concurrent causation." *Thompson*, 93 S.W.3d at 22.

The opinion in *Thompson* does not make clear whether the evidence showed that the gunshot and the airway obstruction operated together to cause death or whether the situation involved surgery that was successful (in stopping the effect of the gunshot) but nevertheless killed the patient (by obstructing her airway). Apparently the distinction was not regarded as important. Thus, section 6.04(a) applied whether the situation involved concurrent causes (the gunshot and airway obstruction acting together) or sequential causes (the airway obstruction causing death after and because of the earlier gunshot).

Thompson strongly suggests that there is no other causation law that a defendant might invoke to obtain a jury charge on proximate causation in any sense of that term. It also suggests no basis for a charge on "intervening" causes or factors that would or might under certain circumstances render simple "but for" causation insufficient on which to base liability.

In contrast, the court of criminal appeals in *Williams v. State*, 235 S.W.3d 742, 763–69 (Tex. Crim. App. 2007), hinted that section 6.04(a) may not fully state Texas criminal causation law.

Williams was convicted of recklessly causing serious bodily injury to her two children. The evidence showed she left them in the care of Bowden, who permitted the premises to catch on fire, causing the children's death. After concluding the evidence failed to support the jury's finding of recklessness, the court of criminal appeals held that the evidence also failed to support the jury's finding that Williams's actions caused the death of the children. It appeared to reason that the actions of Bowden were an unforeseeable "intervening cause" and as a result the defendant's actions were not a "but for" cause of the result as required by section 6.04(a). *Williams*, 235 S.W.3d at 764–65.

Williams suggests that despite the lack of any provision for this in section 6.04(a), Texas causation law includes some requirement of foreseeability: "Obviously, some element of foreseeability limits criminal causation just as it limits principles of civil 'proximate causation.'" *Williams*, 235 S.W.3d at 764 (citing an explanatory note to the Model Penal Code). But note the dissent at *Williams*, 235 S.W.3d at 772 (Keller, P.J., joined by Meyers, J., dissenting) ("'Foreseeability' is not expressly a part of Texas's criminal law of causation, and I see no need at this time to import it as an aid in determining 'but-for' causality."). Judge Cochran, author of the *Williams* opinion, further explained her view of concurrent causation in *Otto v. State*, 273 S.W.3d 165, 172–77 (Tex. Crim. App. 2008) (Cochran, J., dissenting).

Williams acknowledges in a footnote that section 6.04(a) "[t]aken literally . . . would imply that but-for causation alone is ordinarily sufficient for liability, subject only to qualification with respect to concurrent causes." *Williams*, 235 S.W.3d at 767 n.66 (quoting Model Penal Code section 2.03 at 265 n.24). *Thompson* suggests that the court of criminal appeals would read section 6.04(a) in this literal manner. *Williams* casts some doubt on this.

Alternative Causation. One aspect of Texas causation law does appear to be clear. A defendant's contention may be what the court of criminal appeals has called "alternative causation." *Barnette v. State*, 709 S.W.2d 650 (Tex. Crim. App. 1986).

The state's theory in an intentional murder case may be that the defendant shot the victim, killing him. The defendant's contention may be that the defendant's shot did not hit the victim but a shot fired by a third party hit the victim and caused his death. The defendant's contention does not raise concurrent causation under Tex. Penal Code

§ 6.04(a), because the defendant is not acknowledging that the defendant's actions in any way contributed to causing the result. The defendant is arguing that the result is attributable entirely to an alternative cause.

Barnette makes clear that an alternative-cause contention merely negates one element of the state's case. Thus, a defendant has no right to an instruction on the defensive theory. *Barnette*, 709 S.W.2d at 652.

It appeared to the Committee that a charge on alternative causation, under more recent case law, might be a prohibited comment on the evidence. Consequently, it does not recommend such a charge.

Possible Concurring Cause. What is—or what might a jury consider—a concurring cause requiring a jury charge on Tex. Penal Code § 6.04(a)'s concurring causation rule? In *Robbins v. State*, 717 S.W.2d 348 (Tex. Crim. App. 1986), in which the state's theory was that the defendant's intoxication caused the death of the victim, the court held that the defendant's "exhaustion" could not be a concurrent cause. "A concurrent cause is 'another cause' in addition to the actor's conduct, an 'agency in addition to the actor.'" *Robbins*, 717 S.W.2d at 351 n.2 (citations omitted).

In many jurisdictions, a preexisting condition of the victim cannot affect the chain of causation between the defendant's act and a particular injury to the victim of a criminal assault. Yet one Texas court has indicated that such preexisting conditions of the victim triggered a right on the part of the defendant to a concurrent cause instruction. *Laird v. State*, No. 06-07-00171-CR, 2008 WL 2690073, at *3 n.4 (Tex. App.—Texarkana July 8, 2008, no pet.) (not designated for publication).

Defendant's Conduct "Contributing to" Result. In *Robbins*, an involuntary manslaughter prosecution, the court of criminal appeals held that the trial court erred by telling the jury in the abstract that the law required proof that the defendant's intoxication "caused or contributed to" the death of the victim. This would have been permissible under pre-1974 law. But under section 6.04(a), a showing that the defendant's conduct contributed to causing a required result is qualified by the concurrent causation provision.

Under section 6.04(a), *Robbins* held, it is no longer Texas law that the defendant's conduct causes a result if it merely contributes to the occurrence of that result. Now the law limits responsibility for a result to situations in which the evidence proves at least minimal "degree of contribution" to the occurrence of the result. Failing to make clear to the jury that the law requires a certain degree of contribution to the causing of the result permits conviction under a lesser standard than the law provides. *Robbins*, 717 S.W.2d at 352.

Robbins held as it did despite the court's conclusion that the facts raised no question regarding concurrent causation and no instruction on concurrent causation should have been given.

Under *Robbins*, the Committee concluded, a trial court would err in simply instructing a jury that the defendant is "criminally responsible" for a result if "but for" the defendant's conduct, "operating either alone or concurrently with another cause," the result would not have occurred.

Robbins, however, simply does not make sense. The only possible operative factors were the defendant's intoxication and his exhaustion. His exhaustion, the court concluded, could not be a concurrent cause. Had the jury been told about concurrent causation, it should have found that inapplicable.

The Committee recognized that the court of criminal appeals might regard *Robbins* as not reflecting current law or might read it differently than the Committee read it. Nevertheless, the Committee concluded it needed to respect what appears to be the law under *Robbins*.

Committee's Approach. The Committee had concern that Tex. Penal Code § 6.04(a) may not provide a clear and principled approach to resolving causation issues posed by criminal prosecutions. It was particularly concerned that the statute appears to make no provision for sequential causation situations. If somehow the statute can be construed to embody comprehensive causation law for criminal cases, the Committee was not confident that this law could be formulated into a jury charge that jurors would both understand and be willing to apply.

Where section 6.04(a) applies, *Robbins* suggests that it provides a vehicle for determining when a defendant's conduct has been shown to have made a sufficient "degree of contribution" to the occurrence of a required result to justify criminal liability. The Committee was not persuaded that the statute in fact does this. In any case, the Committee had considerable difficulty writing an actual jury instruction that would permit juries to make principled decisions on whether defendants' conduct contributed to the causing of injury or damage to a "degree" justifying criminal responsibility.

Nevertheless, given the case law—and particularly *Thompson*—the Committee proceeded on the assumption that the only causation law on which juries should be instructed is that contained in section 6.04(a).

The Committee considered suggesting that, in situations requiring no explanation of concurrent causation possibly relieving the defendant of responsibility, the jury be told the defendant's conduct need not be the sole or only cause of the result. Rather the defendant is "criminally responsible" for a result if "but for" the defendant's conduct, "operating either alone or concurrently with another cause," the result would not have occurred.

Robbins, however, seems to bar such an approach.

The Committee was persuaded that under the case law, section 6.04(a) concurrent causation law is the only qualification of a general rule that "but for" causation is sufficient for causation in criminal law. How concurrent causation law must or may be

applied is considerably uncertain. Given this uncertainty, the Committee concluded that trial judges should avoid including concurrent causation instructions in jury charges if there is no reason to believe it is applicable. The risk of confusing juries is simply too great.

If the facts raise concurrent causation under section 6.04(a), a trial court must not only instruct on concurrent causation in the abstract but also apply it to the facts. *Nugent v. State*, 749 S.W.2d 595 (Tex. App.—Corpus Christi 1988, no pet.) (conviction for involuntary manslaughter reversed for failure to apply concurrent causation to facts). The case law, however, is not specific regarding how abstract concurrent causation law is to be applied when it must be applied.

The Committee suspects that trial judges are sometimes so confused by section 6.04(a) that they give an abstract discussion on concurrent causation out of an abundance of caution. Unable to determine how specifically concurrent causation might apply to the facts of the cases, however, they do not seriously attempt to apply the abstract law to these facts.

More rigorous efforts to apply concurrent causation law to the facts may lead to conclusions that this law simply is inapplicable. Such a conclusion means that neither an abstract nor an applied version of that law should be included in the jury charge. Where such instructions are in fact warranted, the Committee has set out optional instructions in, for example, CPJC 80.2 in *Texas Criminal Pattern Jury Charges—Crimes against Persons & Property*, and in CPJC 40.19 in *Texas Criminal Pattern Jury Charges—Intoxication, Controlled Substance & Public Order Offenses*.

CPJC 1.9 Jury Unanimity

The Texas Constitution requires that jury verdicts in felony cases be unanimous, and statutory law requires unanimity in all criminal cases. *Pizzo v. State*, 235 S.W.3d 711, 714 (Tex. Crim. App. 2007).

Instructions to juries must, of course, direct juries to be unanimous when the law requires this. Recent developments in jury unanimity law have greatly increased the difficulty of jury submission of many criminal cases. The decisions have not been clear regarding the differences, if any, among the requirements of federal constitutional law, Texas constitutional law, and Texas statutory law.

Unanimity Regarding Alternatives Submitted to Jury. Many statutes defining crimes set out alternatives. The state frequently seeks conviction under alternative theories. Sometimes in these cases, but not always, jury unanimity requires that a given jury agree on which alternative the jury relies on in finding the defendant guilty.

When the state relies on different "incidents" or "acts" as constituting different commissions of a single statutorily defined offense, unanimity is required. It has no significance that the state contends that these different commissions violated the statute because each of them would be proved by relying on different "theories" or alternative ways of committing the statutory offenses. Unanimity is required not by the state's reliance on different theories or ways of committing the charged crime but rather by its reliance on different acts or incidents. *Stuhler v. State*, 218 S.W.3d 706, 716–17 (Tex. Crim. App. 2007) (explaining *Ngo v. State*, 175 S.W.3d 738, 745 (Tex. Crim. App. 2005), and *Francis v. State*, 36 S.W.3d 121 (Tex. Crim. App. 2000)).

The major problem arises when the state relies on a single incident or act and argues that by this incident or act the defendant committed the crime under different and alternative theories. In *Stuhler*, for example, the state relied, alternatively, on proof that the defendant committed indecency with a child by contact by causing the victim to suffer (1) serious bodily injury or (2) serious mental deficiency, impairment, or injury. The charged offense was created and defined by Tex. Penal Code § 22.04(a), which permitted conviction under either theory.

In these cases, "'[j]ury unanimity is required on the essential elements of the offense' but is 'generally not required on the alternate modes or means of commission.'" *Pizzo*, 235 S.W.3d at 714 (quoting *Jefferson v. State*, 189 S.W.3d 305, 311 (Tex. Crim. App. 2006), quoting *State v. Johnson*, 243 Wis. 2d 365, 627 N.W.2d 455, 459–60 (2001)).

The question in cases such as *Stuhler* is the nature of the statutory alternatives. If causing serious bodily injury to a child and causing serous mental deficiency, impairment, or injury to a child are different offenses, each with different "essential elements," juries must be unanimous about one or the other as the basis for the defendants' convictions. If those options are instead "alternate modes or means of

commission" of a single statutory crime, they do not define different essential elements. In these situations, jurors who all agree the defendant is guilty need not agree on the alternative under which guilt is established.

In a specific situation, then, the issue is whether statutory alternatives reflect different statutory offenses or rather different means of committing a single statutory offense.

In *Stuhler*, the court of criminal appeals adopted, as a rule of thumb for interpreting this aspect of statutes, an analysis first suggested by Judge Cochran concurring in *Jefferson*. Under this analysis, the court looks to the grammatical structure of the statute. In a result-oriented offense such as injury to a child, the court will identify the main verb defining the conduct constituting the offense. If this verb has multiple direct objects, those objects are likely to each define a separate offense on which a jury must be unanimous.

In contrast, if the alternatives are provided by "adverbial phrases, introduced by the preposition 'by,'" they are likely to describe a different manner and means of committing a single offense; the alternatives "are not the gravamen of the offense, nor elements on which the jury must be unanimous." *Stuhler*, 218 S.W.3d at 718 (quoting *Jefferson*, 189 S.W.3d at 315–16 (Cochran, J., concurring, joined by Price and Johnson, J.J.)).

In *Stuhler* itself, the court concluded that the alternatives were different offenses. Consequently, the jury charge had to make clear to the jury that it must be unanimous on whether it found the defendant had been proved to have caused serious bodily injury to the child victim or, rather, to have caused serious mental deficiency, impairment, or injury to that victim.

Pizzo addressed indecency with a child as defined by several Penal Code provisions, which together defined the offense as touching of the anus, breast, or any part of the genitals of a child with intent to arouse or gratify the sexual desire of any person. The majority applied the *Stuhler* analysis as indicating that touching the breast of the victim and touching the genitals of the victim were different offenses. When a jury is given these as alternatives, the instructions must make clear that the jury must be unanimous on which alternative is relied on to convict.

Three members of the court in *Pizzo*, including Judge Cochran, disagreed on the reasoning by which the court should reach the result of the majority opinion. They found that proper application of the *Stuhler* analysis indicated that the alternatives were not separate offenses. Since the *Stuhler* analysis is only a rule of thumb, they reasoned, the results it suggested might be contradicted by other means. They found other indicators of legislative intent controlling and requiring that touching the breast of the victim and touching the genitals be treated as different offenses. *Pizzo*, 235 S.W.3d at 722 (Price, J., concurring).

As a result of the case law, the Committee had difficulty predicting what the requirement of unanimity would require regarding the particular offense. The six-to-three split in *Pizzo* makes clear the difficulty of the Committee's task. In addressing particular offenses, the Committee addressed as carefully as it could what the present case law suggests will be required.

Unanimity on Defensive Matters. How, if at all, the requirement of unanimity applies to defensive matters is not entirely clear.

The court of criminal appeals has held that a jury charge on sudden passion in a murder case must require the jury to be unanimous on a punishment phase finding adverse to the defendant, that is, on a finding that the defendant did not meet his burden of proving sudden passion. *Sanchez v. State*, 23 S.W.3d 30, 34 (Tex. Crim. App. 2000).

Sanchez strongly suggests that the requirement of unanimity applies to both defenses and affirmative defenses. *Cf. Chapman v. State*, No. 01-00-00110-CR, 2001 WL 754812, at *1–2 (Tex. App.—Houston [1st Dist.] July 5, 2001, pet. ref'd) (not designated for publication) (jury charge on involuntary intoxication was adequate because it required all jurors to vote that defendant had not established defense of involuntary intoxication).

But if there are alternative grounds on which the jury can find against the defendant on a defense, jury unanimity apparently does not require the jury to be unanimous on the specific basis on which it finds against the defendant. *Harrod v. State*, 203 S.W.3d 622 (Tex. App.—Dallas 2006, no pet.) (jury charge on self-defense need not require unanimity on which "element" of self-defense the state "negated").

Committee's Approach. The Committee attempted to apply the approach of *Stuhler* and *Pizzo* in identifying when existing law requires a jury to be unanimous regarding alternatives presented by the definition of the charged offense.

Regarding defensive matters, the Committee concluded that under *Sanchez* and *Harrod*, the instructions must make clear that a jury's decision to reject a defense or affirmative defense must be unanimous. If the decision to reject the defense or affirmative defense can rest on any of several alternative grounds, however, unanimity is not required regarding the specific ground.

In addition, of course, the Committee faced the troublesome matter of identifying language that would convey to juries the substance of the requirement of unanimity, once that substance had been determined. Rather than use the term *unanimous* and phrases derived from this, the Committee concluded that jurors were more likely to understand instructions put in terms of when all members of the jury must "agree."

The Committee was also clear that the instructions should address the matter directly and, as explicitly as possible, explain to jurors on which matters they must all agree.

CPJC 1.10 Venue

Generally, venue requires only that the state prove that the charged offense was committed in the county of prosecution. In exceptional cases, the state may invoke the statutory provisions that sometimes permit prosecution in one county of an offense committed in another county. When this occurs, the jury instructions on venue may be quite complicated. *See Whitley v. State*, 635 S.W.2d 791, 797 (Tex. App.—Tyler 1982, no pet.).

Venue is not an element of the charged offense and need be proved only by a preponderance of the evidence. Tex. Code Crim. Proc. art. 13.17. Obviously, the instructions need not tell the jury that proof beyond a reasonable doubt is required. *Villani v. State*, 116 S.W.3d 297, 308–09 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) ("[The] proposed instructions [misstated the law because they] would have required the State to prove venue beyond a reasonable doubt, when the State is only required to prove venue by a preponderance of the evidence.").

Practice, however, has been to simply phrase the instructions as requiring proof beyond a reasonable doubt of all the charging instrument's allegations, including the allegation that the offense was committed in the county specified. *E.g., Melton v. State*, 158 S.W. 550, 552 (Tex. Crim. App. 1913) ("[The] charge [in a rape prosecution] expressly required the jury to believe beyond a reasonable doubt that the appellant had sexual intercourse with [the victim] in Eastland [C]ounty, Tex. . . . .").

The Committee considered recommending a charge that distinguished venue from the elements of the charged offense and told the jury that venue need be proved only by a preponderance of the evidence. It concluded, however, that generally the state would not be significantly disadvantaged by having to prove venue by proof beyond a reasonable doubt. Explaining to juries the need to separate venue and treat it differently would, on the other hand, often add to the complexity of the instructions and the difficulty of jurors' comprehension of them.

On balance, then, the Committee recommends the widespread practice of simply telling juries that among the matters that must be proved beyond a reasonable doubt is the commission of the offense. In unusual cases in which more elaborate instructions on venue must be given, of course, those instructions might best be drafted to make clear that the burden of proof is only the lesser one.

CPJC 2.1 Instruction

JURY INSTRUCTIONS

Members of the jury,

The defendant, [*name*], is accused of [*offense*]. The defendant has pleaded "not guilty," and you have heard all of the evidence that will be produced on whether the defendant has been proved guilty.

Both sides will soon present final arguments. Before they do so, I must now give you the instructions you must follow in deciding whether the defendant has been proved guilty or not.

You will have a written copy of these instructions to take with you and to use during your deliberations.

First I will tell you about some general principles of law that must govern your decision of the case. Then I will tell you about the specific law applicable to this case. Finally, I will instruct you on the rules that must control your deliberations.

GENERAL PRINCIPLES

The [Indictment/Information]

The [indictment/information] is not evidence of guilt. The [indictment/information] is only a document required to bring the case before you. The [indictment/information] cannot be considered in any way by the jury. Do not consider the fact that the defendant has been arrested, confined, or indicted or otherwise charged. You may not draw any inference of guilt from any of these circumstances.

Presumption of Innocence

The defendant is presumed innocent of the charge. All persons are presumed to be innocent, and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The law does not require a defendant to prove his innocence or produce any evidence at all. Unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case, the presumption of innocence alone is sufficient to acquit the defendant.

Burden of Proof

The burden of proof throughout the trial is always on the state. The defendant does not have the burden to prove anything. The state must prove every element of the offense beyond a reasonable doubt to establish guilt for the offense. If the state proves every element of the offense beyond a reasonable doubt, then you must find the defendant guilty. If the state does not prove every element of the offense beyond a reasonable doubt, then you must find the defendant not guilty. If, after you have considered all the evidence and these instructions, you have a reasonable doubt about whether the defendant is guilty, you must find the defendant not guilty.

Jury as Fact Finder

As the jurors, you review the evidence and determine the facts and what they prove. You judge the believability of the witnesses and what weight to give their testimony.

In judging the facts and the believability of the witnesses, you must apply the law provided in these instructions.

Evidence

The evidence consists of the testimony and exhibits admitted in the trial. You must consider only evidence to reach your decision. You must not consider, discuss, or mention anything that is not evidence in the trial. You must not consider or mention any personal knowledge or information you may have about any fact or person connected with this case that is not evidence in the trial.

Statements made by the lawyers are not evidence. The questions asked by the attorneys are not evidence. Evidence consists of the testimony of the witnesses and materials admitted into evidence.

Nothing the judge has said or done in this case should be considered by you as an opinion about the facts of this case or influence you to vote one way or the other.

You should give terms their common meanings, unless you have been told in these instructions that the terms are given special meanings. In that case, of course, you should give those terms the meanings provided in the instructions.

While you should consider only the evidence, you are permitted to draw reasonable inferences from the testimony and exhibits that are justified in the light of common experience. In other words, you may make deductions and reach

conclusions that reason and common sense lead you to draw from the facts that have been established by the evidence.

You are to render a fair and impartial verdict based on the evidence admitted in the case under the law that is in these instructions. Do not allow your verdict to be determined by bias or prejudice.

Admitted Exhibits

You may, if you wish, examine exhibits. If you wish to examine an exhibit, the foreperson will inform the court and specifically identify the exhibit you wish to examine. Only exhibits that were admitted into evidence may be given to you for examination.

Testimony

Certain testimony will be read back to you by the court reporter if you request. To request that testimony be read back to you, you must follow these rules. The court will allow testimony to be read back to the jury only if the jury, in a writing signed by the foreperson, (1) states that it is requesting that testimony be read back, (2) states that it has a disagreement about a specific statement of a witness or a particular point in dispute, and (3) identifies the name of the witness who made the statement. The court will then have the court reporter read back only that part of the statement that is in disagreement.

The Verdict

The law requires that you render a verdict of either "guilty" or "not guilty." The verdict of "not guilty" simply means that the state's evidence does not prove the defendant guilty beyond a reasonable doubt.

You may return a verdict only if all twelve of you agree on this verdict.

When you reach a verdict, the foreperson should notify the court.

[Include the following if the defendant did not testify and the defendant does not object.]

Defendant's Right to Remain Silent

The defendant has a constitutional right to remain silent. The defendant may testify on his own behalf. The defendant may also choose not to testify. The defendant's decision not to testify cannot be held against him, and it is not evidence of guilt. You must not speculate, guess, or even talk about what the

defendant might have said if he had taken the witness stand or why he did not. The foreperson of the jury must immediately stop any juror from mentioning the defendant's decision not to testify.

RULES THAT CONTROL DELIBERATIONS

You must follow these rules while you are deliberating and until you reach a verdict. After the closing arguments by the attorneys, you will go into the jury room.

Your first task will be to pick your foreperson. The foreperson should conduct the deliberations in an orderly way. Each juror has one vote, including the foreperson. The foreperson must supervise the voting, vote with other members on the verdict, and sign the verdict sheet.

While deliberating and until excused by the trial court, all jurors must follow these rules:

1. You must not discuss this case with any court officer, or the attorneys, or anyone not on the jury.

2. You must not discuss this case unless all of you are present in the jury room. If anyone leaves the room, then you must stop your discussions about the case until all of you are present again.

3. You must communicate with the judge only in writing, signed by the foreperson and given to the judge through the officer assigned to you.

4. You must not conduct any independent investigations, research, or experiments.

5. You must tell the judge if anyone attempts to contact you about the case before you reach your verdict.

Your sole duty at this point is to determine whether the defendant has been proved guilty. You must restrict your deliberations to this matter.

After you have arrived at your verdict, you are to use one of the forms attached to these instructions. You should have your foreperson sign his or her name to the particular form that conforms to your verdict.

After the closing arguments by the attorneys, you will begin your deliberations to decide your verdict.

[Insert instructions for charged offense. Include any other instructions raised by the evidence. Continue with the following verdict form or use a verdict form tailored to the facts in the case.]

VERDICT—NOT GUILTY

We, the jury, find the defendant, [*name*], not guilty.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

VERDICT—GUILTY

We, the jury, find the defendant, [*name*], guilty of [*offense*], as charged in the [indictment/information].

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

[Continue with punishment instructions as needed.]

COMMENT

Accurately Posing Issue for Jury. The Code of Criminal Procedure mandates that, in a jury trial on a plea of not guilty, the jury's verdict must be "guilty" or "not guilty." *See* Tex. Code Crim. Proc. art. 37.07, § 1(b). This may misleadingly suggest that to return a verdict favorable to the accused, the jury must conclude that the defendant is actually not guilty. In fact, such a verdict requires only a finding that the defendant has not been proved guilty by the exceptionally high standard of proof beyond a reasonable doubt.

Those portions of the instructions that define "proof beyond a reasonable doubt" are, of course, designed to convey this.

The Committee concluded, however, that care should be taken, in addition, to phrase the instructions to avoid any suggestion that the jury must or even should address whether the defendant is actually not guilty.

A number of decisions have found no reversible error in jury instructions referring to the jury's task as deciding the guilt or innocence of the defendant. *Mason v. State*, No. 08-99-00149-CR, 2000 WL 965041 (Tex. App.—El Paso July 13, 2000, pet. ref'd) (not designated for publication); *Flores v. State*, 920 S.W.2d 347, 356–57 (Tex. App.—San Antonio 1996), *pet. dism'd, improvidently granted*, 940 S.W.2d 660 (Tex. Crim. App. 1996); *Barnes v. State*, 855 S.W.2d 173, 175 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd).

Nevertheless, the Committee concluded that insofar as possible the instructions should be phrased in terms that avoid any suggestion that the jury needs to address whether the defendant is actually not guilty. Thus the Committee chose in the second paragraph to say, "I must now give you the instructions you must follow in deciding whether the defendant has been proved guilty or not." This is suggested rather than, "I must now give you the instructions you must follow in deciding whether the defendant is guilty or not guilty." The same approach was followed throughout the instructions.

Presumption of Innocence. The instruction implements the Code of Criminal Procedure's provision for the presumption of innocence:

> All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that he has been arrested, confined, or indicted for, or otherwise charged with, the offense gives rise to no inference of guilt at his trial.

Tex. Code Crim. Proc. art. 38.03.

Charging Instrument Not Evidence. A trial court probably is not required to tell the jury that the charging instrument is not evidence. *See Magness v. State*, 244 S.W.2d 810, 810 (Tex. Crim. App. 1952) ("Though the trial court might well have given the requested charge [that the information filed against him was no evidence of his guilt], we are unable to agree that his failure to do so was prejudicial to the rights of appellant.").

Nevertheless, such an instruction has traditionally been given. *E.g., Beal v. State*, 520 S.W.2d 907, 911 (Tex. Crim. App. 1975) ("[T]he jury was charged by the court that the indictment was not evidence and was not to be 'considered as a fact or circumstance against the defendant.'"); *Hall v. State*, 150 S.W.2d 404, 407 (Tex. Crim. App. 1941) (trial court "told the jury-men that the indictment was not any evidence and should not be so considered by them").

The Committee believes the instruction should continue to be included.

Jurors as Judges of Facts. The role of the jurors is addressed in two provisions of the Code of Criminal Procedure:

> The jury, in all cases, is the exclusive judge of the facts proved, and of the weight to be given to the testimony, except where it is provided by law that

> proof of any particular fact is to be taken as either conclusive or presumptive proof of the existence of another fact, or where the law directs that a certain degree of weight is to be attached to a certain species of evidence.

Tex. Code Crim. Proc. art. 38.04.

> Unless otherwise provided in this Code, the jury is the exclusive judge of the facts, but it is bound to receive the law from the court and be governed thereby.

Tex. Code Crim. Proc. art. 36.13.

Consistent with present practice, the essence of these statutory provisions is included in the proposed instruction.

Evidence to Be Provided. The jurors' right of access to evidence is addressed in two provisions of the Code of Criminal Procedure:

> There shall be furnished to the jury upon its request any exhibits admitted as evidence in the case.

Tex. Code Crim. Proc. art. 36.25.

> In the trial of a criminal case in a court of record, if the jury disagree as to the statement of any witness they may, upon applying to the court, have read to them from the court reporter's notes that part of such witness testimony or the particular point in dispute, and no other . . . .

Tex. Code Crim. Proc. art. 36.28.

The jury should be told of its right of such access.

Defendant's Failure to Testify. The defendant's clear constitutional right not to testify is protected by a specific provision in the Code of Criminal Procedure:

> Any defendant in a criminal action shall be permitted to testify in his own behalf therein, but the failure of any defendant to so testify shall not be taken as a circumstance against him, nor shall the same be alluded to or commented on by counsel in the cause.

Tex. Code Crim. Proc. art. 38.08.

> Texas cases are generally in accord with [*Carter v. Kentucky*, 450 U.S. 288, 297 (1981)]. If a defendant properly requests or timely objects, he is entitled to a jury instruction that his failure to testify cannot be taken as a circumstance against him. *See, e.g., Wilkens v. State*, 847 S.W.2d 547, 553 (Tex. Crim. App. 1992); *Brown v. State*, 617 S.W.2d 234, 238 (Tex. Crim. App. 1981).

Michaelwicz v. State, 186 S.W.3d 601, 623 (Tex. App.—Austin 2006, pet. ref'd).

The court of criminal appeals has refused to hold that a trial judge errs if, over objection of the defendant, the judge gives an instruction on the defendant's failure to testify. But the court has made clear that trial judges should not give the instruction in these situations: "We . . . admonish trial judges to omit such instruction when requested by the defense to do so." *Rogers v. State*, 486 S.W.2d 786, 788 (Tex. Crim. App. 1972). *Accord Hill v. State*, 466 S.W.2d 791, 793–94 (Tex. Crim. App. 1971); *Jackson v. State*, No. 03-96-00521-CR, 1997 WL 6311 (Tex. App.—Austin Jan. 9, 1997, pet. ref'd) (not designated for publication).

If the defendant does in fact testify, the court of criminal appeals has also held that the trial court properly refused to give an instruction that the defendant was not required to do so. *Bircher v. State*, 491 S.W.2d 443, 445 (Tex. Crim. App. 1973).

Definition of Proof Beyond Reasonable Doubt. In *Paulson v. State*, 28 S.W.3d 570 (Tex. Crim. App. 2000) (overruling *Geesa v. State*, 820 S.W.2d 154 (Tex. Crim. App. 1991)), the court of criminal appeals made clear that trial courts are not required to give instructions defining reasonable doubt. It added that "the better practice is to give no definition of reasonable doubt at all to the jury." *Paulson*, 28 S.W.3d at 573. But further, a trial court would not err in giving a definition if the state and the defense were to agree to give the definition set out in *Geesa*. *Paulson*, 28 S.W.3d at 573.

A trial court did not abuse its discretion in instructing the jury, "It is not required that the prosecution prove guilt beyond all possible doubt; it is required that the prosecution's proof excludes all 'reasonable doubt' concerning the defendant's guilt." *Woods v. State*, 152 S.W.3d 105, 114–15 (Tex. Crim. App. 2004) (noting that instruction did not contain definitional portions of *Geesa* charge). In an unreported opinion, however, the court of criminal appeals observed that it "continue[d] to adhere to our position [in *Paulson*] that the better practice is to leave wholly to the jury the task of assigning meaning to the phrase 'beyond a reasonable doubt.'" *Perkins v. State*, No. 74,318, 2004 WL 3093239, at *2 (Tex. Crim. App. June 30, 2004) (not designated for publication).

At least one court has held that even giving a definition over the defendant's objection is not necessarily reversible error. *Holland v. State*, 249 S.W.3d 705, 707 (Tex. App.—Beaumont 2008, no pet.) (definition given in oral instructions between swearing of jury and defendant's plea to indictment).

The Committee concluded, as the court of criminal appeals has made clear, that trial courts should not make any effort, directly or otherwise, to define the concept of reasonable doubt.

Explanation of "Not Guilty" Verdict. The instructions must convey to the jury that it is required to return a verdict favorable to the accused if it concludes the state has failed to prove the accused guilty by the uniquely high standard of proof beyond a reasonable doubt. This is the case even if the jurors believe on balance that the defendant committed the charged offense.

There is some support for this in the case law. *See Lindley v. State*, 123 S.W. 1107, 1108 (Tex. Crim. App. 1909).

On the other hand, at least one case has held that such an instruction is not required if the instructions properly define the state's burden of proof. *See McDonald v. State*, 911 S.W.2d 798, 805 (Tex. App.—San Antonio 1995, pet. dism'd).

CHAPTER 3 SPECIAL INSTRUCTIONS

CPJC 3.1 Instruction—Limited Use of Evidence—Uncharged "Bad Acts"

[Insert instructions for underlying offense.]

Evidence of Wrongful Acts Possibly Committed by Defendant

During the trial, you heard evidence that the defendant may have committed wrongful acts not charged in the indictment. [*If requested by a party, include judge's description of specific acts.*] The state offered the evidence to show that the defendant [*describe purpose*]. You are not to consider that evidence at all unless you find, beyond a reasonable doubt, that the defendant did, in fact, commit the wrongful act. Those of you who believe the defendant did the wrongful act may consider it.

Even if you do find that the defendant committed a wrongful act, you may consider this evidence only for the limited purpose I have described. You may not consider this evidence to prove that the defendant is a bad person and for this reason was likely to commit the charged offense. In other words, you should consider this evidence only for the specific, limited purpose I have described. To consider this evidence for any other purpose would be improper.

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

The limited admissibility of evidence of uncharged bad acts of the defendant is addressed in Tex. R. Evid. 404(b). The requirement of a jury instruction on evidence admitted for limited purposes is based on Tex. R. Evid. 105(a).

Under rule 404(b), "[e]vidence of other crimes, wrongs or acts" is not admissible for character conformity purposes—to show that the accused is a "bad person" as a basis for the state to argue that this bad character indicates the accused committed the crime charged. Such evidence "may, however, . . . be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Tex. R. Evid. 404(b).

Case law, although not the terms of rule 404(b), requires proof beyond a reasonable doubt. *Ex parte Varelas*, 45 S.W.3d 627, 631 (Tex. Crim. App. 2001) ("Once an extraneous act has been ruled admissible, the jurors must be instructed . . . 'that they cannot consider against the defendant such collateral crimes, unless it has been shown to their satisfaction that the accused is guilty thereof.'") (quoting *Lankford v. State*, 248 S.W.

389, 389 (Tex. Crim. App. 1923)); *George v. State*, 890 S.W.2d 73, 76 (Tex. Crim. App. 1994) ("[W]e hold, if the defendant so requests at the guilt/innocence phase of trial, the trial court must instruct the jury not to consider extraneous offense evidence admitted for a limited purpose unless it believes beyond a reasonable doubt that the defendant committed the extraneous offense.").

The rule that the limited purpose for which the evidence is admitted must be included in the jury instruction has long been clear. Should the trial court admit the evidence of another crime, wrong, or act because it has relevance apart from character conformity, "then upon timely further request, the trial judge should instruct the jury that the evidence is limited to whatever purpose the proponent has persuaded him it serves." *Montgomery v. State*, 810 S.W.2d 372, 388 (Tex. Crim. App. 1990). Texas Rule of Evidence 105(a) embodies this requirement.

Some evidence is admitted as "same transaction contextual evidence"—"those events and circumstances that are intertwined, inseparable parts of an event that, if viewed in isolation, would make no sense at all." No limiting instruction should be given if this is the basis for admission of the evidence. *Delgado v. State*, 235 S.W.3d 244, 253 (Tex. Crim. App. 2007); *Camacho v. State*, 864 S.W.2d 524 (Tex. Crim. App. 1993).

Need for Request When Evidence Admitted. If at the time the evidence is admitted the defendant does not request a limiting instruction, the trial judge is not obligated to give one in the final charge to the jury. *Delgado*, 235 S.W.3d at 251.

A trial judge does, however, have discretion to give a limiting instruction in the final charge to the jury even though none was given at the time the evidence was admitted. *Delgado* reasonably suggests that, as a general rule, a trial judge who has admitted evidence for all purposes should be reluctant at the end of trial to, in a sense, change the ground rules and ask the jurors to consider the evidence for a more limited purpose than that for which they have been thinking about it.

Nevertheless, there may be unusual situations in which trial judges should exercise this discretion and include a limiting instruction in the final instructions. For example, when offered, evidence may appear not to be extraneous offense evidence or same transaction contextual extraneous offense evidence, but later developments may make clear the evidence is in fact admissible only for limited purposes under rule 404(b). In such situations, trial judges could quite reasonably decide that limiting instructions should be given in the final instructions, although none were given (or perhaps even sought) when the evidence was admitted.

Contents of Instruction When Evidence Admitted. The Committee recommends that the final instructions to the jury include a description of the specific "bad acts" at issue. The instruction given when the evidence is admitted, however, should not include such a specific summary of the acts sought to be proved. Thus, that instruction might be something like the following:

> The state is now going to introduce evidence that the defendant may have committed wrongful acts not charged in the indictment.
>
> The state offered the evidence to show that the defendant [*describe purpose*]. You are not to consider that evidence at all unless you find, beyond a reasonable doubt, that the defendant did, in fact, commit the wrongful act. Those of you who believe the defendant did the wrongful act may consider it.
>
> Even if you do find that the defendant committed a wrongful act, you may consider this evidence only for the limited purpose I have described. You may not consider this evidence to prove that the defendant is a bad person and for this reason was likely to commit the charged offense. In other words, you should consider this evidence only for the specific, limited purpose I have described. To consider this evidence for any other purpose would be improper.

Giving Instruction without Request of Party. Texas Rule of Evidence 105(a) provides that the limiting instruction is to be given "upon request." The court of criminal appeals advised, "Trial judges should be wary of giving a limiting instruction under rule 105(a) without a request because a party might well intentionally forego a limiting instruction as part of its deliberate strategy 'to minimize the jury's recollection of the unfavorable evidence.'" *See Oursbourn v. State*, 259 S.W.3d 159, 179 n.80 (Tex. Crim. App. 2008) (quoting *United States v. Johnson*, 46 F.3d 1166, 1171 (D.C. Cir. 1995)).

Specificity of Limiting Instruction. The Committee was divided on whether, as a matter of sound policy, an instruction should attempt to specifically identify the extraneous bad act evidence at issue, explain the limited purpose for which the jurors may consider the evidence, or both.

Some members of the Committee believed that such specificity in the limiting instruction focused on the evidence and thus inappropriately emphasized it more than necessary to accomplish the purpose of limiting instructions. Thus, they believed, such specificity violates the spirit and perhaps also the letter of the Texas Code of Criminal Procedure's prohibition against the trial judge's commenting on the evidence. *See* Tex. Code Crim. Proc. art. 36.14.

Other members of the Committee believed that the specificity and focus on the evidence was necessary to the purpose of the limiting instruction. The task of a limiting instruction is an especially difficult one. This task is sufficiently likely to be successful, these members concluded, only if the instruction uses considerable specificity in informing the jurors of the permissible use they may make of the evidence at issue. The very nature of limiting instructions requires that the trial court focus on the evi-

dence involved and make clear to the jury that its proper use of this evidence requires special attention.

Focusing on—and thus calling jurors' attention to—this particular kind of evidence, these members concluded, is necessary to providing effective limiting instructions. When the applicable law requires focusing on particular evidence, doing so violates neither the letter nor the spirit of the prohibition against commenting on the evidence.

These Committee members also concluded that encouraging specific instructions would encourage judges and lawyers to consider more carefully the difficult questions regarding the appropriate use of extraneous bad act evidence. The court of criminal appeals has noted, for example, that trial courts with some frequency inappropriately admit evidence of repeated bad acts similar to the charged offense under the "plan" exception. "When used properly, the 'plan' exception allows admission of evidence to show steps taken by the defendant in preparation for the charged offense." *Daggett v. State*, 187 S.W.3d 444, 451 (Tex. Crim. App. 2005).

Clearly the instruction should avoid giving the jurors a laundry list of abstractly appropriate uses of extraneous bad act evidence. It should tell the jurors only about those appropriate uses that apply to the specific case.

The basic difficulty is that the instruction really does not limit the ultimate purpose for which the jurors are to consider the evidence. The evidence ultimately may be used to show the defendant's guilt. But the instruction should limit the manner in which the jurors reason from the evidence to the conclusion that the defendant is guilty.

A majority of the Committee concluded that trial judges should submit instructions that are specific in the two ways set out above.

How specifically such instructions should be drafted is best illustrated using *Burton v. State*, 230 S.W.3d 846, 848–51 (Tex. App.—Houston [14th Dist.] 2007).

In *Burton*, the defendant was charged with a single bank robbery (of a Chase Bank branch), and evidence of several other robberies he committed (including robberies of Frost Bank, Washington Mutual Bank, and others) was admitted to show identity after he placed that element in issue. No issue was raised regarding the jury instruction, which was as follows:

> You are instructed that if there is any testimony before you in this case regarding the Defendant having committed offenses other than the offense alleged against him in the indictment in this case, you cannot consider said testimony for any purpose unless you find and believe beyond a reasonable doubt that the Defendant committed such offenses if any were committed. And even then, you may only consider the same in determining motive, modus operandi, and/or identity of the Defendant, if any, in connection with the offense, if any, alleged against him in the indictment of this case and for no other purpose.

Burton, 230 S.W.3d at 851 n.5.

The Committee recommends that an instruction for a situation such as that presented in *Burton* provide something as follows:

> During the trial, you heard evidence that the defendant may have committed wrongful acts not charged in the indictment. Specifically, you have heard evidence that he may have robbed other banks, including the Frost Bank and the Washington Mutual Bank. The state offered the evidence to show that the defendant was the person who robbed the Chase Bank as alleged in the indictment.

Some members of the Committee believed the instructions can and should go further and explain more specifically how the state was asking the jurors to reason from the evidence. Thus the instructions on the *Burton* facts might include the following:

> The state argues that those other robberies were similar to the robbery charged in the indictment, that the defendant committed the other robberies, and that this suggests the defendant committed the charged robbery.
>
> If you decide to consider this evidence, you may consider it as proving the defendant's guilt only in this manner argued by the state.

A majority of the Committee, however, believed this would offend the spirit if not the letter of the prohibition against summarizing and commenting on the evidence.

Evidence of Multiple Wrongful Acts Introduced. If evidence of multiple wrongful acts has been introduced, the instructions should make clear to the jury that it is to address act by act how, if at all, to consider this evidence. Thus the instructions might read along the following lines:

> You are not to consider evidence that the defendant committed any of these wrongful acts at all unless you find, beyond a reasonable doubt, that the defendant did, in fact, commit that wrongful act. Those of you who believe the defendant did one or more of the wrongful acts may consider it or them.

CPJC 3.2 Instruction—Limited Use of Evidence—Defendant's Prior Convictions

[Insert instructions for underlying offense.]

Evidence of Prior Convictions of Defendant

Evidence that the defendant was previously convicted of an offense can be considered only for the limited purpose of determining if you believe the defendant. Even though evidence was introduced that the defendant was previously convicted of an offense or offenses, you must not consider it as evidence of guilt in this case. You may choose to disregard the evidence and not consider it at all. But if you choose to consider the evidence, you must consider it only for the limited purpose of determining if you believe the defendant and the weight to give his testimony.

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

Impeachment of witnesses by prior convictions is provided for in Tex. R. Evid. 609. The requirement of a jury instruction on evidence admitted for limited purposes is based on Tex. R. Evid. 105(a).

If the defendant testifies, the state may introduce evidence of prior convictions to impeach the defendant's credibility. Tex. R. Evid. 609(a). The defendant is entitled to an instruction limiting the jury's use of this evidence to the purpose for which it was admitted. Tex. R. Evid. 105(a). Limiting instructions are well accepted and often given. *E.g., Rivera v. State*, 233 S.W.3d 403, 405 (Tex. App.—Waco 2007, pet. ref'd); *Paita v. State*, 125 S.W.3d 708, 715 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd).

The Committee concluded that use of the traditional term *credibility* would be best avoided in explaining to the jury the permissible use of this evidence. Consequently, the instruction uses plainer language.

CPJC 3.3 Instruction—Accomplice Witness Testimony—Accomplice as Matter of Law

[Insert instructions for underlying offense.]

Sufficiency of Testimony of Accomplice

A person cannot be convicted of a crime on the uncorroborated testimony of an accomplice. An accomplice is someone whose participation in the crime would permit his conviction for the crime charged in the [indictment/information] [*include if applicable:* or a lesser included offense of that crime].

[*Name of accomplice*] is an accomplice to [the crime of [*offense*], if it was committed/[*offense*], a lesser included offense of the crime charged in the [indictment/information]]. The defendant, [*name of defendant*], therefore cannot be convicted on the testimony of [*name of accomplice*] unless that testimony is corroborated.

Evidence is sufficient to corroborate the testimony of an accomplice if that evidence tends to connect the defendant, [*name of defendant*], with the commission of any offense that may have been committed. Evidence is not sufficient to corroborate the testimony of an accomplice if that evidence merely shows the offense was committed.

[Include the following if raised by the evidence.]

Testimony of another accomplice is not sufficient to corroborate the testimony of an accomplice. The corroborative evidence, in other words, must be from some source other than accomplices.

[Include the following if raised by the evidence.]

Proof that the defendant was merely present in the company of the accomplice shortly before or after the time of any offense that was committed is not, in itself, sufficient corroboration of the accomplice's testimony. That evidence, however, can be considered along with other suspicious circumstances.

[Include the following if raised by the evidence.]

Proof that the defendant was present at the scene of any crime that was committed is not, in itself, sufficient to corroborate the testimony of an accomplice. That evidence, however, can be considered along with other suspicious circumstances.

Application of Law to Facts

You cannot convict the defendant on the testimony of [*name of accomplice*] unless—

1. there is other evidence, outside of the testimony of [*name of accomplice*], that tends to connect the defendant, [*name of defendant*], with the commission of the offense charged; and

2. on the basis of all the evidence in the case, you believe, beyond a reasonable doubt, that the defendant is guilty.

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

Corroboration of the testimony of an accomplice is required by Tex. Code Crim. Proc. art. 38.14.

Preliminary Matters. The long-standing "accomplice witness" rule has its basis in the Texas Code of Criminal Procedure. "A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense." Tex. Code Crim. Proc. art. 38.14. The wording of the current statute is identical to article 653 of the 1856 Code of Criminal Procedure.

As a matter of evidence sufficiency, corroboration of accomplice testimony is clearly a matter for the jury under proper instructions. *Brown v. State*, 23 Tex. 195, 204 (1859).

Few, if any, instructions in Texas criminal procedure have been litigated more often or the subject of more comment by the appellate courts. The continuing vitality of the holdings and commentary of the appellate courts is a major consideration in formulating an appropriate modern instruction on accomplice witness corroboration.

Even today, when a witness is determined an accomplice as a matter of law, the instructions are often based on those used in *Brown v. State*, 124 S.W. 101 (Tex. Crim. App. 1909), which were approved with considerable discussion in *Quinn v. State*, 123 S.W.2d 890, 892–93 (Tex. Crim. App. 1938) (opinion on motion for rehearing). *Quinn* remains—in a sense—the leading case on jury instructions regarding accomplice witness testimony.

This instruction presents significant problems regarding the extent to which holdings and language of appellate decisions may or must be included in the jury instructions. Some of the traditional case law requirements may be questionable in light of

the recent adoption of the rule that jury instructions on nonstatutory defensive matters are sometimes improper comments on the evidence. See further discussion at CPJC 1.2 in this volume.

An accomplice witness instruction must not only set out the law in the abstract but also apply it to the facts of the particular case. *Doyle v. State*, 133 S.W.2d 972, 973 (Tex. Crim. App. 1939). The Committee's instruction therefore provides for this.

Defining "Accomplice Witness." "Whether a witness is an accomplice witness so as to require corroboration of his testimony is frequently difficult to determine." *Harris v. State*, 738 S.W.2d 207, 216 (Tex. Crim. App. 1986).

An accomplice is generally said to be a person who participated in the commission of the charged offense and thus could be prosecuted for that offense or a lesser included offense. *E.g., Rodriguez v. State*, 104 S.W.3d 87, 91 (Tex. Crim. App. 2003). A more accurate statement of the rule would be that an accomplice is someone whose participation in the crime would permit the person's *conviction* for the crime. This obviously embodies Tex. Penal Code § 7.02, so that an accomplice is any person who is responsible for the offense under that statute. *Rodriguez*, 104 S.W.3d at 91. The Committee's instruction uses this approach.

Participation after Offense Committed. Before enactment of the 1974 Penal Code, a witness might have been an accomplice by virtue of involvement in the events *after* the commission of the offense. This is, generally speaking, no longer the case. A witness who is shown to have provided assistance to the defendant *after* the defendant committed the charged offense may be guilty of hindering the defendant's apprehension or prosecution. But the witness is not by this activity made responsible for the offense committed by the defendant and thus is not an accomplice. *See Easter v. State*, 536 S.W.2d 223 (Tex. Crim. App. 1976).

Necessary Participants. If the crime is defined in a way that makes a particular category of persons necessary participants but the offense makes no provision for the liability of these "necessary" participants, they are not responsible for the offense and thus are not accomplices. In a prosecution for delivery of a controlled substance, the recipient is such a participant and thus is not an accomplice. *Rodriguez*, 104 S.W.3d at 91–92.

Juvenile Participants. An earlier "juvenile" exception to the accomplice witness rule was abolished in *Blake v. State*, 971 S.W.2d 451 (Tex. Crim. App. 1998). A juvenile witness's status as a possible accomplice is now to be determined by whether the witness faces or could face a juvenile court determination that the witness is delinquent.

Undercover Officer. An undercover law enforcement officer who participates in the events is not an accomplice, and the same is true regarding a private person who acts under law enforcement officers' direction and supervision. *Parr v. State*, 606 S.W.2d 928, 929 (Tex. Crim. App. [Panel Op.] 1980). If a witness of either sort

engaged in entrapment, however, the witness becomes an accomplice witness. The evidence may raise a question of whether entrapment occurred, which has been held to require submission of the witness's status to the jury. *Gomez v. State*, 461 S.W.2d 422, 424 (Tex. Crim. App. 1970).

Private Person Acting with Law Enforcement Motives. Apparently even a private person whose participation was motivated by a desire to obtain information for use by law enforcement authorities is not an accomplice. *Gonzalez v. State*, 63 S.W.3d 865, 881–82 (Tex. App.—Houston [14th Dist.] 2001), *aff'd after review on other grounds*, 117 S.W.3d 831 (Tex. Crim. App. 2003) (witness "did not possess the requisite intent for the commission of the charged crime; she was attempting to obtain evidence to be used in a criminal prosecution, and she was not a 'blameworthy participant'"); *Jarnigan v. State*, 57 S.W.3d 76, 90–91 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd).

When Status of Witness Is Jury Question. Case law indicates that jury submission of a witness's status has long been preferred by the appellate courts. Early decisions were adamant. *See Zollicoffer v. State*, 16 Tex. Ct. App. 312 (1884) ("It has been the practice in such cases to submit this issue to the jury, and, believing the practice to be a safe and proper one, and in harmony with the spirit of our system of procedure, we are not disposed to change it.").

Later decisions, however, reflected judicial approval of sometimes taking the issue from the jury. *See Swan v. State*, 76 S.W. 464, 465 (Tex. Crim. App. 1903) ("[W]here the evidence unquestionably shows that a witness is an accomplice, it occurs to us that the better practice would be to so instruct the jury."); *Phillips v. State*, 164 S.W.2d 844, 845 (Tex. Crim. App. 1942) ("[Despite] early decisions . . . evidenc[ing] great liberality towards the power of the trial court in submitting the question of accompliceship to the jury, even going so far as is shown in the *Zollicoffer* case, supra, in allowing the trial court to submit to the jury the question of accompliceship of a co-indictee of the person on trial for the same offense, the recent decisions have refused to follow the *Zollicoffer* case to such an extent.").

Nevertheless, it is still "good law" that "[w]here there is a doubt whether a witness is an accomplice, submitting the issue to the jury is sufficient even though the evidence seems to preponderate in favor of the conclusion that the witness is an accomplice as a matter of law." *Carrillo v. State*, 591 S.W.2d 876, 882 (Tex. Crim. App. 1979). *Accord, e.g., Kunkle v. State*, 771 S.W.2d 435, 439 (Tex. Crim. App. 1986); *Korell v. State*, 253 S.W.3d 405, 410 (Tex. App.—Austin 2008, pet. filed).

Convictions have been reversed because trial judges submitted witnesses' status to juries rather than instructing the juries that the witnesses were accomplices as a matter of law. *Burns v. State*, 703 S.W.2d 649, 652 (Tex. Crim. App. 1985); *Luck v. State*, 67 S.W.2d 302 (Tex. Crim. App. 1934); *Bass v. State*, 62 S.W.2d 127, 128 (Tex. Crim.

App. 1933) (opinion on motion for rehearing); *De La Rosa v. State*, 919 S.W.2d 791, 795–96 (Tex. App.—San Antonio 1996, pet. ref'd).

While some court of criminal appeals' decisions indicated an instruction on accomplice as a matter of law should be given if the witness "could have been charged" with the same offense as the defendant, the court in *Ash v. State* retreated from this position, setting out the situations when a witness is an accomplice as a matter of law:

- If the witness has been charged with the same offense as the defendant or a lesser-included offense;
- If the State charges a witness with the same offense as the defendant or a lesser-included of that offense, but dismisses the charges in exchange for the witness's testimony against the defendant; and
- When the evidence is uncontradicted or so one-sided that no reasonable juror could conclude that the witness was not an accomplice.

Ash v. State, No. PD-0244-16, 2017 WL 2791727, at *5–6 (Tex. Crim. App. June 28, 2017).

When the defendant was charged with capital murder committed in the course of burglary and robbery, uncontested evidence that the witnesses had been indicted for the burglary and robbery rendered those witnesses accomplices as a matter of law. *Herron v. State*, 86 S.W.3d 621, 631 (Tex. Crim. App. 2002).

Witness Guilty of Related Offense. Generally, indictment for or even conviction of an offense simply related in its commission to the charged offense will not make a witness an accomplice as a matter of law. *Korell*, 253 S.W.3d at 411 (witness's admission to facts making her complicit in delivery of drugs to defendant did not make witness accomplice as matter of law to defendant's later commission of possession of drugs with intent to deliver).

But there may be some flexibility in this analysis. When the defendant was charged with capital murder of a child, a witness was rendered an accomplice as a matter of law by her plea of guilty to causing injury to the child by failing to protect him from the defendant. Although injury to a child is not a lesser included offense of capital murder, the witness was "a blameworthy participant in the commission of this offense, and she is thus an accomplice as a matter of law." *Johnson v. State*, 234 S.W.3d 43, 53–54 (Tex. App.—El Paso 2007, no pet.).

Witness Participating after Offense Committed. Uncontradicted evidence that the witness assisted the defendant but only after the defendant completed the charged offense is not, of course, sufficient to render the witness an accomplice as a matter of law. *Druery v. State*, 225 S.W.3d 491, 500 (Tex. Crim. App. 2007).

Describing Corroboration Required. Tex. Code Crim. Proc. art. 38.14 defines the corroboration required for the testimony of an accomplice, and the Committee's instruction follows present practice in using the statutory language.

Arguably, this somewhat obscures the original intention. Early decisions indicated that the corroborating testimony was required to tend to show both the commission of the offense and the accused's "connection" with it. *Crowell v. State*, 24 Tex. Ct. App. 404, 411, 6 S.W. 318, 320 (1887) (instructions "should have required the corroboration to be as to facts tending to show the commission of an offense, and the defendant's connection with such commission"); *Tucker v. State*, 124 S.W. 904, 905 (Tex. Crim. App. 1910) (instruction given stated, "There must be evidence outside of the testimony of the accomplice witnesses tending to prove the crime was committed and tending to connect the defendant therewith before the same would be considered sufficient corroboration.").

In the vast majority of cases, and perhaps in all, corroborating evidence tending to connect the defendant with the offense will also tend to show "the commission of the offense." The Committee instruction's language that corroboration is insufficient "if it merely shows the commission of the offense" makes clear that it must tend to show that commission of the charged offense.

Connecting Defendant with Offense. The instruction must make clear that the corroborating evidence must tend to connect the defendant to the offense. Numerous early convictions were reversed because the instructions given could be read as requiring only that the accomplice testimony tend to connect the defendant to the offense. *E.g., Fruger v. State*, 120 S.W. 197, 198 (Tex. Crim. App. 1909).

Elaboration from Appellate Analyses. A major question for the Committee was the extent to which the instructions may and should contain the substance of appellate analyses of the evidence sufficient to make a witness an accomplice.

Some elaboration is required by case law. In *Golden v. State*, 851 S.W.2d 291 (Tex. Crim. App. 1993), the trial court was held to have erred in refusing to instruct the jury that "[m]ere presence of the [d]efendant with an accomplice shortly before or shortly after the commission of a crime is not sufficient corroboration." *Golden*, 851 S.W.2d at 294 (second alteration in original). This, of course, is not embodied in statutory law, but comes from appellate analyses of accomplice corroboration claims.

Some members of the Committee questioned whether *Golden* remains sound law in light of the court of criminal appeals' subsequent application of the statutory prohibition against comments on the evidence. To the extent that *Golden* remains sound law, some members concluded, the decision fails to make clear the extent to which other aspects of appellate analyses must, may, or should be included.

In some discussions, the courts have offered a variety of comments related to sufficiency of the evidence: "It is not necessary that the corroboration directly link the accused to the crime or be sufficient in itself to establish guilt." *Reed v. State*, 744 S.W.2d 112, 126 (Tex. Crim. App. 1988); *Walker v. State*, 252 S.W. 543, 547 (Tex. Crim. App. 1923) ("There is no doubt but that the corroborative evidence may be circumstantial, . . . *and the court may with propriety so instruct the jury.*") (emphasis

added). *See also Hatley v. State*, 206 S.W.3d 710, 714 (Tex. App.—Texarkana 2006) (corroborating evidence "may be either direct or circumstantial"); *Adams v. State*, 180 S.W.3d 386, 415 (Tex. App.—Corpus Christi 2005, no pet.) ("The required corroborative evidence may be either circumstantial or direct and need not directly link the accused to the crime.").

The Committee attempted to follow the spirit of *Golden* by including—for use when the facts presented the questions—some of what appear to be the most important aspects of appellate analyses.

Presence with Accomplice Shortly before or after Offense Committed. Following *Golden*, the Committee included a statement that mere presence in the company of an accomplice shortly before or after commission of the offense is not sufficient to corroborate.

Presence at Scene of Offense. Should, or at least can, the jury be told that proof of the defendant's presence at or near the location of the crime is also, itself, insufficient?

In *Brown v. State*, 672 S.W.2d 487 (Tex. Crim. App. 1984), the court stated, "Proof that the accused was at or near the scene of the crime at or about the time of its commission, when coupled with other suspicious circumstances, may tend to connect the accused to the crime so as to furnish sufficient corroboration to support a conviction." *Brown*, 672 S.W.2d at 489.

Brown and similar statements of the rule suggest that presence at or near the scene of the crime at or about the time of its commission, alone, is *not* sufficient. This is arguably the holding in *Tompkins v. State*, 501 S.W.2d 132 (Tex. Crim. App. 1973): "[T]he proximity of appellant to the offense was insufficient to corroborate the accomplice witness in and of itself, and did not furnish sufficient corroboration even when coupled with the other testimony to meet the requirements of Article 38.14." *Tompkins*, 501 S.W.2d at 134 (citation omitted). Some courts of appeals have acknowledged that this is the law. *Martinez v. State*, 163 S.W.3d 92, 95 (Tex. App.—Amarillo 2005, no pet.) ("[O]ne's mere presence at the scene of a crime when it is committed or near the time of its commission does not alone tend to connect the individual to the crime."); *Brown v. State*, 159 S.W.3d 703, 708 (Tex. App.—Texarkana 2004, pet. ref'd) ("Mere presence of a defendant at the scene of the crime is insufficient to corroborate accomplice testimony."); *Petty v. State*, No. 04-94-00441-CR, 1996 WL 84334, at *8 (Tex. App.—San Antonio Feb. 29, 1996, pet. ref'd) (not designated for publication) ("Mere presence of the appellant with the accomplice witness, or even alone, at or near the scene of the crime at or about the time of its commission is not, in itself, sufficient corroboration.").

Further, the court of criminal appeals stated this as existing accomplice witness law in a 2008 summary of accomplice witness law. *Malone v. State*, 253 S.W.3d 253, 256 (Tex. Crim. App. 2008).

But should this be provided to the jury? If *Golden* permits and in fact requires including the admonition that the presence of an accomplice with the defendant before or after the crime is not sufficient, the rationale would seem to also apply to the defendant's presence at the scene.

The Committee's instruction therefore contains such a provision.

Corroboration by Testimony of Another Accomplice. The rule that the jury must be told that one accomplice cannot corroborate the testimony of another is clear. *Pace v. State*, 31 S.W. 173, 173 (Tex. Crim. App. 1895) ("Appellant complains and assigns as error the failure of the court to charge that one accomplice could not be corroborated by another accomplice. This proposition is correct, but is not applicable to the facts of this case."). *Accord Fields v. State*, 426 S.W.2d 863, 865 (Tex. Crim. App. 1968) (instruction that one accomplice could not corroborate another "is required where one witness is an accomplice and another may be found to have been"). The Committee agreed that when the facts might lead a jury to rely on testimony of another accomplice, the instructions should make clear that this would not be sufficient.

If one witness is identified in the instructions as an accomplice as a matter of law, whether the necessary corroboration can be provided by the testimony of another witness may depend on whether that other witness is also an accomplice. In such cases, of course, the instructions must submit the status of that other witness as an accomplice.

Corroboration by a Different Category of Suspect Witness. While it has long been the law that two accomplices cannot corroborate each other, the court of criminal appeals has not yet ruled on whether one suspect witness (such as a jailhouse informant or covert agent) can corroborate another (e.g., accomplice witness). One court of appeals has held that it cannot. *Patterson v. State*, 204 S.W.3d 852, 859 (Tex. App.—Corpus Christi 2006, pet. ref'd) (informant could not corroborate accomplice and vice-versa); *but see Phillips v. State*, No. 10-12-00164-CR, 2015 WL 7443625, at *2 (Tex. App.—Waco Nov. 19, 2015, pet. ref'd) (mem. op., not designated for publication) (not error to refuse instruction that jailhouse witness could not corroborate accomplice witness). The Committee believed these kinds of witnesses could not corroborate each other and that, where applicable, the jury must be so instructed.

Corroboration by Defendant's Confession. Corroboration can be provided by a defendant's "judicial" confession, for example, when the defendant testifies at trial, even if the defendant adds exculpatory claims. *Jackson v. State*, 516 S.W.2d 167, 171 (Tex. Crim. App. 1974) (corroboration provided by defendant's testimony despite his claim of self-defense).

Corroboration can also be provided by an out-of-court statement of the defendant. *DeBlanc v. State*, 799 S.W.2d 701, 718 (Tex. Crim. App. 1990); *Mays v. State*, 726 S.W.2d 937, 942 (Tex. Crim. App. 1986).

The Committee concluded that it is generally undesirable to complicate the instruction with this information, since nothing in the general language precludes corrobora-

tion by the defendant's own statements. If the defendant raises an issue regarding whether an out-of-court statement can be considered by the jury, however, a proper instruction may make clear to the jury that it can look to the statement for corroboration only if it first determines that it may consider the statement. *Cf. Ball v. State*, 39 S.W.2d 619 (Tex. Crim. App. 1931).

Sufficiency of Uncorroborated Accomplice Testimony and Other Evidence. The instruction might attempt to make clear to juries that it addresses only whether a defendant can be convicted on the basis of no more than the combination of (1) the accomplice's testimony and (2) the specific evidence corroborating that testimony.

Theoretically, there might be a few situations in which the nonaccomplice witness testimony is insufficient to corroborate the accomplice testimony but the evidence is sufficient considering both (1) all the nonaccomplice witness evidence and (2) the uncorroborated testimony of the accomplice. This situation is unlikely to arise. Consequently, the complexity necessary to incorporate it into the instruction is not worth the risk of more general confusion.

This is particularly the case because any effort to do this would create a risk of violating the clear traditional rule against even suggesting to juries that they may convict on accomplice testimony alone.

Phrasing Instructions. The long history of accomplice witness instructions suggests a number of matters that might best be described as concerning the appropriate or necessary method of phrasing the instructions.

Avoiding Comment on Evidence. Traditional instructions often used awkward language to avoid an improper assumption that a crime was in fact committed. References to the charged offense are often followed by the caveat *if any*. The Committee's instruction accommodates these concerns by stating, "[*name of accomplice*] is an accomplice to any crime that was committed in this case."

Conviction on Accomplice Witness Testimony "Alone." "The jury should never be told directly or by inference that they could convict upon the testimony of the accomplice witness *'alone'*, for under no circumstances can that be done . . . ." *Quinn v. State*, 123 S.W.2d 890, 892 (Tex. Crim. App. 1938) (opinion on motion for rehearing). This traditionally was particularly important if the testimony of the accomplice did not make out a "complete case" against the defendant. *Smith v. State*, 144 S.W.2d 894, 896 (Tex. Crim. App. 1940).

The Committee's instruction therefore avoids reference to conviction on accomplice testimony "alone."

Finding That Accomplice Testimony Is "True." Accomplice-witness instructions sometimes require the jury to first find that the accomplice's testimony is true. An instruction that included this requirement was held "more than adequate to satisfy" article 38.14 of the Texas Code of Criminal Procedure in *Holladay v. State*, 709 S.W.2d

194, 202 (Tex. Crim. App. 1986). At least one early case seemed to require "the jury to find the testimony of the accomplices is true." *Doyle v. State*, 133 S.W.2d 972, 973 (Tex. Crim. App. 1939). The actual instruction in *Doyle*, however, was erroneous not because it failed to expressly require jurors to find it true but because it "practically instructed the jury that [the accomplices'] testimony was true." *Doyle*, 133 S.W.2d at 973. Although the language in *Doyle* suggesting that the instruction is required has not been disavowed, after *Doyle*, the court of criminal appeals found that the absence of such an instruction was not error if "elsewhere in the charge the law of reasonable doubt was properly submitted as to the whole case." *White v. State*, 385 S.W.2d 397, 400 (Tex. Crim. App. 1964).

Clearly, if the jury believes the accomplice testimony is totally incredible, then it need go no further in determining if that testimony has been corroborated. But what happens if the jury believes the accomplice's testimony is true to some degree? The jury is entitled to rely on the corroborative evidence to persuade it to believe that the accomplice is telling the truth. Consequently, an instruction that the jury must first find the accomplice's testimony is true may not be an accurate statement of the law. For these reasons, and because there is nothing in article 38.14 to support such an instruction, the Committee recommends against it.

Requirement That All Evidence Show Guilt beyond Reasonable Doubt. "We have suggested before that, in connection with a proper charge on accomplice testimony, *it is well for the court in every case* to instruct the jury that they must believe from all the evidence that the accused is guilty beyond a reasonable doubt." *Quinn*, 123 S.W.2d at 892 (quoting *Spears v. State*, 277 S.W. 142, 143 (Tex. Crim. App. 1925)). An instruction that included this language was held "more than adequate to satisfy" article 38.14 of the Texas Code of Criminal Procedure. *Holladay*, 709 S.W.2d at 202. The reason given for the instruction is that sometimes the accomplice's testimony will fall short of proving a complete case against the defendant and the nonaccomplice testimony may only tend to connect him to the offense. When this happens, the jury should not convict, even though the accomplice testimony is corroborated. The additional language ensures this does not happen. *Quinn*, 123 S.W.2d at 892.

Unlike other stand-alone instructions (like those for article 38.23), accomplice-witness instructions often follow the specific language of article 38.14 and may purport to set out the circumstances under which a conviction is authorized and when it is not. With instructions of this sort, it would be important to tell jurors that, in order to convict, they must believe from all the evidence that the defendant is guilty beyond a reasonable doubt.

At the same time, article 38.14 does not expressly require such an instruction. *Green v. State*, 231 S.W.2d 433, 436 (Tex. Crim. App. 1950), on rehearing, explained that while the lack of such an instruction resulted in reversible error in that case, the instruction is not necessarily "indispensable." In most cases, jurors are given this kind of instruction later in the charge.

The Committee decided that it was better to include the instruction.

Presence at Scene or with Accomplice. The accomplice witness instructions include the propositions from the appellate case law that corroborating evidence is not sufficient if it merely shows that the defendant was present with the accomplice shortly before or after the offense or that the defendant was present at the scene.

The instructions also tell the jury that evidence of the defendant's presence may be considered with other evidence. This is clearly the law for purposes of appellate review of sufficiency of the evidence. *E.g., Dowthitt v. State*, 931 S.W.2d 244, 249 (Tex. Crim. App. 1996) ("While the accused's mere presence in the company of the accomplice before, during, and after the commission of the offense is insufficient by itself to corroborate accomplice testimony, evidence of such presence, coupled with other suspicious circumstances, may tend to connect the accused to the offense."). Whether it is appropriate for jury instructions is less clear. The appellate courts appear not to have considered complaints that so instructing juries is inappropriate.

The Committee included this information in the instruction to ensure that the jury would not mistakenly believe that such evidence, although not sufficient in itself, was irrelevant.

CPJC 3.4 Instruction—Accomplice Witness Testimony—Accomplice Status Submitted to Jury

[Insert instructions for underlying offense.]

Sufficiency of Testimony of Accomplice

A person cannot be convicted of a crime on the uncorroborated testimony of an accomplice. An accomplice is someone whose participation in the crime would permit his conviction for the crime charged in the [indictment/information] [*include if applicable:* or a lesser included offense of that crime].

You must determine whether [*name of accomplice*] is an accomplice to the crime of [*offense*], if it was committed [*include if applicable:* , or a lesser included offense of that crime]. If you determine that [*name of accomplice*] is an accomplice, you must then also determine whether there is evidence corroborating the testimony of [*name of accomplice*].

Status of Witness

An accomplice is someone whose participation in the crime would permit his conviction for the crime charged in the [indictment/information] [*include if applicable:* or a lesser included offense of that crime].

A person's participation in the crime permits the person's conviction for the crime if—

[Include only those items that are relevant to the particular case.]

1. the person and the defendant, acting together, committed the crime;

or

2. the person both—
   a. solicited, encouraged, directed, aided, or attempted to aid the defendant in committing the crime; and
   b. acted with the intent to promote or assist the commission of the offense; or
3. the person—
   a. had a legal duty to prevent commission of the offense, and
   b. failed to make a reasonable effort to prevent the offense, and

c. [acted with/had at the time] the intent to promote or assist the commission of the offense; or

4. it can be shown that—

a. the person joined with the defendant in a conspiracy to commit a felony, and

b. the defendant committed the offense in furtherance of the unlawful purpose of that conspiracy, and

c. the offense was one that should have been anticipated as a result of the carrying out of the conspiracy.

[Include the following if raised by the evidence.]

A person is not responsible for an offense committed by another if the person is merely present while the other commits the offense.

[Include the following in a felony prosecution in which the state claims the witness participated under duress.]

Lack of Responsibility Because of Duress

A person is not responsible for an offense committed by another if the person participated in the offense under duress. A person participates in an offense under duress if a preponderance of the evidence shows both—

1. the person participated in the offense because the person was compelled by a threat of imminent death or serious bodily injury to the person or another, and

2. the threat would render a person of reasonable firmness incapable of resisting the pressure.

A person is responsible for an offense despite having participated under duress if the person intentionally, knowingly, or recklessly placed himself in a situation in which it was probable that he would be subject to compulsion.

Corroboration of Testimony If Witness Is Accomplice

If you find that [*name of accomplice*] is an accomplice, you must consider whether there is evidence corroborating the testimony of [*name of accomplice*].

Evidence is sufficient to corroborate the testimony of an accomplice if that evidence tends to connect the defendant, [*name of defendant*], with the commission of the offense committed. Evidence is not sufficient to corroborate the

testimony of an accomplice if that evidence merely shows the offense was committed.

[Include the following if raised by the evidence.]

Testimony of another accomplice is not sufficient to corroborate the testimony of an accomplice. The corroborative evidence, in other words, must be from some source other than accomplices.

[Include the following if raised by the evidence.]

Proof that the defendant was merely present in the company of the accomplice shortly before or after the time of any offense that was committed is not, in itself, sufficient corroboration of the accomplice's testimony. That evidence, however, can be considered along with other suspicious circumstances.

[Include the following if raised by the evidence.]

Proof that the defendant was present at the scene of any crime that was committed is not, in itself, sufficient to corroborate the testimony of an accomplice. That evidence, however, can be considered along with other suspicious circumstances.

Application of Law to Facts

You cannot convict the defendant on the testimony of [*name of accomplice*] unless—

1. you find that [*name of accomplice*] was not an accomplice, or
2. you find that [*name of accomplice*] was an accomplice, and—
    a. there is other evidence, outside of the testimony of [*name of accomplice*], that tends to connect the defendant, [*name of defendant*], with the commission of the offense charged; and
    b. on the basis of all the evidence in the case, you believe, beyond a reasonable doubt, that the defendant is guilty.

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

Corroboration of the testimony of an accomplice is required by Tex. Code Crim. Proc. art. 38.14.

Preliminary Matters. The long-standing "accomplice witness" rule has its basis in the Texas Code of Criminal Procedure: "A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense." Tex. Code Crim. Proc. art. 38.14. The wording of the current statute is identical to article 653 of the 1856 Code of Criminal Procedure.

As a matter of evidence sufficiency, corroboration of accomplice testimony is clearly a matter for the jury under proper instructions. *Brown v. State*, 23 Tex. 195, 204 (1859).

Few, if any, instructions in Texas criminal procedure have been litigated more often or the subject of more comment by the appellate courts. The continuing vitality of the holdings and commentary of the appellate courts is a major consideration in formulating an appropriate modern instruction on accomplice witness corroboration.

Even today, when a witness is determined an accomplice as a matter of law, the instructions are often based on those used in *Brown v. State*, 124 S.W. 101 (Tex. Crim. App. 1909), which were approved with considerable discussion in *Quinn v. State*, 123 S.W.2d 890, 892–93 (Tex. Crim. App. 1938) (opinion on motion for rehearing). *Quinn* remains—in a sense—the leading case on jury instructions regarding accomplice witness testimony.

This instruction presents significant problems regarding the extent to which holdings and language of appellate decisions may or must be included in the jury instructions. Some of the traditional case law requirements may be questionable in light of the recent adoption of the rule that jury instructions on nonstatutory defensive matters are sometimes improper comments on the evidence. See further discussion at CPJC 1.2 in this volume.

An accomplice witness instruction must not only set out the law in the abstract but also apply it to the facts of the particular case. *Doyle v. State*, 133 S.W.2d 972, 973 (Tex. Crim. App. 1939). The Committee's instruction therefore provides for this.

Defining "Accomplice Witness." "Whether a witness is an accomplice witness so as to require corroboration of his testimony is frequently difficult to determine." *Harris v. State*, 738 S.W.2d 207, 216 (Tex. Crim. App. 1986).

An accomplice is generally said to be a person who participated in the commission of the charged offense and thus could be prosecuted for that offense or a lesser included offense. *E.g., Rodriguez v. State*, 104 S.W.3d 87, 91 (Tex. Crim. App. 2003).

A more accurate statement of the rule would be that an accomplice is someone whose participation in the crime would permit the person's *conviction* for the crime. This obviously embodies Tex. Penal Code § 7.02, so that an accomplice is any person who is responsible for the offense under that statute. *Rodriguez*, 104 S.W.3d at 91. The Committee's instruction uses this approach.

Participation after Offense Committed. Before enactment of the 1974 Penal Code, a witness might have been an accomplice by virtue of involvement in the events *after* the commission of the offense. This is, generally speaking, no longer the case. A witness who is shown to have provided assistance to the defendant *after* the defendant committed the charged offense may be guilty of hindering the defendant's apprehension or prosecution. But the witness is not by this activity made responsible for the offense committed by the defendant and thus is not an accomplice. *See Easter v. State*, 536 S.W.2d 223 (Tex. Crim. App. 1976).

Necessary Participants. If the crime is defined in a way that makes a particular category of persons necessary participants but the offense makes no provision for the liability of these "necessary" participants, they are not responsible for the offense and thus are not accomplices. In a prosecution for delivery of a controlled substance, the recipient is such a participant and thus is not an accomplice. *Rodriguez*, 104 S.W.3d at 91–92.

Juvenile Participants. An earlier "juvenile" exception to the accomplice witness rule was abolished in *Blake v. State*, 971 S.W.2d 451 (Tex. Crim. App. 1998). A juvenile witness's status as a possible accomplice is now to be determined by whether the witness faces or could face a juvenile court determination that the witness is delinquent.

Undercover Officer. An undercover law enforcement officer who participates in the events is not an accomplice, and the same is true regarding a private person who acts under law enforcement officers' direction and supervision. *Parr v. State*, 606 S.W.2d 928, 929 (Tex. Crim. App. [Panel Op.] 1980). If a witness of either sort engaged in entrapment, however, the witness becomes an accomplice witness. The evidence may raise a question of whether entrapment occurred, which has been held to require submission of the witness's status to the jury. *Gomez v. State*, 461 S.W.2d 422, 424 (Tex. Crim. App. 1970).

Private Person Acting with Law Enforcement Motives. Apparently even a private person whose participation was motivated by a desire to obtain information for use by law enforcement authorities is not an accomplice. *Gonzalez v. State*, 63 S.W.3d 865, 881–82 (Tex. App.—Houston [14th Dist.] 2001), *aff'd after review on other grounds*, 117 S.W.3d 831 (Tex. Crim. App. 2003) (witness "did not possess the requisite intent for the commission of the charged crime; she was attempting to obtain evidence to be used in a criminal prosecution, and she was not a 'blameworthy participant'");

Jarnigan v. State, 57 S.W.3d 76, 90–91 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd).

When Status of Witness Is Jury Question. Case law indicates that jury submission of a witness's status has long been preferred by the appellate courts. Early decisions were adamant. *See Zollicoffer v. State*, 16 Tex. Ct. App. 312 (1884) ("It has been the practice in such cases to submit this issue to the jury, and, believing the practice to be a safe and proper one, and in harmony with the spirit of our system of procedure, we are not disposed to change it.").

Later decisions, however, reflected judicial approval of sometimes taking the issue from the jury. *See Swan v. State*, 76 S.W. 464, 465 (Tex. Crim. App. 1903) ("[W]here the evidence unquestionably shows that a witness is an accomplice, it occurs to us that the better practice would be to so instruct the jury."); *Phillips v. State*, 164 S.W.2d 844, 845 (Tex. Crim. App. 1942) ("[Despite] early decisions . . . evidenc[ing] great liberality towards the power of the trial court in submitting the question of accompliceship to the jury, even going so far as is shown in the *Zollicoffer* case, supra, in allowing the trial court to submit to the jury the question of accompliceship of a co-indictee of the person on trial for the same offense, the recent decisions have refused to follow the *Zollicoffer* case to such an extent.").

Nevertheless, it is still "good law" that "[w]here there is a doubt whether a witness is an accomplice, submitting the issue to the jury is sufficient even though the evidence seems to preponderate in favor of the conclusion that the witness is an accomplice as a matter of law." *Carrillo v. State*, 591 S.W.2d 876, 882 (Tex. Crim. App. 1979). *Accord, e.g., Kunkle v. State*, 771 S.W.2d 435, 439 (Tex. Crim. App. 1986); *Korell v. State*, 253 S.W.3d 405, 410 (Tex. App.—Austin 2008, pet. filed).

Convictions have been reversed because trial judges submitted witnesses' status to juries rather than instructing the juries that the witnesses were accomplices as a matter of law. *Burns v. State*, 703 S.W.2d 649, 652 (Tex. Crim. App. 1985); *Luck v. State*, 67 S.W.2d 302 (Tex. Crim. App. 1934); *Bass v. State*, 62 S.W.2d 127, 128 (Tex. Crim. App. 1933) (opinion on motion for rehearing); *De La Rosa v. State*, 919 S.W.2d 791, 795–96 (Tex. App.—San Antonio 1996, pet. ref'd).

While some court of criminal appeals' decisions indicated an instruction on accomplice as a matter of law should be given if the witness "could have been charged" with the same offense as the defendant, the court in *Ash v. State* retreated from this position, setting out the situations when a witness is an accomplice as a matter of law:

- If the witness has been charged with the same offense as the defendant or a lesser-included offense;

- If the State charges a witness with the same offense as the defendant or a lesser-included of that offense, but dismisses the charges in exchange for the witness's testimony against the defendant; and

- When the evidence is uncontradicted or so one-sided that no reasonable juror could conclude that the witness was not an accomplice.

Ash v. State, No. PD-0244-16, 2017 WL 2791727, at *5–6 (Tex. Crim. App. June 28, 2017).

When the defendant was charged with capital murder committed in the course of burglary and robbery, uncontested evidence that the witnesses had been indicted for the burglary and robbery rendered those witnesses accomplices as a matter of law. *Herron v. State*, 86 S.W.3d 621, 631 (Tex. Crim. App. 2002).

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But there may be some flexibility in this analysis. When the defendant was charged with capital murder of a child, a witness was rendered an accomplice as a matter of law by her plea of guilty to causing injury to the child by failing to protect him from the defendant. Although injury to a child is not a lesser included offense of capital murder, the witness was "a blameworthy participant in the commission of this offense, and she is thus an accomplice as a matter of law." *Johnson v. State*, 234 S.W.3d 43, 53–54 (Tex. App.—El Paso 2007, no pet.).

Witness Participating after Offense Committed. Uncontradicted evidence that the witness assisted the defendant but only after the defendant completed the charged offense is not, of course, sufficient to render the witness an accomplice as a matter of law. *Druery v. State*, 225 S.W.3d 491, 500 (Tex. Crim. App. 2007).

Describing Corroboration Required. Tex. Code Crim. Proc. art. 38.14 defines the corroboration required for the testimony of an accomplice, and the Committee's instruction follows present practice in using the statutory language.

Arguably, this somewhat obscures the original intention. Early decisions indicated that the corroborating testimony was required to tend to show both the commission of the offense and the accused's "connection" with it. *Crowell v. State*, 24 Tex. Ct. App. 404, 411, 6 S.W. 318, 320 (1887) (instructions "should have required the corroboration to be as to facts tending to show the commission of an offense, and the defendant's connection with such commission"); *Tucker v. State*, 124 S.W. 904, 905 (Tex. Crim. App. 1910) (instruction given stated, "There must be evidence outside of the testimony of the accomplice witnesses tending to prove the crime was committed and tending to connect the defendant therewith before the same would be considered sufficient corroboration.").

In the vast majority of cases, and perhaps in all, corroborating evidence tending to connect the defendant with the offense will also tend to show "the commission of the offense." The Committee instruction's language that corroboration is insufficient "if it merely shows the commission of the offense" makes clear that it must tend to show that commission of the charged offense.

Connecting Defendant with Offense. The instruction must make clear that the corroborating evidence must tend to connect the defendant to the offense. Numerous early convictions were reversed because the instructions given could be read as requiring only that the accomplice testimony tend to connect the defendant to the offense. *E.g., Fruger v. State*, 120 S.W. 197, 198 (Tex. Crim. App. 1909).

Elaboration from Appellate Analyses. A major question for the Committee was the extent to which the instructions may and should contain the substance of appellate analyses of the evidence sufficient to make a witness an accomplice.

Some elaboration is required by case law. In *Golden v. State*, 851 S.W.2d 291 (Tex. Crim. App. 1993), the trial court was held to have erred in refusing to instruct the jury that "[m]ere presence of the [d]efendant with an accomplice shortly before or shortly after the commission of a crime is not sufficient corroboration." *Golden*, 851 S.W.2d at 294 (second alteration in original). This, of course, is not embodied in statutory law, but comes from appellate analyses of accomplice corroboration claims.

Some members of the Committee questioned whether *Golden* remains sound law in light of the court of criminal appeals' subsequent application of the statutory prohibition against comments on the evidence. To the extent that *Golden* remains sound law, some members concluded, the decision fails to make clear the extent to which other aspects of appellate analyses must, may, or should be included.

In some discussions, the courts have offered a variety of comments related to sufficiency of the evidence: "It is not necessary that the corroboration directly link the accused to the crime or be sufficient in itself to establish guilt." *Reed v. State*, 744 S.W.2d 112, 126 (Tex. Crim. App. 1988); *Walker v. State*, 252 S.W. 543, 547 (Tex. Crim. App. 1923) ("There is no doubt but that the corroborative evidence may be circumstantial, . . . *and the court may with propriety so instruct the jury.*") (emphasis added). *See also Hatley v. State*, 206 S.W.3d 710, 714 (Tex. App.—Texarkana 2006) (corroborating evidence "may be either direct or circumstantial"); *Adams v. State*, 180 S.W.3d 386, 415 (Tex. App.—Corpus Christi 2005, no pet.) ("The required corroborative evidence may be either circumstantial or direct and need not directly link the accused to the crime.").

The Committee attempted to follow the spirit of *Golden* by including—for use when the facts presented the questions—some of what appear to be the most important aspects of appellate analyses.

Presence with Accomplice Shortly before or after Offense Committed. Following *Golden*, the Committee included a statement that mere presence in the company of an

accomplice shortly before or after commission of the offense is not sufficient to corroborate.

Presence at Scene of Offense. Should, or at least can, the jury be told that proof of the defendant's presence at or near the location of the crime is also, itself, insufficient?

In *Brown v. State*, 672 S.W.2d 487 (Tex. Crim. App. 1984), the court stated, "Proof that the accused was at or near the scene of the crime at or about the time of its commission, when coupled with other suspicious circumstances, may tend to connect the accused to the crime so as to furnish sufficient corroboration to support a conviction." *Brown*, 672 S.W.2d at 489.

Brown and similar statements of the rule suggest that presence at or near the scene of the crime at or about the time of its commission, alone, is *not* sufficient. This is arguably the holding in *Tompkins v. State*, 501 S.W.2d 132 (Tex. Crim. App. 1973): "[T]he proximity of appellant to the offense was insufficient to corroborate the accomplice witness in and of itself, and did not furnish sufficient corroboration even when coupled with the other testimony to meet the requirements of Article 38.14." *Tompkins*, 501 S.W.2d at 134 (citation omitted). Some courts of appeals have acknowledged that this is the law. *Martinez v. State*, 163 S.W.3d 92, 95 (Tex. App.—Amarillo 2005, no pet.) ("[O]ne's mere presence at the scene of a crime when it is committed or near the time of its commission does not alone tend to connect the individual to the crime."); *Brown v. State*, 159 S.W.3d 703, 708 (Tex. App.—Texarkana 2004, pet. ref'd) ("Mere presence of a defendant at the scene of the crime is insufficient to corroborate accomplice testimony."); *Petty v. State*, No. 04-94-00441-CR, 1996 WL 84334, at *8 (Tex. App.—San Antonio Feb. 29, 1996, pet. ref'd) (not designated for publication) ("Mere presence of the appellant with the accomplice witness, or even alone, at or near the scene of the crime at or about the time of its commission is not, in itself, sufficient corroboration.").

Further, the court of criminal appeals stated this as existing accomplice witness law in a 2008 summary of accomplice witness law. *Malone v. State*, 253 S.W.3d 253, 256 (Tex. Crim. App. 2008).

But should this be provided to the jury? If *Golden* permits and in fact requires including the admonition that the presence of an accomplice with the defendant before or after the crime is not sufficient, the rationale would seem to also apply to the defendant's presence at the scene.

The Committee's instruction therefore contains such a provision.

Corroboration by Testimony of Another Accomplice. The rule that the jury must be told that one accomplice cannot corroborate the testimony of another is clear. *Pace v. State*, 31 S.W. 173, 173 (Tex. Crim. App. 1895) ("Appellant complains and assigns as error the failure of the court to charge that one accomplice could not be corroborated by another accomplice. This proposition is correct, but is not applicable to the facts of this case."). *Accord Fields v. State*, 426 S.W.2d 863, 865 (Tex. Crim. App.

1968) (instruction that one accomplice could not corroborate another "is required where one witness is an accomplice and another may be found to have been"). The Committee agreed that when the facts might lead a jury to rely on testimony of another accomplice, the instructions should make clear that this would not be sufficient.

If one witness is identified in the instructions as an accomplice as a matter of law, whether the necessary corroboration can be provided by the testimony of another witness may depend on whether that other witness is also an accomplice. In such cases, of course, the instructions must submit the status of that other witness as an accomplice.

Corroboration by a Different Category of Suspect Witness. While it has long been the law that two accomplices cannot corroborate each other, the court of criminal appeals has not yet ruled on whether one suspect witness (such as a jailhouse informant or covert agent) can corroborate another (e.g., accomplice witness). One court of appeals has held that it cannot. *Patterson v. State*, 204 S.W.3d 852, 859 (Tex. App.—Corpus Christi 2006, pet. ref'd) (informant could not corroborate accomplice and vice-versa); *but see Phillips v. State*, No. 10-12-00164-CR, 2015 WL 7443625, at *2 (Tex. App.—Waco Nov. 19, 2015, pet. ref'd) (mem. op., not designated for publication) (not error to refuse instruction that jailhouse witness could not corroborate accomplice witness). The Committee believed these kinds of witnesses could not corroborate each other and that, where applicable, the jury must be so instructed.

Corroboration by Defendant's Confession. Corroboration can be provided by a defendant's "judicial" confession, for example, when the defendant testifies at trial, even if the defendant adds exculpatory claims. *Jackson v. State*, 516 S.W.2d 167, 171 (Tex. Crim. App. 1974) (corroboration provided by defendant's testimony despite his claim of self-defense).

Corroboration can also be provided by an out-of-court statement of the defendant. *DeBlanc v. State*, 799 S.W.2d 701, 718 (Tex. Crim. App. 1990); *Mays v. State*, 726 S.W.2d 937, 942 (Tex. Crim. App. 1986).

The Committee concluded that it is generally undesirable to complicate the instruction with this information, since nothing in the general language precludes corroboration by the defendant's own statements. If the defendant raises an issue regarding whether an out-of-court statement can be considered by the jury, however, a proper instruction may make clear to the jury that it can look to the statement for corroboration only if it first determines that it may consider the statement. *Cf. Ball v. State*, 39 S.W.2d 619 (Tex. Crim. App. 1931).

Sufficiency of Uncorroborated Accomplice Testimony and Other Evidence. The instruction might attempt to make clear to juries that it addresses only whether a defendant can be convicted on the basis of no more than the combination of (1) the accomplice's testimony and (2) the specific evidence corroborating that testimony.

Theoretically, there might be a few situations in which the nonaccomplice witness testimony is insufficient to corroborate the accomplice testimony but the evidence is

sufficient considering both (1) all the nonaccomplice witness evidence and (2) the uncorroborated testimony of the accomplice. This situation is unlikely to arise. Consequently, the complexity necessary to incorporate it into the instruction is not worth the risk of more general confusion.

This is particularly the case because any effort to do this would create a risk of violating the clear traditional rule against even suggesting to juries that they may convict on accomplice testimony alone.

Phrasing Instructions. The long history of accomplice witness instructions suggests a number of matters that might best be described as concerning the appropriate or necessary method of phrasing the instructions.

Avoiding Comment on Evidence. Traditional instructions often used awkward language to avoid an improper assumption that a crime was in fact committed. References to the charged offense are often followed by the caveat *if any*. The Committee's instruction accommodates these concerns by stating, "[*name of accomplice*] is an accomplice to any crime that was committed in this case."

Conviction on Accomplice Witness Testimony "Alone." "The jury should never be told directly or by inference that they could convict upon the testimony of the accomplice witness *'alone'*, for under no circumstances can that be done . . . ." *Quinn v. State*, 123 S.W.2d 890, 892 (Tex. Crim. App. 1938) (opinion on motion for rehearing). This traditionally was particularly important if the testimony of the accomplice did not make out a "complete case" against the defendant. *Smith v. State*, 144 S.W.2d 894, 896 (Tex. Crim. App. 1940).

The Committee's instruction therefore avoids reference to conviction on accomplice testimony "alone."

Finding That Accomplice Testimony Is "True." Accomplice-witness instructions sometimes require the jury to first find that the accomplice's testimony is true. An instruction that included this requirement was held "more than adequate to satisfy" article 38.14 of the Texas Code of Criminal Procedure in *Holladay v. State*, 709 S.W.2d 194, 202 (Tex. Crim. App. 1986). At least one early case seemed to require "the jury to find the testimony of the accomplices is true." *Doyle v. State*, 133 S.W.2d 972, 973 (Tex. Crim. App. 1939). The actual instruction in *Doyle*, however, was erroneous not because it failed to expressly require jurors to find it true but because it "practically instructed the jury that [the accomplices'] testimony was true." *Doyle*, 133 S.W.2d at 973. Although the language in *Doyle* suggesting that the instruction is required has not been disavowed, after *Doyle*, the court of criminal appeals found that the absence of such an instruction was not error if "elsewhere in the charge the law of reasonable doubt was properly submitted as to the whole case." *White v. State*, 385 S.W.2d 397, 400 (Tex. Crim. App. 1964).

Clearly, if the jury believes the accomplice testimony is totally incredible, then it need go no further in determining if that testimony has been corroborated. But what happens if the jury believes the accomplice's testimony is true to some degree? The jury is entitled to rely on the corroborative evidence to persuade it to believe that the accomplice is telling the truth. Consequently, an instruction that the jury must first find the accomplice's testimony is true may not be an accurate statement of the law. For these reasons, and because there is nothing in article 38.14 to support such an instruction, the Committee recommends against it.

Requirement That All Evidence Show Guilt beyond Reasonable Doubt. "We have suggested before that, in connection with a proper charge on accomplice testimony, *it is well for the court in every case* to instruct the jury that they must believe from all the evidence that the accused is guilty beyond a reasonable doubt." *Quinn*, 123 S.W.2d at 892 (quoting *Spears v. State*, 277 S.W. 142, 143 (Tex. Crim. App. 1925)). An instruction that included this language was held "more than adequate to satisfy" article 38.14 of the Texas Code of Criminal Procedure. *Holladay*, 709 S.W.2d at 202. The reason given for the instruction is that sometimes the accomplice's testimony will fall short of proving a complete case against the defendant and the nonaccomplice testimony may only tend to connect him to the offense. When this happens, the jury should not convict, even though the accomplice testimony is corroborated. The additional language ensures this does not happen. *Quinn*, 123 S.W.2d at 892.

Unlike other stand-alone instructions (like those for article 38.23), accomplice-witness instructions often follow the specific language of article 38.14 and may purport to set out the circumstances under which a conviction is authorized and when it is not. With instructions of this sort, it would be important to tell jurors that, in order to convict, they must believe from all the evidence that the defendant is guilty beyond a reasonable doubt.

At the same time, article 38.14 does not expressly require such an instruction. *Green v. State*, 231 S.W.2d 433, 436 (Tex. Crim. App. 1950), on rehearing, explained that while the lack of such an instruction resulted in reversible error in that case, the instruction is not necessarily "indispensable." In most cases, jurors are given this kind of instruction later in the charge.

The Committee decided that it was better to include the instruction.

Presence at Scene or with Accomplice. The accomplice witness instructions include the propositions from the appellate case law that corroborating evidence is not sufficient if it merely shows that the defendant was present with the accomplice shortly before or after the offense or that the defendant was present at the scene.

The instructions also tell the jury that evidence of the defendant's presence may be considered with other evidence. This is clearly the law for purposes of appellate review of sufficiency of the evidence. *E.g., Dowthitt v. State*, 931 S.W.2d 244, 249 (Tex. Crim. App. 1996) ("While the accused's mere presence in the company of the

accomplice before, during, and after the commission of the offense is insufficient by itself to corroborate accomplice testimony, evidence of such presence, coupled with other suspicious circumstances, may tend to connect the accused to the offense."). Whether it is appropriate for jury instructions is less clear. The appellate courts appear not to have considered complaints that so instructing juries is inappropriate.

The Committee included this information in the instruction to ensure that the jury would not mistakenly believe that such evidence, although not sufficient in itself, was irrelevant.

Instructing on "Elements" of Accomplice Liability. The accomplice witness instructions provide for a witness to be found an accomplice witness under four different theories: (1) joint commission of the crime, (2) aiding and abetting the accused, (3) failing to prevent the accused from committing the offense, and (4) the coconspirator rule in Tex. Penal Code § 7.02(b).

A witness might be an accomplice under Tex. Penal Code § 7.02(a)(1), which provides for liability for causing an "innocent or nonresponsible person" to engage in the conduct at issue or aiding that person in doing so. Ordinarily, the accused will be the person who engaged in the conduct, so if the accused is innocent or nonresponsible there should not be a trial. Hence, the instruction's definition of an accomplice omits any reference to this.

The case law is not entirely clear on the extent to which the instruction may, or perhaps must, elaborate on the statutory law determining whether the witness is responsible for any offense committed by the defendant and thus is an accomplice. Some case law considerably predates the current statutory provisions. *Burks v. State*, 260 S.W. 181, 183 (Tex. Crim. App. 1923) ("We do not think it error to have submitted to the jury . . . the proposition that the mere presence of one without criminal connection with the offense would not make him an accomplice, and the further proposition that mere knowledge that a crime has been committed and concealment of such knowledge would not constitute the person having or concealing such knowledge an accomplice.").

The courts have assumed that an instruction properly expands on the general rules for responsibility for the crimes of another by stating that under these rules a showing that the witness was merely present when the defendant committed the crime is not enough to make the witness an accomplice witness. *Golden*, 851 S.W.2d at 293 ("Mere presence alone, however, will not constitute one a party to an offense."); *Elliott v. State*, 976 S.W.2d 355, 358 n.4 (Tex. App.—Austin 1998, pet. ref'd) ("Mere presence alone will not constitute one a party to an offense. . . ."). The Committee's instruction includes such a provision.

When Facts Raise "Defense" to Liability as Accomplice. If the evidence raises a question of whether the witness might not be responsible for the charged offense because of a "defense," the jury submission should put this to the jury. *Jones v. State*,

272 S.W.2d 368, 370 (Tex. Crim. App. 1954) (when evidence showed witness would be accomplice unless witness acted under duress, trial court erred in failing to submit "such issue" to jury). *See Alexander v. State*, No. 01-98-00506-CR, 1999 WL 977815, at *3 (Tex. App.—Houston [1st Dist.] Oct. 28, 1999, pet. ref'd) (not designated for publication) (setting out jury instructions containing duress "defense" to accomplice status).

The Committee's instruction contains a sample of how it recommends defensive matters be submitted. The sample puts to the jury whether a witness in a felony prosecution is rendered a nonaccomplice witness by the affirmative defense of duress as provided in Tex. Penal Code § 8.05.

Burden of Proof on Status of Witness. Existing practice is often to instruct jurors that corroboration is required unless the state proves beyond a reasonable doubt that a witness is not an accomplice witness. *E.g., Pace v. State*, 124 S.W. 949, 952–53 (Tex. Crim. App. 1910) (instruction told jury to require corroboration "if you are satisfied from the evidence that the witness . . . was an accomplice, or you have a reasonable doubt as to whether he was or not"); *Haney v. State*, 951 S.W.2d 551, 553 (Tex. App.—Waco 1997, no pet.) ("The instruction also tells the jurors that, if after looking at the evidence they have a reasonable doubt regarding whether or not the witness acted as Haney's accomplice, then corroboration is necessary.").

An early accomplice witness charge was faulted in *Beach v. State*, 12 S.W. 868 (Tex. Ct. App. 1889), for not requiring proof beyond a reasonable doubt of certain facts related to the dispute about the status of the witness. *Beach* has never been cited in another case and is not authority for the proposition that the corroboration requirement is inapplicable only if the state proves beyond a reasonable doubt that the witness was not an accomplice.

There seems neither need nor justification for imposing a requirement of proof beyond a reasonable doubt. The Committee's instruction does not do so.

Unanimity on Status of Witness. At least one court has held that the requirement of jury unanimity does not apply to whether a witness was an accomplice requiring corroboration. *Webb v. State*, No. 01-94-01081-CR, 1995 WL 717194, at *4 (Tex. App.—Houston [1st Dist.] Dec. 7, 1995, pet. ref'd) (not designated for publication) ("Contrary to appellant's claim, the law and the court's charge do not require that the jury unanimously determine whether [the witness] was an accomplice to the murder. *See* Tex. Code Crim. Proc. Ann. art. 37.07, § 1(a) (Vernon 1981) (providing for a general verdict in every criminal case).").

The Committee agreed that this is existing law. Therefore the instruction does not require unanimity on accomplice matters.

CPJC 3.5 Instruction—Covert Agent Testimony—Corroboration Required as Matter of Law

[Insert instructions for underlying offense.]

Sufficiency of Testimony of Covert Agent

A defendant may not be convicted of the offense charged on the uncorroborated testimony of a person who is not a licensed peace officer or a special investigator but who was acting covertly on behalf of a law enforcement agency or under the color of law enforcement.

The testimony of [*name of covert agent*] must be corroborated. Evidence is sufficient to corroborate the testimony of [*name of covert agent*] if that evidence tends to connect the defendant, [*name of defendant*], with the commission of any offense that may have been committed. Evidence is not sufficient to corroborate if it merely shows that the offense was committed.

[Include the following if raised by the evidence.]

Testimony of [*name of covert agent X*] cannot corroborate the testimony of [*name of covert agent Y*]. Likewise, the testimony of [*name of covert agent Y*] cannot corroborate the testimony of [*name of covert agent X*].

Application of Law to Facts

You cannot convict the defendant on the testimony of [*name of covert agent*] unless—

1. there is evidence, outside of the testimony of [*name of covert agent*], that tends to connect the defendant with the commission of the offense charged, and

2. on the basis of all the evidence in the case, you believe, beyond a reasonable doubt, that the defendant is guilty.

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

When This Instruction Applies. Corroboration of the testimony of so-called covert agents is required by Tex. Code Crim. Proc. art. 38.141. Under that statute, corroboration of a covert agent is required only in a trial of an offense under Health and

Safety Code chapter 481, the Texas Controlled Substances Act. Thus, the corroboration would not apply, for instance, to offenses involving simulated controlled substances or dangerous drugs because those offenses do not fall within chapter 481.

Preliminary Matters. Controlled substance prosecutions involving testimony by so-called covert agents are often affected by the following statutory corroboration requirement:

> (a) A defendant may not be convicted of an offense under Chapter 481, Health and Safety Code, on the testimony of a person who is not a licensed peace officer or a special investigator but who is acting covertly on behalf of a law enforcement agency or under the color of law enforcement unless the testimony is corroborated by other evidence tending to connect the defendant with the offense committed.
>
> (b) Corroboration is not sufficient for the purposes of this article if the corroboration only shows the commission of the offense.
>
> (c) In this article, "peace officer" means a person listed in Article 2.12, and "special investigator" means a person listed in Article 2.122.

Tex. Code Crim. Proc. art. 38.141.

In 2008, the court of criminal appeals explained:

> [T]he standard for evaluating sufficiency of the evidence for corroboration under the accomplice-witness rule applies when evaluating sufficiency of the evidence for corroboration under the covert-agent rule. Accordingly, when weighing the sufficiency of corroborating evidence under Article 38.141(a), a reviewing court must exclude the testimony of the covert agent from consideration and examine the remaining evidence (i.e., non-covert agent evidence) to determine whether there is evidence that tends to connect the defendant to the commission of the offense.

Malone v. State, 253 S.W.3d 253, 258 (Tex. Crim. App. 2008).

In *Malone*, the court assumed that proof that the accused was merely present at the scene of the offense would not be sufficient but declined to address what constitutes "mere presence" under such an analysis.

Instructions on covert agent testimony should, under *Malone*, closely resemble those on accomplice witness testimony. As in the accomplice witness situation, whether corroboration is required might itself sometimes be a jury question. Consequently, the instruction above first covers situations in which the court determines corroboration is required and, second, provides for submission of the need for corroboration to the jury.

Corroboration by a Different Category of Suspect Witness. While it has long been the law that two accomplices cannot corroborate each other, the court of criminal

appeals has not yet ruled on whether one suspect witness (such as a jailhouse informant or covert agent) can corroborate another (e.g., accomplice witness). One court of appeals has held that it cannot. *Patterson v. State*, 204 S.W.3d 852, 859 (Tex. App.—Corpus Christi 2006, pet. ref'd) (informant could not corroborate accomplice and vice-versa); *but see Phillips v. State*, No. 10-12-00164-CR, 2015 WL 7443625, at *2 (Tex. App.—Waco Nov. 19, 2015, pet. ref'd) (mem. op., not designated for publication) (not error to refuse instruction that jailhouse witness could not corroborate accomplice witness). The Committee believed these kinds of witnesses could not corroborate each other and that, where applicable, the jury must be so instructed.

CPJC 3.6 Instruction—Covert Agent Testimony—Corroboration Requirement Submitted to Jury

[Insert instructions for underlying offense.]

Sufficiency of Testimony of Covert Agent

A defendant may not be convicted of the offense charged on the uncorroborated testimony of a person who is not a licensed peace officer or a special investigator but who was acting covertly on behalf of a law enforcement agency or under the color of law enforcement.

The testimony of [*name of covert agent*] must be corroborated if both—

1. [*name of covert agent*] was not a licensed peace officer or a special investigator, and

2. [[*name of covert agent*] was acting covertly on behalf of a law enforcement agency or under the color of law enforcement/[*name of covert agent*], in gathering the information about which he testified, was acting covertly on behalf of a law enforcement agency or under the color of law enforcement].

You must determine whether [*name of covert agent*] is a witness whose testimony must be corroborated.

Application of Law to Facts

If you determine that [*name of covert agent*] is a witness whose testimony must be corroborated, you cannot convict the defendant on the basis of [*name of covert agent*]'s testimony unless you find that both—

1. there is other evidence in the case, outside of the testimony of [*name of covert agent*], that tends to connect the defendant with the offense committed, and

2. on the basis of all the evidence in the case, you believe, beyond a reasonable doubt, that the defendant is guilty.

The other evidence required to corroborate the testimony of [*name of covert agent*] is not sufficient if it merely shows the commission of the offense.

[Include the following if raised by the evidence.]

If you have found that [*name of covert agent X*] is a witness whose testimony must be corroborated, and you have found that [*name of covert agent Y*] is a

witness whose testimony must be corroborated, you cannot use either witness's testimony to corroborate the other.

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

When This Instruction Applies. Corroboration of the testimony of so-called covert agents is required by Tex. Code Crim. Proc. art. 38.141. Under that statute, corroboration of a covert agent is required only in a trial of an offense under Health and Safety Code chapter 481, the Texas Controlled Substances Act. Thus, the corroboration would not apply, for instance, to offenses involving simulated controlled substances or dangerous drugs because those offenses do not fall within chapter 481.

Preliminary Matters. Controlled substance prosecutions involving testimony by so-called covert agents are often affected by the following statutory corroboration requirement:

> (a) A defendant may not be convicted of an offense under Chapter 481, Health and Safety Code, on the testimony of a person who is not a licensed peace officer or a special investigator but who is acting covertly on behalf of a law enforcement agency or under the color of law enforcement unless the testimony is corroborated by other evidence tending to connect the defendant with the offense committed.
>
> (b) Corroboration is not sufficient for the purposes of this article if the corroboration only shows the commission of the offense.
>
> (c) In this article, "peace officer" means a person listed in Article 2.12, and "special investigator" means a person listed in Article 2.122.

Tex. Code Crim. Proc. art. 38.141.

In 2008, the court of criminal appeals explained:

> [T]he standard for evaluating sufficiency of the evidence for corroboration under the accomplice-witness rule applies when evaluating sufficiency of the evidence for corroboration under the covert-agent rule. Accordingly, when weighing the sufficiency of corroborating evidence under Article 38.141(a), a reviewing court must exclude the testimony of the covert agent from consideration and examine the remaining evidence (i.e., non-covert agent evidence) to determine whether there is evidence that tends to connect the defendant to the commission of the offense.

Malone v. State, 253 S.W.3d 253, 258 (Tex. Crim. App. 2008).

In *Malone*, the court assumed that proof that the accused was merely present at the scene of the offense would not be sufficient but declined to address what constitutes "mere presence" under such an analysis.

Instructions on covert agent testimony should, under *Malone*, closely resemble those on accomplice witness testimony. As in the accomplice witness situation, whether corroboration is required might itself sometimes be a jury question. Consequently, the instruction above first covers situations in which the court determines corroboration is required and, second, provides for submission of the need for corroboration to the jury.

Corroboration by a Different Category of Suspect Witness. While it has long been the law that two accomplices cannot corroborate each other, the court of criminal appeals has not yet ruled on whether one suspect witness (such as a jailhouse informant or covert agent) can corroborate another (e.g., accomplice witness). One court of appeals has held that it cannot. *Patterson v. State*, 204 S.W.3d 852, 859 (Tex. App.—Corpus Christi 2006, pet. ref'd) (informant could not corroborate accomplice and vice-versa); *but see Phillips v. State*, No. 10-12-00164-CR, 2015 WL 7443625, at *2 (Tex. App.—Waco Nov. 19, 2015, pet. ref'd) (mem. op., not designated for publication) (not error to refuse instruction that jailhouse witness could not corroborate accomplice witness). The Committee believed these kinds of witnesses could not corroborate each other and that, where applicable, the jury must be so instructed.

CPJC 3.7 Instruction—Inmate Witness Testimony—Corroboration Required as Matter of Law

[Insert instructions for underlying offense.]

Sufficiency of Testimony of Inmate Witness

A defendant may not be convicted of the offense charged on the uncorroborated testimony of a person to whom the defendant made a statement against the defendant's interest during a time when the person was imprisoned or confined in the same correctional facility as the defendant.

The testimony of [*name of inmate witness*] must be corroborated.

Evidence is sufficient to corroborate [*name of inmate witness*]'s testimony if that evidence tends to connect the defendant, [*name of defendant*], with the commission of any offense that may have been committed. Evidence is not sufficient to corroborate [*name of inmate witness*]'s testimony if that evidence merely shows the offense was committed.

[Include the following if raised by the evidence.]

Testimony of an inmate witness to whom the defendant makes a statement against the defendant's interest while they are both imprisoned or confined in the same correctional facility is not sufficient to corroborate a different inmate witness to whom the defendant also makes a statement against interest.

Application of Law to Facts

You cannot convict the defendant on the testimony of [*name of inmate witness*] unless—

1. there is evidence, outside of the testimony of [*name of inmate witness*], that tends to connect the defendant with the commission of the offense charged, and

2. on the basis of all evidence in the case, you believe, beyond a reasonable doubt, that the defendant is guilty.

COMMENT

A jailhouse-witness instruction is required only if the witness testifies about a statement of the defendant that was against the defendant's interest. *Phillips v. State*, 463 S.W.3d 59, 67 (Tex. Crim. App. 2015). This requirement of corroboration is codified

in Tex. Code Crim. Proc. art. 38.075. A trial court must *sua sponte* include an article 38.075 jailhouse-witness instruction when applicable to the case. *Phillips*, 463 S.W.3d at 65.

In *Phillips*, the court of criminal appeals considered what it meant for a statement to be "against the defendant's interest." The court determined that the meaning was not identical to the hearsay exception for statements against interest in Texas Rule of Evidence 803(24) and that a statement could be against the defendant's interest even if it did not expose him to criminal liability. *Phillips*, 463 S.W.3d at 67–68. The statement need not be a confession or an admission; it is simply required to be "adverse to [the defendant's] position." *Phillips*, 463 S.W.3d at 68. In *Phillips*, the jailhouse witnesses testified that Phillips tried to get them to lie and say that the codefendant had confessed to committing the offense alone. These statements were sufficiently adverse to appellant's position that they warranted a jury instruction requiring that the witnesses' testimony be corroborated.

Given the similarity in this statute and the accomplice-witness corroboration statute, some accomplice-witness law will likely apply in this context, too. For example, on remand of the *Phillips* case, the court of appeals determined that the two jailhouse witnesses who testified could not corroborate each other and that the jury should have been so instructed. *Phillips v. State*, No. 10-12-00164-CR, 2015 WL 7443625, at *2 (Tex. App.—Waco Nov. 19, 2015, pet. ref'd) (not designated for publication); *see also Cook v. State*, 460 S.W.3d 703, 709 (Tex. App.—Eastland 2015) (applying accomplice sufficiency rule that a defendant's "mere presence" at the scene is not enough for covert agent corroboration).

Corroboration by a Different Category of Suspect Witness. While it has long been the law that two accomplices cannot corroborate each other, the court of criminal appeals has not yet ruled on whether one suspect witness (such as a jailhouse informant or covert agent) can corroborate another (e.g., accomplice witness). One court of appeals has held that it cannot. *Patterson v. State*, 204 S.W.3d 852, 859 (Tex. App.—Corpus Christi 2006, pet. ref'd) (informant could not corroborate accomplice and vice-versa); *but see Phillips*, 2015 WL 7443625, at *2 (not error to refuse instruction that jailhouse witness could not corroborate accomplice witness). The Committee believed these kinds of witnesses could not corroborate each other and that, where applicable, the jury must be so instructed.

CPJC 3.8 Instruction—Inmate Witness Testimony—Status Submitted to Jury

[Insert instructions for underlying offense.]

Sufficiency of Testimony of Inmate Witness

A defendant may not be convicted of the offense charged on the uncorroborated testimony of a person to whom the defendant made a statement against the defendant's interest during a time when the person was imprisoned or confined in the same correctional facility as the defendant.

The testimony of [*name of inmate witness*] must be corroborated if both—

1. the defendant, [*name of defendant*], made a statement against [his/her] interest to [*name of inmate witness*], and

2. at the time the statement was made, the defendant, [*name of defendant*], and [*name of inmate witness*] were both imprisoned or confined in the same correctional facility.

[Include the following if raised by the evidence.]

Testimony of an inmate witness to whom the defendant makes a statement against the defendant's interest while they are both imprisoned or confined in the same correctional facility is not sufficient to corroborate a different inmate witness to whom the defendant also makes a statement against interest.

Definitions

Correctional Facility

"Correctional facility" means a place designated by law for the confinement of a person arrested for, charged with, or convicted of a criminal offense. The term includes a [*insert confinement facility, e.g.*, county jail].

Application of Law to Facts

You cannot convict the defendant on the testimony of [*name of inmate witness*] unless—

1. you find that [*name of inmate witness*] was not an inmate witness, or

2. you find that [*name of inmate witness*] was an inmate witness, and

a. there is evidence, outside of the testimony of [*name of inmate witness*], that tends to connect the defendant, [*name of defendant*], with the commission of the offense charged, and

b. on the basis of all the evidence in the case, you believe, beyond a reasonable doubt, that the defendant is guilty.

COMMENT

A jailhouse-witness instruction is required only if the witness testifies about a statement of the defendant that was against the defendant's interest. *Phillips v. State*, 463 S.W.3d 59, 67 (Tex. Crim. App. 2015). This requirement of corroboration is codified in Tex. Code Crim. Proc. art. 38.075. A trial court must *sua sponte* include an article 38.075 jailhouse-witness instruction when applicable to the case. *Phillips*, 463 S.W.3d at 65.

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Corroboration by a Different Category of Suspect Witness. While it has long been the law that two accomplices cannot corroborate each other, the court of criminal appeals has not yet ruled on whether one suspect witness (such as a jailhouse informant or covert agent) can corroborate another (e.g., accomplice witness). One court of appeals has held that it cannot. *Patterson v. State*, 204 S.W.3d 852, 859 (Tex. App.—Corpus Christi 2006, pet. ref'd) (informant could not corroborate accomplice and

vice-versa); *but see Phillips*, 2015 WL 7443625, at *2 (not error to refuse instruction that jailhouse witness could not corroborate accomplice witness). The Committee believed these kinds of witnesses could not corroborate each other and that, where applicable, the jury must be so instructed.

CPJC 3.9 Instruction—Use or Exhibition of Deadly Weapon—By Defendant Personally

[Insert instructions for underlying offense. Include the following if the state contends the defendant personally used or exhibited the deadly weapon.]

Use or Exhibition of Deadly Weapon

If you find the defendant guilty of [*offense*], you must also address whether the state has proved, beyond a reasonable doubt, that the defendant used or exhibited a deadly weapon during the commission of the offense or during immediate flight from committing it.

Definitions

Deadly Weapon

"Deadly weapon" means—

1. a firearm; or

2. anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or

3. anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.

Serious Bodily Injury

"Serious bodily injury" means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

Bodily Injury

"Bodily injury" means physical pain, illness, or any impairment of physical condition.

Firearm

"Firearm" means any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use.

[Include the following if raised by the evidence.]

"Firearm" does not include a firearm that may have, as an integral part, a folding knife blade or other characteristics of weapons made illegal by chapter 46 of the Texas Penal Code and that is—

1. an antique or curio firearm manufactured before 1899, or

2. a replica of an antique or curio firearm manufactured before 1899, but only if the replica does not use rim fire or center fire ammunition.

Application of Law to Facts

You must decide whether the state has proved, beyond a reasonable doubt, that the defendant used or exhibited a deadly weapon during the commission of the offense or during immediate flight from committing it.

If you decide the state has proved this, indicate this in your verdict. If you decide the state has not proved this, indicate this in your verdict.

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge. Include the following at the end of the verdict form for a verdict of "guilty."]

With regard to whether the defendant used or exhibited a deadly weapon, we find: (select one)

_____ The state has proved, beyond a reasonable doubt, that the defendant used or exhibited a deadly weapon during the commission of the offense or during immediate flight from committing it.

_____ The state has not proved, beyond a reasonable doubt, that the defendant used or exhibited a deadly weapon during the commission of the offense or during immediate flight from committing it.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

COMMENT

The deadly weapon finding is provided for in Tex. Code Crim. Proc. arts. 42A.054(b)–(d), 42A.204. The definition of "deadly weapon" is from Tex. Penal Code § 1.07(a)(17). The definition of "serious bodily injury" is from Tex. Penal Code § 1.07(a)(46). The definition of "bodily injury" is from Tex. Penal Code § 1.07(a)(8). The definition of "firearm" is from Tex. Penal Code § 46.01(3).

Jury Submission of "Deadly Weapon" Question. Articles 42A.054 and 42A.204 of the Texas Code of Criminal Procedure provides for the making of a finding that a deadly weapon was used in the commission of an offense. If such a finding is made, it is to be included in the judgment. Tex. Code Crim. Proc. art. 42.01, § 1(21). The state may seek such a finding and must give the defendant notice of its intent to seek that finding, although the notice need not be in the charging instrument. *Luken v. State*, 780 S.W.2d 264, 266 (Tex. Crim. App. 1989).

If a jury is the trier of fact in a criminal prosecution, the jury is the appropriate entity to decide whether a finding of use of a deadly weapon is justified. *Ex parte Thomas*, 638 S.W.2d 905 (Tex. Crim. App. 1982). *Accord Drichas v. State*, 175 S.W.3d 795, 798 (Tex. Crim. App. 2005). *See generally Polk v. State*, 693 S.W.2d 391 (Tex. Crim. App. 1985).

Procedurally, *Polk* made clear, submission of a special issue to the jury is appropriate in many situations. It is unnecessary in two types of cases. One is when the charging instrument or the application portion of the jury instructions explicitly requires proof of the use of a deadly weapon and the verdict is that the defendant is guilty "as charged in the indictment." The other is when those same sources make clear that the jury must have found the use of an instrument that is a deadly weapon per se, such as a pistol, a firearm, or a handgun. *Polk*, 693 S.W.2d at 394.

Submission of a special issue is probably preferable in any situation in which there could be any doubt about whether the jury's action included the necessary determination. The court of criminal appeals held that a trial judge *could* look to the jury instruction as well as the indictment to determine if a verdict of guilty of a lesser included offense included the necessary finding. Nevertheless, it commented that in such cases submission of a special issue is "a commendable practice." *Lafleur v. State*, 106 S.W.3d 91, 92 n.6 (Tex. Crim. App. 2003).

The burden of proof is on the state, and that burden is proof beyond a reasonable doubt. Clearly the better practice is for the special issue itself to incorporate that burden of proof. *Olivas v. State*, 202 S.W.3d 137, 145 (Tex. Crim. App. 2006).

When Jury Submission Is Appropriate. Views have differed on when the deadly weapon issue is best submitted to the jury. *Polk* suggested that submission at punishment would be the "better practice," reasoning that this is most consistent with the command in Tex. Code Crim. Proc. art. 37.07, § 1(a), that "[t]he verdict in every

criminal action must be general." *Polk*, 693 S.W.2d at 394 n.3. A later plurality opinion of the court of criminal appeals described submission at the guilt stage as the better practice. *Hill v. State*, 913 S.W.2d 581, 586 (Tex. Crim. App. 1996) (plurality opinion). *See also Olivas*, 202 S.W.3d at 142 n.9 (court of appeals' holding that submission of deadly weapon issue at guilt was improper was not before court of criminal appeals, "but we note that the deadly weapon issue has been submitted in this manner in other cases").

The Committee agrees that submission of the deadly weapon issue to the jury is better done at the guilt stage of the trial. This considerably simplifies the punishment stage instruction.

Definition of "Use" or "Exhibit." The Committee considered whether to recommend that the deadly weapon instruction define either or both of the terms *use* and *exhibit*.

The leading cases defining these terms for purposes of reviewing the sufficiency of the evidence are *Coleman v. State*, 145 S.W.3d 649 (Tex. Crim. App. 2004), and *Patterson v. State*, 769 S.W.2d 938 (Tex. Crim. App. 1989). "Use" as defined in this case law presents a stronger case for definition in the instructions than "exhibit."

In *Patterson*, the court of criminal appeals quoted with apparent approval the court of appeals' statement that the term *use* "extends . . . to *any* employment of a deadly weapon, even its simple possession, if such possession facilitates the associated felony." *Patterson*, 769 S.W.2d at 941 (citing *Patterson v. State*, 723 S.W.2d 308, 315 (Tex. App.—Austin 1987)). But this suggests the employment of the weapon must actually facilitate the felony, that is, have some impact.

Other parts of the *Patterson* discussion indicate that the term *use* means instead to employ for a particular purpose. *Patterson*, 769 S.W.2d at 940–41. Under such an approach, whether a person "used" the weapon would turn in part on the person's intent or purpose. It would not require any actual successful impact on the events.

Most likely, under *Patterson* and *Coleman*, any conduct with the weapon, or even its passive possession, is sufficient if done for the purpose of facilitating the felony.

This is, to some extent, inconsistent with the terms of the statute. *See* Tex. Code Crim. Proc. art. 42A.054(b)–(d). Literally interpreted, the statute seems to cover any use of the weapon during the relevant period, whether or not that use is intended to have, or actually has, any impact on the commission of the felony or escape from its commission. *Patterson* and *Coleman*, however, assume that the statute requires such a nexus between the use and the felony.

A definition might incorporate the substance of the following:

> A person "uses a deadly weapon during the commission of a felony offense or in immediate flight from the commission" if the person in any way employs the deadly weapon to facilitate commission

> of the felony or escape from its commission. A person's mere possession of a deadly weapon, if the person intends this possession to facilitate the felony or escape, may constitute use of that deadly weapon.

The Committee decided, however, not to recommend a definition of either "use" or "exhibit" in the instruction. For a decision regarding this, see *White v. State*, No. 05-93-01754-CR, 1995 WL 81372, at *5 (Tex. App.—Dallas Feb. 22, 1995) (not designated for publication) (trial court did not err in refusing to define "exhibit" in punishment stage charge). In most cases, jurors' common-sense understanding of those terms should suffice to permit their proper application. Further, the case law does not provide clear and complete definitions of them for the exceptional situations in which general understanding might not suffice.

CPJC 3.10 Instruction—Use or Exhibition of Deadly Weapon—By Defendant or Party

[Insert instructions for underlying offense.
Include the following if the state contends either that the defendant personally used or exhibited the deadly weapon or that another party to the offense did so.]

Use or Exhibition of Deadly Weapon

If you find the defendant guilty of [*offense*], you must also address whether the state has proved, beyond a reasonable doubt, that a deadly weapon was used or exhibited during the commission of the offense or during immediate flight from committing it.

Relevant Statutes

To prove that a deadly weapon was used or exhibited, the state must prove, beyond a reasonable doubt, one of two elements. The elements are that—

1. the defendant himself used or exhibited a deadly weapon during the commission of the offense or in immediate flight from committing it; or

2. all of the following:

   a. the defendant was a party to the offense; and

   b. another party to the offense used or exhibited a deadly weapon during the commission of the offense or in immediate flight from committing it; and

   c. the defendant knew that a deadly weapon would be used or exhibited during the commission of the offense or in immediate flight from committing it.

Definitions

Deadly Weapon

"Deadly weapon" means—

1. a firearm; or

2. anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or

3. anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.

Serious Bodily Injury

"Serious bodily injury" means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

Bodily Injury

"Bodily injury" means physical pain, illness, or any impairment of physical condition.

Firearm

"Firearm" means any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use.

[Include the following if raised by the evidence.]

"Firearm" does not include a firearm that may have, as an integral part, a folding knife blade or other characteristics of weapons made illegal by chapter 46 of the Texas Penal Code and that is—

1. an antique or curio firearm manufactured before 1899, or

2. a replica of an antique or curio firearm manufactured before 1899, but only if the replica does not use rim fire or center fire ammunition.

Party to the Offense

"Party to the offense" means any person who is responsible for an offense committed by another because—

1. the person, acting with intent to promote or assist the commission of the offense, solicited, encouraged, directed, aided, or attempted to aid another person to commit the offense; or

2. the person and the other who committed the offense were members of a conspiracy to commit a felony, the offense was committed in furtherance of the unlawful purpose of the conspiracy, and the offense was one that should have been anticipated as a result of the carrying out of the conspiracy; or

3. the person acted with the kind of culpability required for the offense and caused or aided an innocent or nonresponsible person to engage in conduct prohibited by the definition of the offense; or

4. having a legal duty to prevent commission of the offense and acting with intent to promote or assist the commission of the offense, the person failed to make a reasonable effort to prevent commission of the offense.

Application of Law to Facts

You must decide whether the state has proved, beyond a reasonable doubt, that a deadly weapon was used or exhibited during the commission of the offense or during immediate flight from committing it.

If you decide the state has proved this, indicate this in your verdict. If you decide the state has not proved this, indicate this in your verdict.

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge. Include the following at the end of the verdict form for a verdict of "guilty."]

With regard to whether the defendant used or exhibited a deadly weapon, we find: (select one)

_____ The state has proved, beyond a reasonable doubt, that a deadly weapon was used or exhibited during the commission of the offense or during immediate flight from committing it.

_____ The state has not proved, beyond a reasonable doubt, that a deadly weapon was used or exhibited during the commission of the offense or during immediate flight from committing it.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

COMMENT

The deadly weapon finding is provided for in Tex. Code Crim. Proc. arts. 42A.054(b)–(d), 42A.204. The definition of "deadly weapon" is from Tex. Penal Code § 1.07(a)(17). The definition of "serious bodily injury" is from Tex. Penal Code § 1.07(a)(46). The definition of "bodily injury" is from Tex. Penal Code § 1.07(a)(8). The definition of "firearm" is from Tex. Penal Code § 46.01(3). The definition of "party to the offense" is based on Tex. Penal Code § 7.02(a).

Jury Submission of "Deadly Weapon" Question. Articles 42A.054 and 42A.204 of the Texas Code of Criminal Procedure provides for the making of a finding that a deadly weapon was used in the commission of an offense. If such a finding is made, it is to be included in the judgment. Tex. Code Crim. Proc. art. 42.01, § 1(21). The state may seek such a finding and must give the defendant notice of its intent to seek that finding, although the notice need not be in the charging instrument. *Luken v. State*, 780 S.W.2d 264, 266 (Tex. Crim. App. 1989).

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Definition of "Use" or "Exhibit." The Committee considered whether to recommend that the deadly weapon instruction define either or both of the terms *use* and *exhibit*.

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Most likely, under *Patterson* and *Coleman*, any conduct with the weapon, or even its passive possession, is sufficient if done for the purpose of facilitating the felony.

This is, to some extent, inconsistent with the terms of the statute. *See* Tex. Code Crim. Proc. art. 42A.054(b)–(d). Literally interpreted, the statute seems to cover any use of the weapon during the relevant period, whether or not that use is intended to have, or actually has, any impact on the commission of the felony or escape from its commission. *Patterson* and *Coleman*, however, assume that the statute requires such a nexus between the use and the felony.

A definition might incorporate the substance of the following:

> A person "uses a deadly weapon during the commission of a felony offense or in immediate flight from the commission" if the per-

> son in any way employs the deadly weapon to facilitate commission of the felony or escape from its commission. A person's mere possession of a deadly weapon, if the person intends this possession to facilitate the felony or escape, may constitute use of that deadly weapon.

The Committee decided, however, not to recommend a definition of either "use" or "exhibit" in the instruction. For a decision regarding this, see *White v. State*, No. 05-93-01754-CR, 1995 WL 81372, at *5 (Tex. App.—Dallas Feb. 22, 1995) (not designated for publication) (trial court did not err in refusing to define "exhibit" in punishment stage charge). In most cases, jurors' common-sense understanding of those terms should suffice to permit their proper application. Further, the case law does not provide clear and complete definitions of them for the exceptional situations in which general understanding might not suffice.

Deadly Weapon Finding Not Appropriate for Nonhuman Victims. In *Prichard v. State*, No. PD-0712-16, 2017 WL 2791524 (Tex. Crim. App. June 28, 2017), the court of criminal appeals held that the deadly weapon finding applies only to human victims. Thus, such a finding should not be submitted in a typical animal cruelty case.

CPJC 4.1 General Comments

What is often called "transferred intent" is provided for in the final portion of Texas Penal Code section 6.04:

> (b) A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that:
>
> (1) a different offense was committed; or
>
> (2) a different person or property was injured, harmed, or otherwise affected.

Tex. Penal Code § 6.04(b).

The statute provides for considerably different rules of liability, depending on whether the state invokes section 6.04(b)(1) (different offense) or section 6.04(b)(2) (different person or property). Section 6.04(b)(2) transferred intent substitutes the "intent" to injure or affect one person or piece of property to another person or piece of property accidentally affected by the defendant's conduct. This rule is consistent with general criminal law. Section 6.04(b)(1), in contrast, appears to substitute the culpable mental state for one offense for that of another, accidentally committed, offense. This rule is unusual and perhaps unique in American criminal law.

Transferred intent need not be pleaded in the charging instrument. *In re K.W.G.*, 953 S.W.2d 483, 488 (Tex. App.—Texarkana 1997, pet. denied) ("There has never been a requirement to plead transferred intent in ordinary criminal cases."); *Bagsby v. State*, 721 S.W.2d 567, 571 (Tex. App.—Fort Worth 1986, no pet.). Whether transferred intent should be included in jury instructions depends on whether the evidence supports guilt on that theory rather than on what the charging instrument includes.

The underlying offenses used as examples in the instructions in this chapter are causing serious bodily injury to a child by an act under Tex. Penal Code § 22.04(a)(1) and assault under Tex. Penal Code § 22.01(a)(1). Guidance for drafting instructions on injury to a child and assault may be found in *Texas Criminal Pattern Jury Charges—Crimes against Persons & Property*, chapter 85.

CPJC 4.2 Instruction—Transferred Intent—Different Offense

INSTRUCTIONS OF THE COURT

Accusation

[Insert relevant accusation unit for specific offense. The following example is for when the underlying offense is causing serious bodily injury to a child under Texas Penal Code section 22.04(a)(1).]

The state accuses the defendant of having committed the offense of causing serious bodily injury to a child by an act. Specifically, the accusation is that the defendant [*insert specific allegations, e.g.*, intentionally or knowingly caused serious bodily injury to [*name*], a child fourteen years old or younger, by striking [*name*] with his fist].

Relevant Statutes

[Insert relevant statutes and definitions units from charged offense. The following example is for a Texas Penal Code section 22.04(a)(1) charge.]

A person commits an offense if he intentionally or knowingly by an act causes serious bodily injury to a child.

To prove that the defendant is guilty of causing serious bodily injury to a child by an act, the state must prove, beyond a reasonable doubt, five elements. The elements are that—

1. the defendant engaged in an act; and

2. the defendant by this act caused bodily injury to another person; and

3. the bodily injury caused to the other person was serious bodily injury; and

4. the person was a child fourteen years old or younger; and

5. the defendant acted either with intent to cause serious bodily injury to the child or with knowledge that his conduct would cause serious bodily injury to the child.

A person commits the different offense of causing some bodily injury to a child by an act if he intentionally or knowingly by an act causes bodily injury

to a child. This offense is a lesser included offense of the offense of which the state accuses the defendant.

To prove that the defendant is guilty of the lesser included offense of causing any bodily injury to a child by an act, the state must prove, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant engaged in an act; and

2. the defendant by this act caused bodily injury to another person; and

3. the person was a child fourteen years old or younger; and

4. the defendant acted either with intent to cause bodily injury to the child or with knowledge that his conduct would cause bodily injury to the child.

Transferred Intent

The state's accusation is that the defendant intentionally or knowingly caused serious bodily injury to [*name*].

"Transferred intent" means a person is criminally responsible for causing a result if the only difference between what the person desired or contemplated and what actually occurred is that a different offense was committed.

This means that a person is criminally responsible for causing serious bodily injury to a child although the person did not intend or contemplate that the bodily injury be "serious" as long as the person intended or had knowledge that his conduct would cause any bodily injury to the child.

Mistake of Fact

The effect of transferred intent in this case may be affected by the defense of mistake of fact.

It is a defense to prosecution that the defendant through mistake formed a reasonable belief about a matter of fact and the mistaken belief negated the kind of culpability required for commission of the offense.

Here, if the defendant through mistake formed a reasonable belief that his conduct would cause bodily injury, but not "serious" bodily injury, he is not guilty of the offense charged.

If the defendant's mistake of fact negates the kind of culpability required for the commission of the offense charged, the defendant may nevertheless be con-

victed of any lesser included offense of which he would be guilty if the facts had been as he believed.

Here, if the defendant through mistake formed a reasonable belief that his conduct would cause bodily injury but not "serious" bodily injury and as a result he is not guilty of the offense charged, he may be guilty of the lesser included offense.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of bodily injury to a child or serious bodily injury to a child.

Definitions

Bodily Injury

"Bodily injury" means physical pain, illness, or any impairment of physical condition.

Serious Bodily Injury

"Serious bodily injury" means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

Intentionally Causing Bodily Injury

A person intentionally causes bodily injury to another if it is the person's conscious objective or desire to cause the bodily injury to another.

Knowingly Causing Bodily Injury

A person knowingly causes bodily injury to another if the person is aware that the person's conduct is reasonably certain to cause the bodily injury to another.

Application of Law to Facts

[Include relevant application of law to facts unit from charged offense. The following example is for a Texas Penal Code section 22.04(a)(1) charge.]

You must determine whether the state has proved, beyond a reasonable doubt, the five elements of causing serious injury to a child. The elements are that—

1. the defendant, in [*county*] County, Texas, on or about [*date*], [*insert specific allegations, e.g.*, struck [*name*] with his fist]; and

2. the defendant by this act caused bodily injury to [*name*]; and

3. the bodily injury caused by the defendant to [*name*] was serious bodily injury; and

4. [*name*] was a child fourteen years old or younger; and

5. the defendant acted either with the intent to cause serious bodily injury or with the knowledge that his conduct would cause serious bodily injury to [*name*].

You may find the state has proved elements 1, 2, 3, 4, and 5 listed above. In this event, you must find the defendant "guilty" of the charged offense of causing serious bodily injury to a child.

You may find the state has proved elements 1, 2, 3, and 4 listed above but that the state has not proved the defendant intended serious bodily injury to [*name*] or knew that serious bodily injury to [*name*] would occur. In this event, you must next determine whether the state has proved the defendant acted with intent to cause some bodily injury to [*name*] or knew that some bodily injury to [*name*] would occur. If you find the state has not proved this, you must find the defendant "not guilty."

If you find the state has proved the defendant acted with intent to cause some bodily injury to [*name*] or knew that some bodily injury to [*name*] would occur, you must proceed to the next step. This step requires you to determine whether, following the instructions on mistake of fact in the following paragraphs, the state has proved only the culpable mental state required for the lesser included offense of causing any bodily injury to a child for the reason explained in these two paragraphs of these instructions.

You must consider the evidence that the defendant acted under a mistake of fact—that he mistakenly believed his actions would cause only non–serious bodily injury. This may establish that the defendant is not guilty of the charged offense of causing serious bodily injury to a child but that the state may nevertheless have proved the defendant guilty of the lesser included offense of causing injury to a child.

You must find the defendant "not guilty" of the charged offense of causing serious injury to a child but "guilty" of the lesser included offense of intentionally causing bodily injury to a child if you find the state has proved elements 1, 2, 3, and 4 listed above and you further find both that—

1. the state has proved only intent to cause non–serious bodily injury or knowledge that non–serious bodily injury would occur; and

2. the state's evidence proves only intent to cause non–serious bodily injury or knowledge that non–serious bodily injury would occur because that evidence shows the defendant mistakenly but reasonably believed his actions would not cause serious bodily injury.

You must find the defendant "guilty" of the charged offense of causing serious bodily injury to a child if—

1. you find the state has proved elements 1, 2, 3, and 4 listed above; and

2. you find the state has proved the defendant acted with intent to cause any bodily injury to [*name*] or knew that some bodily injury to [*name*] would occur; and

3. you do not find the state has proved only the culpable mental state required for the lesser included offense of causing any bodily injury to a child for the reason explained in these last two paragraphs of these instructions.

To repeat and summarize, you are to find the defendant "guilty" of the lesser included offense of causing injury to a child if you determine the state has proved, beyond a reasonable doubt, five elements. Those elements are that—

1. the defendant, in [*county*] County, Texas, on or about [*date*], [*insert specific allegations, e.g.*, struck [*name*] with his fist]; and

2. the defendant by this act caused bodily injury to [*name*]; and

3. the bodily injury caused by the defendant to [*name*] was serious bodily injury; and

4. [*name*] was a child fourteen years old or younger; and

5. the defendant acted with intent to cause non–serious bodily injury or knowledge that non–serious bodily injury would occur because the defendant mistakenly but reasonably believed his actions would not cause serious bodily injury.

You must all agree on all five elements listed above for either the charged offense or the lesser included offense.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more elements listed above for the respective offense, you must find the defendant "not guilty."

If you all agree the state has proved, beyond a reasonable doubt, all elements listed above for the respective offense, you must find the defendant "guilty."

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

The role of transferred intent in criminal liability is addressed in Tex. Penal Code § 6.04(b).

The above instruction is based on an indictment for causing serious bodily injury to a child under Tex. Penal Code § 22.04(a)(1). The Committee chose this example in light of issues raised by *Thompson v. State*, 236 S.W.3d 787 (Tex. Crim. App. 2007), discussed below. The definition of "bodily injury" is from Tex. Penal Code § 1.07(a)(8), and the definition of "serious bodily injury" is from Tex. Penal Code § 1.07(a)(46). The court will need to modify the instruction depending on what the accusation charges.

Texas Penal Code section 6.04(b)(1) creates an unusual and broad kind of "transferred intent": "A person is . . . criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that . . . a different offense was committed . . . ."

This provision continued and expanded the law that previously had been embodied in article 42 of the 1925 Penal Code:

> One intending to commit a felony and who in the act of preparing for or executing the same shall through mistake or accident do another act which, if voluntarily done, would be a felony, shall receive the punishment affixed to the felony actually committed.

Vernon's Ann. P.C. art. 42 (1925).

Penal Code section 6.04(b)(1) is consistent with felony murder under section 19.02(b)(3) and perhaps provides something of a conceptual basis for felony murder. Felony murder, however, is fully provided for in section 19.02(b)(3), and there is no need for a felony murder instruction to incorporate or even refer to section 6.04(b)(1).

When and how section 6.04(b)(1) applies—apart from murder—has troubled Texas courts. This is clear from the few appellate cases dealing with the provision.

In *Lewis v. State*, 815 S.W.2d 560 (Tex. Crim. App. 1991), a prosecution for capital murder, the defendant claimed error "in abstractly instructing the jury over his objection regarding the theory of 'transferred intent' which appears at V.T.C.A., Penal Code § 6.04(b)(1)." The court did not reach whether this was prohibited by the definition of capital murder, because the lack of an application provision meant the jury was not authorized to convict using transferred intent. *Lewis*, 815 S.W.2d at 562. Apparently the state's theory was that the evidence showed Lewis intended to commit robbery, and the only difference between what he intended and what he caused was that murder rather than robbery was committed.

The provision was relied on in *Price v. State*, No. 05-91-003447-CR, 1992 WL 360170, at *9 (Tex. App.—Dallas Nov. 19, 1992), *pet. ref'd*, 861 S.W.2d 913 (Tex. Crim. App. 1993) (Clinton, J., joined by Baird and Overstreet, JJ., dissenting). In *Price*, the jury instruction is somewhat confusing but appeared to permit the jury to find the defendant Price guilty of criminal mischief if it found he intended to commit obstruction of a passageway and with the culpable mental state required for that offense damaged property. Three members of the court of criminal appeals argued that review should be granted to review the lower courts' application of transferred intent. Review, however, was denied.

In *Loredo v. State*, 130 S.W.3d 275, 282–84 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd), the provision seems to have been applied to arson—setting a fire with intent to damage a building. The state's theory appears to have been that if it proved the defendant Loredo set a fire intending to burn a safe inside a building and accidentally burned the building, transferred intent rendered him guilty of arson. The Houston court of appeals agreed that transferred intent under section 6.04(b)(1) applied but that the trial court had erroneously instructed the jury under section 6.04(b)(2). The error was, however, harmless.

The statute was also relied on in *Palafox v. State*, 949 S.W.2d 48 (Tex. App.—Texarkana 1997, no writ), in which the defendant Palafox was charged with possession of heroin. The jury was apparently permitted by a section 6.04(b)(1) instruction to convict him of the charged offense if it found the state proved he possessed what he believed was cocaine. *Palafox*, 949 S.W.2d at 49 (jury was properly instructed and evidence supported conviction).

The Committee concluded that without further clarification from the case law, there is sufficient uncertainty regarding the appropriate use of section 6.04(b)(1) that the Committee could not attempt to develop and recommend an instruction for that use. Apparently, and despite *Price*, *Loredo*, and *Palafox*, the provision is seldom actually invoked in practice.

One recent case, however, gives rise to issues the Committee concluded it should attempt to address.

Thompson held explicitly that transferred intent under section 6.04(b)(1) applied in a prosecution for intentionally or knowingly causing serious bodily injury to a child under Tex. Penal Code § 22.04(a)(1). This first-degree felony offense generally requires intent or knowledge concerning serious bodily injury.

Thompson held that under section 6.04(b)(1) the culpable mental state required for third-degree felony injury to a child (intent or knowledge concerning some bodily injury) transferred to—and was sufficient for—the first-degree felony of intentionally or knowingly causing serious bodily injury to a child.

In *Thompson*, the jury instruction initially set out the charged offense as requiring that the defendant "intentionally or knowingly cause[] serious bodily injury to [the child]." *Thompson v. State*, 183 S.W.3d 787, 788 (Tex. App.—Austin 2005), *aff'd*, 236 S.W.3d 787. It then set out an abstract statement of section 6.04(b)(1). In the application portion it directed the jury to first consider whether the state proved guilt under a version of the charged crime requiring proof of intent to cause serious bodily injury or knowledge that serious bodily injury would result. The jury was told that if it did not find guilt proved under that provision to consider alternatively whether the state proved guilt under a version of the charged offense requiring only proof of intent to cause bodily injury to the named child. *See Thompson*, 236 S.W.3d at 790.

The court of criminal appeals at one point stated in *Thompson*, "The trial court correctly submitted the law of transferred intent in the jury charge." *Thompson*, 236 S.W.3d at 800.

Thompson also made clear that, at least as applied in that case, the impact of transferred intent could be mitigated by proper application of the doctrine of mistake of fact.

The above instruction suggests how a section 6.04(b)(1) transferred intent instruction might most effectively inform the jury of this law in the situation in which the case law makes clear it does apply. The reference in section 6.04(b) to matters "risked" seems designed to address application of transferred intent to situations in which recklessness is sufficient. The statement of the statute in the above instruction's transferred intent unit includes only those portions relevant when the charged offense—as is the case here—requires either intent or knowledge.

The Committee is not satisfied with these instructions. Thus it does not affirmatively recommend their use. It offers them, however, as an effort to implement *Thompson* that might serve as the basis for further efforts to carry out the jury submission that *Thompson* held is sometimes required.

CPJC 4.3 Instruction—Transferred Intent—Different Person or Property

INSTRUCTIONS OF THE COURT

Accusation

[Insert relevant accusation unit for specific offense. The following example is for when the underlying offense is causing bodily injury to another under Texas Penal Code section 22.01(a)(1).]

The state accuses the defendant of having committed the offense of assault. Specifically, the accusation is that the defendant [*insert specific allegations, e.g.*, intentionally, knowingly, or recklessly caused bodily injury to [*name*] by striking [*name*] with a stick, slapping him with his hand, or kicking him with his foot].

Relevant Statutes

[Insert relevant statutes and definitions units from charged offense. The following example is for a Texas Penal Code section 22.01(a)(1) charge.]

A person commits an offense if the person intentionally, knowingly, or recklessly causes bodily injury to another.

To prove that the defendant is guilty of assault, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant caused bodily injury to another; and
2. the defendant—
    a. intended to cause the bodily injury; or
    b. had knowledge that he would cause the bodily injury; or
    c. was reckless about whether he would cause the bodily injury.

Transferred Intent

The state's accusation is that the defendant intentionally, knowingly, or recklessly caused bodily injury to [*name*].

A person is criminally responsible for causing a result if the only difference between what the person desired, contemplated, or risked and what actually occurred is that a different person was injured, harmed, or otherwise affected.

Even if the defendant did not intend bodily injury to [*name*], did not know that bodily injury to [*name*] would occur, or did not act with recklessness about whether bodily injury to [*name*] would occur, the defendant is criminally responsible for the injury to [*name*] if both—

1. the defendant intended bodily injury to [*name of third person*], knew that bodily injury to [*name of third person*] would occur, or was reckless about whether that bodily injury would occur to [*name of third person*]; and

2. with that culpable mental state caused injury to [*name*].

Therefore, the state may prove its accusation that the defendant intentionally, knowingly, or recklessly caused bodily injury to [*name*] by proving the defendant both—

1. caused bodily injury to [*name*]; and

2. either—

   a. intended to cause bodily injury to [*name of third person*]; or

   b. believed that he would cause bodily injury to [*name of third person*]; or

   c. was reckless about whether he would cause bodily injury to [*name of third person*].

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of assault.

Definitions

Bodily Injury

"Bodily injury" means physical pain, illness, or any impairment of physical condition.

Intentionally Causing Bodily Injury

A person intentionally causes bodily injury to another if it is the person's conscious objective or desire to cause the bodily injury to another.

Knowingly Causing Bodily Injury

A person knowingly causes bodily injury to another if the person is aware that the person's conduct is reasonably certain to cause the bodily injury to another.

Recklessly Causing Bodily Injury

A person recklessly causes bodily injury to another if the person is aware of but consciously disregards a substantial and unjustifiable risk that the person's action will cause bodily injury to another. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Application of Law to Facts

[Include relevant application of law to facts unit from charged offense. The following example is for a Texas Penal Code section 22.01(a)(1) charge.]

You must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, in [*county*] County, Texas, on or about [*date*], caused bodily injury to [*name*] by [*insert specific allegations, e.g.*,

    a. striking [*name*] with a stick; or

    b. slapping [*name*] with his hand; or

    c. kicking [*name*] with his foot]; and

2. the defendant did this either—

    a. intending to cause the injury to [*name*], knowing that the injury to [*name*] would be caused, or with recklessness about whether the injury to [*name*] would be caused; or

    b. intending to cause an injury to [*name of third person*], knowing that an injury to [*name of third person*] would be caused, or with recklessness about whether an injury to [*name of third person*] would be caused.

You must all agree on elements 1 and 2 listed above, but you do not have to agree on the method of causing bodily injury listed in elements 1.a, 1.b, and 1.c

above. Further, you need not all agree on whether the state has proved element 2 by means of element 2.a or 2.b above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of elements 1 and 2 listed above, you must find the defendant "not guilty."

If you all agree the state has proved, beyond a reasonable doubt, both of the two elements listed above, you must find the defendant "guilty."

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

The role of transferred intent in criminal liability is addressed in Tex. Penal Code § 6.04(b). Section 6.04(b)(2) generally applies when the state's theory is that the charged offense is the same statutory offense for which the accused actually had the required culpable mental state except that the person or property harmed or affected was different than what was anticipated by the accused. The definition of "bodily injury" is from Tex. Penal Code § 1.07(a)(8).

Because of the difficulty of formulating an instruction in purely abstract terms, the above instruction uses simple assault as a vehicle for an instruction in which the state produces evidence showing the defendant accidentally injured the complainant while attempting to assault someone else.

This instruction assumes the state's evidence supports guilt with or without section 6.04(b)(2) transferred intent. The application of law to facts unit, then, presents these as alternatives.

CPJC 5.1 Party Liability Generally

Criminal liability for the conduct of another is addressed in Tex. Penal Code §§ 7.01–.03. Traditional aiding and abetting liability, the subject of this chapter, is defined in Penal Code section 7.02(a)(2). A series of court of criminal appeals cases enforced a rule that "the State may not support a jury verdict of guilty upon the theory that an accused was criminally responsible for an offense committed by the conduct of another person unless the court's charge specifically and adequately authorizes the jury to convict the accused upon that theory." Applying this rule, the court held that an instruction must contain at least "an application paragraph authorizing a conviction under conditions specified by other paragraphs of the jury charge to which the application paragraph necessarily and unambiguously refers." *Plata v. State*, 926 S.W.2d 300, 304 (Tex. Crim. App. 1996), *overruled on other grounds by Malik v. State*, 953 S.W.2d 234, 239 (Tex. Crim. App. 1997). Under this approach, and when the defendant had not objected in the trial court, an application paragraph was sufficient when it told jurors to convict—

> if you believe from the evidence beyond a reasonable doubt that in Jefferson County, Texas, on or about March 25, 1991, the defendant Brice Christopher Chatman, either acting alone or as a party, as that term has been defined, intentionally or knowingly caused the death of an individual, namely: Lester Guillory, Jr., by shooting him with a deadly weapon, namely: a firearm . . . .

Chatman v. State, 846 S.W.2d 329, 330 (Tex. Crim. App. 1993); *accord Ransom v. State*, 920 S.W.2d 288, 303 (Tex. Crim. App. 1994).

Another line of cases, however, held that a defendant is entitled on proper request or objection in the trial court to—in *Plata*'s terms—"an application paragraph specifying all of the conditions to be met before a conviction under such theory is authorized" (*Plata*, 926 S.W.2d at 304). *Johnson v. State*, 739 S.W.2d 299 (Tex. Crim. App. 1987) (plurality opinion); *accord Scott v. State*, 768 S.W.2d 308, 309–10 (Tex. Crim. App. 1989).

Johnson and *Scott* require that on request the trial court specify in the application paragraph that the state must prove all the following:

1. The specified elements of the guilt of the primary actor;

2. That the defendant solicited, encouraged, directed, aided, or attempted to aid the primary actor's commission of the offense; and

3. That the defendant did this "with intent to promote or assist the commission of the offense" by the primary actor.

Several Texas courts have refused to find error in the rejection of defendants' requests for more specific or elaborate instructions on parties. *E.g., Roberts v. State*,

319 S.W.3d 37, 51–52 (Tex. App.—San Antonio 2010, pet. ref'd) (rejecting contention that instructions should have required proof defendant "acted with the intent to promote or assist in the commission [of what] she knew to be a criminal offense"); *Guevara v. State*, 297 S.W.3d 350, 365–67 (Tex. App.—San Antonio 2009, pet. ref'd) (rejecting contentions that instructions should have provided that, "in addition to the illegal conduct of the primary actor, it must be shown that the accused harbored the specific intent to promote or assist the commission of the offense" and "[t]he accused must know that he was assisting in the offense's commission"); *Cunningham v. State*, 848 S.W.2d 898, 906 (Tex. App.—Corpus Christi 1993, pet. ref'd) (rejecting contention that "the charge should have stated the manner and means or specific acts by which appellant was guilty as an accomplice").

Instructions similar to those suggested in this chapter were approved in *Taylor v. State*, 148 S.W.3d 592, 594–96 (Tex. App.—Fort Worth 2004, pet. ref'd), and *Guevara*, 297 S.W.3d at 365–67. These instructions are also consistent with the discussion of party liability in *Ex parte Thompson*, 179 S.W.3d 549 (Tex. Crim. App. 2005).

The underlying offense used as the example in the instructions in this chapter is murder under Tex. Penal Code § 19.02(b)(1). Guidance for drafting instructions on murder may be found in *Texas Criminal Pattern Jury Charges—Crimes against Persons & Property*, chapter 80.

Element 2 of the application of law to facts unit of the instructions requires that the primary actor and the defendant have the same mental state. This does not address the possibility that a defendant prosecuted as a party might be guilty of a more or less serious offense than the primary actor. The court of criminal appeals has not addressed this issue in the context of appropriate jury instructions. However, the court has discussed the extent to which the liability of a party is actually derivative of that of the primary actor in a habeas corpus action that rejected the defendant's claim of actual innocence of capital murder, based on the conviction of the primary actor for only felony murder. In *Ex parte Thompson*, applicant Thompson was convicted of capital murder and sentenced to death based on the fatal shooting of Rahim by the applicant's codefendant, Butler, during the aggravated robbery of a convenience store in Houston. The court of criminal appeals affirmed the conviction and sentence, finding that the jury in this case was properly—

> instructed that it could find applicant guilty of capital murder in any of three different ways: as the actual triggerman, as a party to Sammy Butler's shooting of Mr. Rahim under Section 7.02(a)(2); or as a co-conspirator to the aggravated robbery under Section 7.02(b). Under the first two theories, the jury was required to find that applicant himself intended the death of Mr. Rahim; under the third theory the jury was required to find that applicant should have anticipated Mr. Rahim's death as a consequence of his and Butler's agreement to commit aggravated robbery and Mr. Rahim's death occurred in furtherance of that crime.

Ex parte Thompson, 179 S.W.3d at 552. The court rejected the applicant's claim that his conviction must be reversed because Butler was acquitted of capital murder and convicted in a later trial only of felony murder, because there was ample evidence at Thompson's trial that both he and Butler intended to commit capital murder. There was some language in *Thompson* supporting the proposition that the accomplice can be convicted of capital murder even if the perpetrator did not intend such a murder. In her concurrence, Presiding Judge Keller made clear that she would require that the government prove at Thompson's trial that Butler and Thompson both intended to kill or knowingly killed the victim. We have drafted the instructions to require both.

CPJC 5.2 Instruction—Party Liability

INSTRUCTIONS OF THE COURT

Accusation

[Insert relevant accusation unit for specific offense. The following example is for when the underlying offense is murder under Texas Penal Code section 19.02(b)(1).]

The state accuses the defendant of having committed the offense of murder. Specifically, the accusation is that [*name of primary actor*] [*insert specific allegations, e.g.*, intentionally or knowingly caused the death of [*name of victim*] by shooting him with a firearm, and the defendant is criminally responsible for this offense because the defendant solicited, encouraged, directed, aided, or attempted to aid [*name of primary actor*] in committing it].

Relevant Statutes

[Insert relevant statutes and definitions units from charged offense. The following example is for a Texas Penal Code section 19.02(b)(1) charge.]

A person commits an offense if the person intentionally or knowingly causes the death of an individual.

To prove that the primary actor is guilty of murder, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the primary actor caused the death of an individual; and
2. the primary actor did this intentionally or knowingly.

Responsibility for Conduct of Another as Party

A person who does not by his own conduct commit an offense may nonetheless be criminally responsible for the conduct of another person.

A person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense.

To prove that the defendant is guilty of an offense committed by the conduct of another, the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. the other person committed the offense; and

2. the defendant [*include one or more of the following as applicable:* solicited, encouraged, directed, aided, or attempted to aid] the other person to commit the offense; and

3. the defendant acted with the intent to promote or assist in the commission of the offense by the other person.

A defendant acts with intent to promote or assist in the commission of an offense when it is his conscious objective or desire to promote or assist in the commission of the offense.

A defendant's mere presence alone will not make him responsible for an offense. A defendant's mere knowledge of a crime or failure to disclose a crime also is not sufficient.

[Include the following if raised by the facts.]

A defendant is guilty of an offense committed by another under the law set out here even if that other person has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense or of a different type or class of offense, or is immune from prosecution.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of murder.

Definitions

Intentionally Causing the Death of an Individual

The primary actor acts intentionally as required by this offense if it is his conscious objective or desire to cause the result of death.

Knowingly Causing the Death of an Individual

The primary actor acts knowingly as required by this offense if he is aware that his conduct is reasonably certain to cause the result of death.

Application of Law to Facts

[Include relevant application of law to facts unit from charged offense. The following example is for a Texas Penal Code section 19.02(b)(1) charge.]

You must determine whether the state has proved, beyond a reasonable doubt, that the defendant is guilty of murder as a party because he is criminally responsible for the commission of a crime committed by the conduct of another person. This is the case if the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. in [*county*] County, Texas, on or about [*date*], [*name of primary actor*] caused the death of an individual, [*name of victim*], by [*insert specific allegations, e.g.*, shooting [*name of victim*] with a firearm]; and

2. [*name of primary actor*] did this intentionally or knowingly; and

3. the defendant [*include one or more of the following as applicable:* solicited, encouraged, directed, aided, or attempted to aid] [*name of primary actor*] to commit the offense of murder; and

4. the defendant acted with the intent to promote or assist the commission of the offense of murder by [*name of primary actor*].

You must all agree on elements 1, 2, 3, and 4 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, and 4 listed above, you must find the defendant "not guilty."

If you all agree the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must find the defendant "guilty."

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

The law of parties is defined in Tex. Penal Code § 7.01. The above instruction is based on an indictment for a murder charged under Tex. Penal Code § 19.02(b)(1). The court will need to modify the instruction depending on what the accusation charges.

This instruction is appropriate when the evidence supports liability only as a party under Penal Code section 7.02(a)(2). The instruction at CPJC 5.3 is for use when the evidence supports liability as the primary actor or as a party under Penal Code section 7.02(a)(2). The instruction at CPJC 5.4 is for use when the evidence supports liability only as a coconspirator under Penal Code section 7.02(b). Finally, the instruction at CPJC 5.5 is for use when the evidence supports liability as either the primary actor, a party under Penal Code section 7.02(a)(2), or a coconspirator under Penal Code section 7.02(b). The instruction selected should be based on the evidence presented.

The instructions may permit conviction as a party rather than, or as an alternative to, conviction as the primary actor, even if the charging instrument makes no reference to liability as a party. *Marable v. State*, 85 S.W.3d 287, 287–88 (Tex. Crim. App. 2002); *accord, e.g., Sorto v. State*, 173 S.W.3d 469, 476 (Tex. Crim. App. 2005) ("[I]t is well-settled that the law of parties need not be pled in the indictment.").

In 1999, Judge Womack stated, "I am doubtful of the rule that the law of parties is available without any allegation in the indictment of conduct that would make one a party." *Planter v. State*, 9 S.W.3d 156, 162 (Tex. Crim. App. 1999) (Womack, J., dissenting). Subsequently, in *Marable*, 85 S.W.3d at 295–300, Judge Womack reiterated this position and was joined in his dissent by Judges Meyers and Johnson. They believe that an indictment must generally allege "that the defendant is criminally responsible for the conduct of another person who is named." *Marable*, 85 S.W.3d at 299.

If the defendant properly objects, it might be error for a trial judge to fail to inform the jury which specific modes of conduct enumerated in Penal Code section 7.02(a)(2) (soliciting, encouraging, directing, aiding, or attempting to aid) form the basis for the conviction. *Ransom v. State*, 920 S.W.2d 288, 303 (Tex. Crim. App. 1994); *Johnson v. State*, 739 S.W.2d 299, 305 n.4 (Tex. Crim. App. 1987).

General practice is to name the person who, under the state's theory, is the primary actor. But the court of criminal appeals has suggested this is not always necessary. *Wooley v. State*, 273 S.W.3d 260, 263 (Tex. Crim. App. 2008) (citing with approval *Wooley v. State*, 223 S.W.3d 732, 735 n.2 (Tex. App.—Houston [14th Dist.] 2007)) (disagreeing with 43 George E. Dix & Robert O. Dawson, *Texas Practice: Criminal Practice and Procedure* § 36.20 n.6 (2d ed. 2001)).

CPJC 5.3 Instruction—Primary Actor and Party Liability

INSTRUCTIONS OF THE COURT

Accusation

[Insert relevant accusation unit for specific offense. The following example is for when the underlying offense is murder under Texas Penal Code section 19.02(b)(1).]

The state accuses the defendant of having committed the offense of murder. Specifically, the accusation is that the defendant is guilty of murder under two alternative theories.

Primary Actor Liability

First, the state contends that the defendant, by his own conduct as a primary actor, committed murder. Specifically, the state contends that the defendant [*insert specific allegations, e.g.*, intentionally or knowingly caused the death of [*name of victim*], by himself shooting [*name of victim*] with a firearm].

Party Liability

Second, the state contends that [*name of primary actor*] [*insert specific allegations, e.g.*, intentionally or knowingly caused the death of [*name of victim*] by shooting him with a firearm], and the defendant is criminally responsible for this offense as a party because the defendant solicited, encouraged, directed, aided, or attempted to aid [*name of primary actor*] in committing it.

Relevant Statutes

[Insert relevant statutes and definitions units from charged offense. The following example is for a Texas Penal Code section 19.02(b)(1) charge.]

Liability as Primary Actor

A person commits an offense if the person intentionally or knowingly causes the death of an individual.

To prove that the defendant is guilty of murder, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant caused the death of an individual; and
2. the defendant did this intentionally or knowingly.

The defendant acts intentionally as required by this offense if it is his conscious objective or desire to cause the result of death.

The defendant acts knowingly as required by this offense if he is aware that his conduct is reasonably certain to cause the result of death.

Responsibility for Conduct of Another as Party

A person who does not by his own conduct commit an offense may nonetheless be criminally responsible for the conduct of another person.

A person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense.

To prove that the defendant is guilty of an offense committed by the conduct of another, the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. the other person committed the offense; and

2. the defendant [*include one or more of the following as applicable:* solicited, encouraged, directed, aided, or attempted to aid] the other person to commit the offense; and

3. the defendant acted with the intent to promote or assist in the commission of the offense by the other person.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of murder.

Definitions

Intentionally Causing the Commission of an Offense

A defendant acts with intent to promote or assist in the commission of an offense when it is his conscious objective or desire to promote or assist in the commission of the offense.

A defendant's mere presence alone will not make him responsible for an offense. A defendant's mere knowledge of a crime or failure to disclose a crime is not sufficient.

[Include the following if raised by the facts.]

A defendant is guilty of an offense committed by another under the law set out here even if that other person has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense or of a different type or class of offense, or is immune from prosecution.

Application of Law to Facts

[Include relevant application of law to facts unit from charged offense. The following example is for a Texas Penal Code section 19.02(b)(1) charge.]

You must determine whether the state has proved, beyond a reasonable doubt, that the defendant is guilty of murder, either as the primary actor or as a party.

Liability as Primary Actor

You must determine whether the state has proved the defendant committed the crime by his own conduct. To prove this, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. in [*county*] County, Texas, on or about [*date*], the defendant [*insert specific allegations, e.g.*, caused the death of an individual, [*name of victim*], by shooting [*name of victim*] with a firearm]; and

2. the defendant did this intentionally or knowingly.

If you all agree the state has proved, beyond a reasonable doubt, both elements 1 and 2 listed above, you must find the defendant "guilty."

Liability as Party

If any of you fail to agree the state has proved, beyond a reasonable doubt, both elements 1 and 2 listed above, you must next decide whether the state has proved, beyond a reasonable doubt, that the defendant is guilty because he is criminally responsible for the commission of a crime committed by the conduct of another person. This is the case if the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. in [*county*] County, Texas, on or about [*date*], [*name of primary actor*] [*insert specific allegations, e.g.*, caused the death of an individual, [*name of victim*], by shooting [*name of victim*] with a firearm]; and

2. [*name of primary actor*] did this intentionally or knowingly; and

3. the defendant [*include one or more of the following as applicable:* solicited, encouraged, directed, aided, or attempted to aid] [*name of primary actor*] to commit the offense of murder; and

4. the defendant acted with the intent to promote or assist the commission of the offense of murder by [*name of primary actor*].

If all of you who did not find the defendant guilty as the primary actor agree that the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must find the defendant "guilty."

If you all agree the state has failed to prove, beyond a reasonable doubt, either element 1 or 2 above establishing the defendant's guilt as the primary actor, and the state has failed to prove, beyond a reasonable doubt, one or more of elements 1 through 4 listed above establishing the defendant's guilt as a party, then you must find the defendant "not guilty."

You need not be unanimous about the theory underlying either your "guilty" or "not guilty" verdict. If you all agree the defendant is guilty either as the primary actor (because the state has proved elements 1 and 2 of primary actor liability beyond a reasonable doubt) or as a party (because the state has proved elements 1 through 4 of party liability beyond a reasonable doubt), then you must find the defendant "guilty." If you all agree the state has failed to prove, beyond a reasonable doubt, either element 1 or 2 of primary actor liability and has failed to prove, beyond a reasonable doubt, one or more of elements 1 through 4 of party liability, you must find the defendant "not guilty."

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

The law of parties is defined in Tex. Penal Code § 7.01. The above instruction is based on an indictment for a murder charged under Tex. Penal Code § 19.02(b)(1). The court will need to modify the instruction depending on what the accusation charges.

This instruction is appropriate when the evidence supports liability as either the primary actor or as a party under Penal Code section 7.02(a)(2). The instruction at CPJC 5.2 is for use when the evidence supports liability only as a party under Penal Code section 7.02(a)(2). The instruction at CPJC 5.4 is for use when the evidence supports liability only as a coconspirator under Penal Code section 7.02(b). Finally, the instruction at CPJC 5.5 is for use when the evidence supports liability as either the primary actor, a party under Penal Code section 7.02(a)(2), or a coconspirator under Penal

Code section 7.02(b). The instruction selected should be based on the evidence presented.

The instructions may permit conviction as a party rather than, or as an alternative to, conviction as the primary actor, even if the charging instrument makes no reference to liability as a party. *Marable v. State*, 85 S.W.3d 287, 287–88 (Tex. Crim. App. 2002); *accord, e.g., Sorto v. State*, 173 S.W.3d 469, 476 (Tex. Crim. App. 2005) ("[I]t is well-settled that the law of parties need not be pled in the indictment.").

In 1999, Judge Womack stated, "I am doubtful of the rule that the law of parties is available without any allegation in the indictment of conduct that would make one a party." *Planter v. State*, 9 S.W.3d 156, 162 (Tex. Crim. App. 1999) (Womack, J., dissenting). Subsequently, in *Marable*, 85 S.W.3d at 295–300, Judge Womack reiterated this position and was joined in his dissent by Judges Meyers and Johnson. They believe that an indictment must generally allege "that the defendant is criminally responsible for the conduct of another person who is named." *Marable*, 85 S.W.3d at 299.

If the defendant properly objects, it might be error for a trial judge to fail to inform the jury which specific modes of conduct enumerated in Penal Code section 7.02(a)(2) (soliciting, encouraging, directing, aiding, or attempting to aid) form the basis for the conviction. *Ransom v. State*, 920 S.W.2d 288, 303 (Tex. Crim. App. 1994); *Johnson v. State*, 739 S.W.2d 299, 305 n.4 (Tex. Crim. App. 1987).

General practice is to name the person who, under the state's theory, is the primary actor. But the court of criminal appeals has suggested this is not always necessary. *Wooley v. State*, 273 S.W.3d 260, 263 (Tex. Crim. App. 2008) (citing with approval *Wooley v. State*, 223 S.W.3d 732, 735 n.2 (Tex. App.—Houston [14th Dist.] 2007)) (disagreeing with 43 George E. Dix & Robert O. Dawson, *Texas Practice: Criminal Practice and Procedure* § 36.20 n.6 (2d ed. 2001)).

Under current case law, in which a jury is permitted to convict on either commission of the offense as a primary actor or as a party, the instructions need not require unanimity on the theory. *Randall v. State*, 232 S.W.3d 285, 294 (Tex. App.—Beaumont 2007, pet. ref'd) (rejecting argument that "the jury must unanimously agree upon whether Randall acted alone, as a party, or as a co-conspirator."); *Hanson v. State*, 55 S.W.3d 681 (Tex. App.—Austin 2001, pet. ref'd) (where supported by evidence, defendant may be convicted on jury instruction charging under alternative theories that defendant was liable as party under section 7.02(a)(2) and as coconspirator under section 7.02(b); jury unanimity not required on theory of party liability); *Washington v. State*, No. 14-98-00211-CR, 2000 WL 145088, at *1 (Tex. App.—Houston [14th Dist.] Feb. 10, 2000, no pet.) (not designated for publication) (no error in state's argument that jury did not have to be unanimous about which of two defendants was primary actor and which was party to offense); *Mills v. State*, 717 S.W.2d 409, 414 (Tex. App.—Texarkana 1986, no pet.).

CPJC 5.4 Instruction—Coconspirator Liability

INSTRUCTIONS OF THE COURT

Accusation

[Insert relevant accusation unit for specific offense. The following example is for when the underlying offense is murder under Texas Penal Code section 19.02(b)(1) based on conspiracy to commit robbery under Texas Penal Code section 29.02.]

The state accuses the defendant of having committed the offense of murder. Specifically, the accusation is that [*name of coconspirator*] [*insert specific allegations, e.g.*, intentionally or knowingly caused the death of [*name of victim*] by shooting him with a firearm, and the defendant is criminally responsible for this offense because the defendant conspired with [*name of coconspirator*] to commit the felony of robbery and [*name of coconspirator*] caused the death of [*name of victim*] in an attempt to carry out this conspiracy].

Relevant Statutes

[Insert relevant statutes and definitions units from charged offense. The following example is for a Texas Penal Code section 19.02(b)(1) charge based on conspiracy to commit robbery under Texas Penal Code section 29.02.]

A person commits an offense if the person intentionally or knowingly causes the death of an individual.

To prove that a person is guilty of murder, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the person caused the death of an individual; and
2. the person did this intentionally or knowingly.

A person acts intentionally as required by this offense if it is his conscious objective or desire to cause the result of death.

A person acts knowingly as required by this offense if he is aware that his conduct is reasonably certain to cause the result of death.

Responsibility for Felony Committed by Coconspirator

The defendant may be responsible for a murder committed by someone else, even though the defendant himself did not knowingly or intentionally cause the death of an individual, because the defendant joined an unlawful conspiracy. At least one member of the unlawful conspiracy must have intentionally or knowingly caused the death of an individual before the defendant can be responsible for murder.

A member of a conspiracy to commit one felony offense is guilty of another felony offense committed by one of his coconspirators when that other felony offense was committed in furtherance of the original unlawful conspiracy and was one that should have been anticipated as a result of the unlawful conspiracy. Under those circumstances, all coconspirators are guilty of the felony offense actually committed by one member of the conspiracy, though the rest of them had no intent to commit it.

Murder and robbery are felony offenses.

To prove that the defendant is guilty of a felony offense committed by one of his coconspirators, the state must prove, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant conspired with others to commit a felony offense; and

2. in the attempt to carry out that conspiracy, one coconspirator committed another felony offense; and

3. that other felony offense was committed in furtherance of the unlawful purpose of the conspiracy; and

4. that other felony offense was one that should have been anticipated as a result of the carrying out of the conspiracy.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of murder.

Definitions

Conspiring with Others to Commit a Felony Offense

A defendant conspires with others to commit a felony offense if—

1. the defendant intends that a felony offense be committed;

2. the defendant agrees with one or more persons that one or more of them engage in conduct that would constitute the felony offense; and

3. one or more of them performs an overt act in pursuance of the agreement.

Intent That a Felony Offense Be Committed

A person intends that a felony offense be committed when it is his conscious objective or desire that the felony offense be committed.

Robbery

The felony offense of robbery occurs if—

1. a person intentionally, knowingly, or recklessly causes bodily injury to another or he intentionally or knowingly threatens or places another in fear of imminent bodily injury or death;

2. during the course of committing a theft;

3. and with the intent to obtain or maintain control of the property stolen.

[Additional definitions may be helpful, such as "course of committing theft" (Texas Penal Code section 29.01); "theft" (Texas Penal Code section 31.03(a)); and the culpable mental states (Texas Penal Code section 6.03).]

Application of Law to Facts

[Include relevant application of law to facts unit from charged offense. The following example is for a Texas Penal Code section 19.02(b)(1) charge based on conspiracy to commit robbery under Texas Penal Code section 29.02.]

You must determine whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. in [*county*] County, Texas, on or about [*date*], the defendant joined a conspiracy to commit robbery; and

2. in an attempt to carry out this conspiracy, [*name of coconspirator*] [*insert specific allegations, e.g.*, intentionally or knowingly caused the death of an individual, [*name of victim*], by shooting [*name of victim*] with a firearm]; and

3. the murder was committed by [*name of coconspirator*] in furtherance of the unlawful conspiracy to rob [*name of victim*]; and

4. the murder should have been anticipated as a result of this conspiracy.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, and 4 above, you must find the defendant "not guilty."

If you all agree the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must find the defendant "guilty."

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

The law of parties is defined in Tex. Penal Code § 7.01. The above instruction is to be used when the evidence does not tend to show that the defendant is the primary actor and there is no evidence of party liability under Tex. Penal Code § 7.02(a)(2). It is for use in the rare situation in which the defendant can be liable for the offense only as a coconspirator under Tex. Penal Code § 7.02(b).

The instruction at CPJC 5.2 is appropriate when the evidence supports liability only as a party under Penal Code section 7.02(a)(2). The instruction at CPJC 5.3 is for use when the evidence supports liability as the primary actor or as a party under Penal Code section 7.02(a)(2). Finally, the instruction at CPJC 5.5 is for use when the evidence supports liability as either the primary actor, a party under Penal Code section 7.02(a)(2), or a coconspirator under Penal Code section 7.02(b). The instruction selected should be based on the evidence presented.

Conspiracy liability is defined in Penal Code section 7.02(b). This instruction is based on an indictment for a murder charged under Penal Code section 19.02(b)(1), in which the conspiracy is one to commit robbery, in violation of Penal Code section 29.02. The court will need to modify the instruction depending on what the accusation charges for the substantive offense and what the object of the conspiracy was. If the defendant is also charged as the direct perpetrator or as a party, the instruction at CPJC 5.5 should be used instead.

Similar instructions regarding coconspirator liability were approved in *Ex parte Thompson*, 179 S.W.3d 549 (Tex. Crim. App. 2005). The court of criminal appeals has held that a defendant in a capital murder case may be convicted solely on the conspiracy theory contained in the jury charge. *Fuller v. State*, 827 S.W.2d 919, 932–33 (Tex. Crim. App. 1992). *See also Valle v. State*, 109 S.W.3d 500, 503–04 (Tex. Crim. App.

2003) ("A defendant can be convicted of capital murder solely on a conspiracy theory under Texas Penal Code section 7.02(b) without having the intent or actual anticipation that a human life would be taken that is required for an affirmative answer to the anti-parties issue.").

The holding in *Mayfield v. State*, 716 S.W.2d 509, 515 (Tex. Crim. App. 1986), that a defendant was entitled to an "independent impulse" instruction in a conspiracy liability case when raised by the evidence, is no longer viable. *Solomon v. State*, 49 S.W.3d 356, 368 (Tex. Crim. App. 2001).

The Committee could find no court of criminal appeals case discussing the issue of the effect, if any, that an alleged withdrawal from a conspiracy has on a case brought under a section 7.02(b) theory of liability. One court has held that a capital murder defendant convicted solely on a conspiracy theory is not entitled to a jury charge on the renunciation defense, because "Penal Code section 15.04(b) only applies to an offense of criminal conspiracy under section 15.02." *Love v. State*, 199 S.W.3d 447, 457 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (trial court did not err in denying Love's requested jury charge based on his alleged communication to his fellow restaurant employees before the robbery that they should "be careful because his friend might try to commit robbery at the restaurant"). One Committee member believes that some form of withdrawal instruction must apply in an appropriate situation, though perhaps it would have common-law, not statutory, roots.

CPJC 5.5 Instruction—Primary Actor, Party, or Coconspirator Liability

INSTRUCTIONS OF THE COURT

Accusation

[Insert relevant accusation unit for specific offense. The following example is for when the underlying offense is murder under Texas Penal Code section 19.02(b)(1), when an alternative theory is conspiracy to commit robbery under Texas Penal Code section 29.02.]

The state accuses the defendant of having committed the offense of murder. Specifically, the accusation is that the defendant is guilty of murder under three alternative theories.

Primary Actor Liability

First, the state contends that the defendant, by his own conduct as a primary actor, committed murder. Specifically, the state contends that the defendant [*insert specific allegations, e.g.*, intentionally or knowingly caused the death of [*name of victim*], by himself shooting [*name of victim*] with a firearm].

Party Liability

Second, the state contends that [*name of primary actor*] [*insert specific allegations, e.g.*, intentionally or knowingly caused the death of [*name of victim*] by shooting him with a firearm, and the defendant is criminally responsible for this offense as a party because the defendant solicited, encouraged, directed, aided, or attempted to aid [*name of primary actor*] in committing it].

Coconspirator Liability

Third, the state contends that [*name of coconspirator*] [*insert specific allegations, e.g.*, intentionally or knowingly caused the death of [*name of victim*] by shooting him with a firearm, and the defendant is criminally responsible for this offense because the defendant conspired with [*name of coconspirator*] to commit a felony and [*name of coconspirator*] caused the death of [*name of victim*] in an attempt to carry out this conspiracy].

Relevant Statutes

[Insert relevant statutes and definitions units from charged offense. The following example is for a Texas Penal Code section 19.02(b)(1) charge, when the murder was committed in furtherance of a conspiracy to commit robbery.]

Liability as Primary Actor

A person commits an offense if the person intentionally or knowingly causes the death of an individual.

To prove that the defendant is guilty of murder, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant caused the death of an individual; and
2. the defendant did this intentionally or knowingly.

The defendant acts intentionally as required by this offense if it is his conscious objective or desire to cause the result of death.

The defendant acts knowingly as required by this offense if he is aware that his conduct is reasonably certain to cause the result of death.

Responsibility for Conduct of Another as Party

A person who does not by his own conduct commit an offense may nonetheless be criminally responsible for the conduct of another person.

A person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense.

To prove that the defendant is guilty of an offense committed by the conduct of another, the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. the other person committed the offense; and
2. the defendant [*include one or more of the following as applicable:* solicited, encouraged, directed, aided, or attempted to aid] the other person to commit the offense; and
3. the defendant acted with the intent to promote or assist in the commission of the offense by the other person.

A defendant acts with intent to promote or assist in the commission of an offense when it is his conscious objective or desire to promote or assist in the commission of the offense.

A defendant's mere presence alone will not make him responsible for an offense. A defendant's mere knowledge of a crime or failure to disclose a crime is not sufficient.

[Include the following if raised by the facts.]

A defendant is guilty of an offense committed by another under the law set out here even if that other person has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense or of a different type or class of offense, or is immune from prosecution.

Responsibility for Felony Committed by Coconspirator

The defendant may be responsible for a murder committed by someone else, even though the defendant himself did not knowingly or intentionally cause the death of an individual, because the defendant joined an unlawful conspiracy. At least one member of the unlawful conspiracy must have intentionally or knowingly caused the death of an individual before the defendant can be responsible for murder.

A member of a conspiracy to commit one felony offense is guilty of another felony offense committed by one of his coconspirators when that other felony offense was committed in furtherance of the original unlawful conspiracy and was one that should have been anticipated as a result of the unlawful conspiracy. Under those circumstances, all coconspirators are guilty of the felony offense actually committed by one member of the conspiracy, though the rest of them had no intent to commit it.

Murder and robbery are felony offenses.

To prove that the defendant is guilty of a felony offense committed by one of his coconspirators, the state must prove, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant conspired with others to commit a felony offense; and

2. in the attempt to carry out that conspiracy, one coconspirator committed another felony offense; and

3. that other felony offense was committed in furtherance of the unlawful purpose of the conspiracy; and

4. that other felony offense was one that should have been anticipated as a result of the carrying out of the conspiracy.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of murder.

Definitions

Conspiring with Others to Commit a Felony Offense

A defendant conspires with others to commit a felony offense if—

1. the defendant intends that a felony offense be committed;

2. the defendant agrees with one or more persons that one or more of them engage in conduct that would constitute the felony offense; and

3. one or more of them performs an overt act in pursuance of the agreement.

Intent That a Felony Offense Be Committed

A person intends that a felony offense be committed when it is his conscious objective or desire that the felony offense be committed.

Robbery

The felony offense of robbery occurs if—

1. a person intentionally, knowingly, or recklessly causes bodily injury to another or he intentionally or knowingly threatens or places another in fear of imminent bodily injury or death;

2. during the course of committing a theft;

3. and with the intent to obtain or maintain control of the property stolen.

[Additional definitions may be helpful, such as "course of committing theft" (Texas Penal Code section 29.01); "theft" (Texas Penal Code section 31.03(a)); and the culpable mental states (Texas Penal Code section 6.03).]

Application of Law to Facts

[Include relevant application of law to facts unit from charged offense. The following example is for a Texas Penal Code section 19.02(b)(1) charge.]

You must determine whether the state has proved, beyond a reasonable doubt, that the defendant is guilty of murder, either as the primary actor, as a party, or as a coconspirator.

Liability as Primary Actor

You must determine whether the state has proved the defendant committed the crime by his own conduct. To prove this, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. in [*county*] County, Texas, on or about [*date*], the defendant [*insert specific allegations, e.g.*, caused the death of an individual, [*name of victim*], by shooting [*name of victim*] with a firearm]; and

2. the defendant did this intentionally or knowingly.

If you all agree the state has proved, beyond a reasonable doubt, both elements 1 and 2 listed above, you must find the defendant "guilty."

Liability as Party

If any of you fail to agree the state has proved, beyond a reasonable doubt, both elements 1 and 2 listed above, you must next decide whether the state has proved, beyond a reasonable doubt, that the defendant is guilty because he is criminally responsible for the commission of a crime committed by the conduct of another person. This is the case if the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. in [*county*] County, Texas, on or about [*date*], [*name of primary actor*] [*insert specific allegations, e.g.*, caused the death of an individual, [*name of victim*], by shooting [*name of victim*] with a firearm]; and

2. [*name of primary actor*] did this intentionally or knowingly; and

3. the defendant [*include one or more of the following as applicable:* solicited, encouraged, directed, aided, or attempted to aid] [*name of primary actor*] to commit the offense of murder; and

4. the defendant acted with the intent to promote or assist the commission of the offense of murder by [*name of primary actor*].

If all of you who did not find the defendant guilty as the primary actor agree that the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must find the defendant "guilty."

Liability as Coconspirator

If any of you fail to agree the state has proved, beyond a reasonable doubt, either elements 1 and 2 of primary liability or elements 1 through 4 of party liability listed above, you must next decide whether the state has proved, beyond a reasonable doubt, that the defendant is guilty because he is criminally responsible for the conduct of a coconspirator. This is the case if the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. in [*county*] County, Texas, on or about [*date*], the defendant joined a conspiracy to commit robbery; and

2. in an attempt to carry out this conspiracy, [*name of coconspirator*] [*insert specific allegations, e.g.*, intentionally or knowingly caused the death of an individual, [*name of victim*], by shooting [*name of victim*] with a firearm]; and

3. the murder was committed by [*name of coconspirator*] in furtherance of the unlawful conspiracy to rob [*name of victim*]; and

4. the murder should have been anticipated as a result of this conspiracy.

If all of you who did not find the defendant guilty as the primary actor or as a party agree that the state has proved, beyond a reasonable doubt, each of the four elements of coconspiracy liability listed above, you must find the defendant "guilty."

If you all agree the state has failed to prove, beyond a reasonable doubt, either element 1 or 2 listed above establishing the defendant's guilt as the primary actor; has failed to prove, beyond a reasonable doubt, one or more of elements 1 through 4 listed above establishing the defendant's guilt as a party; and has failed to prove, beyond a reasonable doubt, one or more of elements 1 through 4 listed above establishing the defendant's guilt as a coconspirator, then you must find the defendant "not guilty."

You need not be unanimous about the theory underlying either your "guilty" or "not guilty" verdict. If you all agree the defendant is guilty either as the primary actor (because the state has proved elements 1 and 2 of primary actor liability beyond a reasonable doubt), or as a party (because the state has proved elements 1 through 4 of party liability beyond a reasonable doubt), or as a

coconspirator (because the state has proved elements 1 through 4 of coconspirator liability beyond a reasonable doubt), then you must find the defendant "guilty." If you all agree the state has failed to prove, beyond a reasonable doubt, either element 1 or 2 of primary actor liability has failed to prove, beyond a reasonable doubt, one or more of elements 1 through 4 of party liability; and has failed to prove, beyond a reasonable doubt, one or more of elements 1 through 4 of coconspirator liability, you must find the defendant "not guilty."

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

The law of parties is defined in Tex. Penal Code § 7.01. The above instruction is based on an indictment for a murder charged under Tex. Penal Code § 19.02(b)(1) that occurred in furtherance of a conspiracy to commit robbery as defined under Penal Code section 29.02. The court will need to modify the instruction depending on what the accusation charges.

This instruction is appropriate when the evidence supports liability as either the primary actor or as a party under Penal Code section 7.02(a)(2) or as a coconspirator under Penal Code section 7.02(b). The instruction at CPJC 5.2 is for use when the evidence supports liability only as a party under Penal Code section 7.02(a)(2). The instruction at CPJC 5.3 is for use when the evidence supports liability as the primary actor or as a party under Penal Code section 7.02(a)(2). Finally, the instruction at CPJC 5.4 is for use when the evidence supports liability only as a coconspirator under Penal Code section 7.02(b). The instruction selected should be based on the evidence presented.

The instructions may permit conviction as a party rather than, or as an alternative to, conviction as the primary actor, even if the charging instrument makes no reference to liability as a party. *Marable v. State*, 85 S.W.3d 287, 287–88 (Tex. Crim. App. 2002); *accord, e.g., Sorto v. State*, 173 S.W.3d 469, 476 (Tex. Crim. App. 2005) ("[I]t is well-settled that the law of parties need not be pled in the indictment.").

In 1999, Judge Womack stated, "I am doubtful of the rule that the law of parties is available without any allegation in the indictment of conduct that would make one a party." *Planter v. State*, 9 S.W.3d 156, 162 (Tex. Crim. App. 1999) (Womack, J., dissenting). Subsequently, in *Marable*, 85 S.W.3d at 295–300, Judge Womack reiterated this position and was joined in his dissent by Judges Meyers and Johnson. They believe that an indictment must generally allege "that the defendant is criminally responsible for the conduct of another person who is named." *Marable*, 85 S.W.3d at 299.

If the defendant properly objects, it might be error for a trial judge to fail to inform the jury which specific modes of conduct enumerated in Penal Code section 7.02(a)(2) (soliciting, encouraging, directing, aiding, or attempting to aid) form the basis for the conviction. *Ransom v. State*, 920 S.W.2d 288, 303 (Tex. Crim. App. 1994); *Johnson v. State*, 739 S.W.2d 299, 305 n.4 (Tex. Crim. App. 1987).

General practice is to name the person who, under the state's theory, is the primary actor. But the court of criminal appeals has suggested this is not always necessary. *Wooley v. State*, 273 S.W.3d 260, 263 (Tex. Crim. App. 2008) (citing with approval *Wooley v. State*, 223 S.W.3d 732, 735 n.2 (Tex. App.—Houston [14th Dist.] 2007)) (disagreeing with 43 George E. Dix & Robert O. Dawson, *Texas Practice: Criminal Practice and Procedure* § 36.20 n.6 (2d ed. 2001)).

Under current case law, in which a jury is permitted to convict on either commission of the offense as a primary actor or as a party, the instructions need not require unanimity on the theory. *Randall v. State*, 232 S.W.3d 285, 294 (Tex. App.—Beaumont 2007, pet. ref'd) (rejecting argument that "the jury must unanimously agree upon whether Randall acted alone, as a party, or as a co-conspirator."); *Hanson v. State*, 55 S.W.3d 681 (Tex. App.—Austin 2001, pet. ref'd) (where supported by evidence, defendant may be convicted on jury instruction charging under alternative theories that defendant was liable as party under section 7.02(a)(2) and as coconspirator under section 7.02(b), jury unanimity not required on theory of party liability); *Washington v. State*, No. 14-98-00211-CR, 2000 WL 145088, at *1 (Tex. App.—Houston [14th Dist.] Feb. 10, 2000, no pet.) (not designated for publication) (no error in state's argument that jury did not have to be unanimous about which of two defendants was primary actor and which was party to offense); *Mills v. State*, 717 S.W.2d 409, 414 (Tex. App.—Texarkana 1986, no pet.).

Similar instructions regarding coconspirator liability were approved in *Ex parte Thompson*, 179 S.W.3d 549 (Tex. Crim. App. 2005). The court of criminal appeals has held that a defendant in a capital murder case may be convicted solely on the conspiracy theory contained in the jury charge. *Fuller v. State*, 827 S.W.2d 919, 932–33 (Tex. Crim. App. 1992). *See also Valle v. State*, 109 S.W.3d 500, 503–04 (Tex. Crim. App. 2003) ("A defendant can be convicted of capital murder solely on a conspiracy theory under Texas Penal Code section 7.02(b) without having the intent or actual anticipation that a human life would be taken that is required for an affirmative answer to the anti-parties issue.").

The holding in *Mayfield v. State*, 716 S.W.2d 509, 515 (Tex. Crim. App. 1986), that a defendant was entitled to an "independent impulse" instruction in a conspiracy liability case when raised by the evidence, is no longer viable. *Solomon v. State*, 49 S.W.3d 356, 368 (Tex. Crim. App. 2001).

The Committee could find no court of criminal appeals case discussing the issue of the effect, if any, that an alleged withdrawal from a conspiracy has on a case brought

under a section 7.02(b) theory of liability. One court has held that a capital murder defendant convicted solely on a conspiracy theory is not entitled to a jury charge on the renunciation defense, because "Penal Code section 15.04(b) only applies to an offense of criminal conspiracy under section 15.02." *Love v. State*, 199 S.W.3d 447, 457 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (trial court did not err in denying Love's requested jury charge based on his alleged communication to his fellow restaurant employees before the robbery that they should "be careful because his friend might try to commit robbery at the restaurant"). One Committee member believes that some form of withdrawal instruction must apply in an appropriate situation, though perhaps it would have common-law, not statutory, roots.

CPJC 6.1 Submission of an Uncharged Offense

When and how to submit to juries the option of convicting defendants of crimes not explicitly charged in the indictment, information, or complaint has proven quite troublesome for Texas courts as well as courts in other jurisdictions. One major area of controversy concerns how a court determines whether to submit an uncharged offense.

How should a trial court determine whether an instruction on an uncharged offense may or should be given? As a general rule, this is determined under a two-step analysis. *E.g., State v. Meru*, 414 S.W.3d 159, 162–63 (Tex. Crim. App. 2013).

The first step of this analysis is to determine if the uncharged offense is a lesser included offense of the charged offense under article 37.09(1) of the Texas Code of Criminal Procedure, a prerequisite for submission. Tex. Code Crim. Proc. art. 37.09(1). The analysis requires a comparison of (1) the elements of the charged offense as alleged in the charging instrument with (2) the elements of the uncharged offense.

Under *Hall v. State*, 225 S.W.3d 524 (Tex. Crim. App. 2007), this comparison is done using a cognate-pleading approach. The court of criminal appeals explained this approach:

> An offense is a lesser-included offense of another offense, under Article 37.09(1) of the Code of Criminal Procedure, if the indictment for the greater-inclusive offense either: 1) alleges all of the elements of the lesser-included offense, or 2) alleges elements plus facts (including descriptive averments, such as non-statutory manner and means, that are alleged for purposes of providing notice) from which all of the elements of the lesser-included offense may be deduced. Both statutory elements and any descriptive averments alleged in the indictment for the greater-inclusive offense should be compared to the statutory elements of the lesser offense. If a descriptive averment in the indictment for the greater offense is identical to an element of the lesser offense, or if an element of the lesser offense may be deduced from a descriptive averment in the indictment for the greater-inclusive offense, this should be factored into the lesser-included-offense analysis in asking whether all of the elements of the lesser offense are contained within the allegations of the greater offense.

Ex parte Watson, 306 S.W.3d 259, 273 (Tex. Crim. App. 2009) (op. on reh'g) (citations omitted).

Meru developed this further:

> [T]he elements of the lesser-included offense do not have to be pleaded in the indictment if they can be deduced from facts alleged in the indictment. In this situation, the functional-equivalence concept can be employed in the lesser-

> included-offense analysis. When utilizing functional equivalence, the court examines the elements of the lesser offense and decides whether they are "functionally the same or less than those required to prove the charged offense."

Meru, 414 S.W.3d at 162.

This analysis has been applied in a number of recent decisions. *Meru*, 414 S.W.3d at 164 (criminal trespass was not lesser included offense of burglary because entry element of criminal trespass [requiring intrusion of whole body] does not require same or less proof than entry for burglary [alleged without specification and thus under statutory definition requiring intrusion of: (1) any part of the body or (2) any physical object connected with the body] and there were no facts alleged in indictment that would allow entry element of criminal trespass to be deduced); *Wortham v. State*, 412 S.W.3d 552 (Tex. Crim. App. 2013) (reckless injury to a child and criminally negligent injury to a child by act were lesser included offenses of knowing or intentional injury to a child by act); *Cavazos v. State*, 382 S.W.3d 377 (Tex. Crim. App. 2012) (manslaughter was lesser included offense of murder based on act committed with intent to cause serious bodily injury, resulting in death); *Rice v. State*, 333 S.W.3d 140 (Tex. Crim. App. 2011) (reckless driving was not lesser included offense of aggravated assault with deadly weapon, i.e., a motor vehicle, because aggravated assault as pled did not require proof that defendant drove the motor vehicle as required for reckless driving).

If the uncharged offense is a lesser included offense under the analysis above, the court must reach the second step of the analysis. This second step focuses on the evidence before the jury and asks whether, under this evidence, a rational jury could find that, if the defendant is guilty, he is guilty only of the lesser included offense. *See Meru*, 414 S.W.3d at 162–63; *Sweed v. State*, 351 S.W.3d 63, 68 (Tex. Crim. App. 2011).

The court of criminal appeals explained further what is needed for a case to present the necessary contested fact question as to whether the defendant, if guilty, is guilty only of the lesser included offense:

> "Anything more than a scintilla of evidence is sufficient to entitle a defendant to a lesser charge." *Bignall v. State*, 887 S.W.2d 21, 23 (Tex.Crim.App.1994). Although this threshold showing is low, "it is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense, but rather, there must be some evidence directly germane to the lesser-included offense for the finder of fact to consider before an instruction on a lesser-included offense is warranted." *Skinner v. State*, 956 S.W.2d 532, 543 (Tex.Crim.App.1997). Accordingly, we have stated that the standard may be satisfied if some evidence refutes or negates other evidence establishing the greater offense or if the evidence presented is subject to different interpretations.

Sweed, 351 S.W.3d at 68.

If the state, on the other hand, seeks submission of a lesser included offense, the court need not apply the second step of the analysis outlined above. In the event that the uncharged offense is a lesser included offense of the charged crime, that uncharged offense should be submitted without reference to the state of the evidence in the particular case if requested by the state. *Grey v. State*, 298 S.W.3d 644 (Tex. Crim. App. 2009).

The rationale for this, *Grey* explained, is the state's charging discretion:

> [T]he State can abandon an element of the charged offense without prior notice and proceed to prosecute a lesser-included offense. If the State can abandon the charged offense in favor of a lesser-included offense, there is no logical reason why the State could not abandon its unqualified pursuit of the charged offense in favor of a qualified pursuit that includes the prosecution of a lesser-included offense in the alternative.

Grey, 298 S.W.3d at 650.

CPJC 6.2 Submission of a Lesser Included Offense

When a trial court gives a lesser included offense instruction, what should the court tell the jury about the order in which it is to consider the greater offense charged in the indictment and the lesser included offense or offenses? Should the court instruct the jury that it may only consider a lesser offense if it has found the defendant "not guilty" of the offense charged in the indictment? Or may the jury "consider" any lesser offenses before deciding whether the defendant is guilty of the offense charged in the indictment? If so, must the jury nevertheless return to the charged offense and find the defendant "not guilty" of the charged offense before returning a "guilty" verdict on a lesser offense? If the jury cannot unanimously agree that the defendant is "not guilty" of the offense charged in the indictment, may it still return a "guilty" verdict on a lesser offense?

Texas law on these questions is not clear. The two leading decisions from the court of criminal appeals are *Boyett v. State*, 692 S.W.2d 512 (Tex. Crim. App. 1985), and *Barrios v. State*, 283 S.W.3d 348 (Tex. Crim. App. 2009).

The traditional approach has been to give a "stair-step" instruction, in which the court first instructs the jury to consider the offense charged in the indictment, and then tells the jury that if it has a reasonable doubt about the charged offense it "should consider whether or not the defendant is guilty of the lesser included offense of [offense named]." *Boyett*, 692 S.W.2d at 515. In some cases, juries have been told that if they have a reasonable doubt about whether the defendant is guilty of the offense charged in the indictment, "you will *acquit* the defendant" of the charged offense and "next consider" a lesser offense. *Barrios*, 283 S.W.3d at 349 (emphasis added).

Traditionally, instructions have also included a "benefit-of-the-doubt" instruction along the following lines:

> If you believe from the evidence, beyond a reasonable doubt, that the defendant is guilty of either [*the charged offense*] on the one hand or [*the lesser included offense*] on the other hand, but you have a reasonable doubt as to which of said offenses he is guilty, then you must resolve that doubt in the defendant's favor and find him guilty of the lesser included offense.

In *Boyett*, the defendant complained because the instruction did not explicitly instruct the jury that it had to "acquit" him of the greater offense before considering his guilt of any lesser offense. The court suggested that the instruction should have told the jurors that if they had a reasonable doubt about whether a defendant was guilty of the greater offense "they should acquit [the defendant] and proceed to consider whether [he] was guilty" of the lesser offense. *Boyett*, 692 S.W.2d at 515. The court

ventured that the instruction given might be reversible error if a defendant objected to it, but declined to find fundamental error.

In *Barrios*, by contrast, the defendant complained of the exact opposite. The instruction there did use the word *acquit*, but the defendant argued that the instruction was inconsistent with the "benefit-of-the-doubt" instruction—that if the jury believed he was guilty of either the greater or the lesser offense, but had a reasonable doubt about which offense he was guilty of, it should "resolve that doubt in the defendant's favor, and find him guilty" of the lesser offense. By requiring an acquittal of the greater offense before the jury could consider his guilt of the lesser offense, he pointed out, the benefit-of-the-doubt instruction would be superfluous. *Barrios*, 283 S.W.3d at 352.

Barrios noted that in *Boyett* the court had said that the "better practice" would have been to tell the jury "if it has a reasonable doubt as to whether the defendant is guilty of any offense in the charge, it will find the defendant not guilty. . . ." *Barrios*, 283 S.W.3d at 352. The court disapproved of the word *acquit* and suggested a new "better practice": trial courts should "include an instruction that explicitly informs the jury that *it may read the charge as a whole*" and tell the jury that "*if you are unable to agree* [on the greater offense], *you will next consider*" the lesser offense, so that the charge "makes it clear to the jury that, at its discretion, it may consider the lesser-included offenses before *making a final decision as to the greater offense*." *Barrios*, 283 S.W.3d at 353 (emphasis added).

Barrios has been applied most notably in *Dixon v. State*, 358 S.W.3d 250, 261–62 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd), in an opinion authored by then-Justice Alcala. The Committee has several concerns about the decision. *Dixon* held—relying on *Barrios*—a trial judge did not err against the defendant when, in response to a question from the jury, the trial judge told the jury that it need not by a unanimous vote find the defendant "not guilty" of the charged offense before convicting him of the lesser included offense.

The Committee has several concerns regarding the suggestion in *Dixon* that under *Barrios* a jury need never reach a unanimous "not guilty" decision on the charged offense before finding a defendant guilty of a lesser included offense.

First, the language about the "better-practice" instruction in *Barrios* is *dicta* and thus not binding. Second, the rationale of *Barrios* seems to depend on the necessity of giving the "benefit-of-the-doubt" instruction. At least one appellate court, however, has said that such an instruction is not required. *Benavides v. State*, 763 S.W.2d 587, 589 (Tex. App.—Corpus Christi 1988, pet. ref'd); *but see McCall v. State*, 14 Tex. Ct. App. 353 (1883) (cited in *Barrios* and holding that it would "ordinarily" be error not to give the instruction when requested). Third, and most importantly, however, *Barrios* is ambiguous. It can be read to mean only that the jury may "consider" lesser offenses before deliberating about the charged offense, but that it must still make a "final deci-

sion"—i.e., reach a "not guilty" verdict—on the charged offense before returning any "guilty" verdict on a lesser offense. Alternatively, though, the *Barrios* discussion may be interpreted as at least assuming that if a jury is unable to agree on a verdict on the offense charged in the indictment, the jury may find the defendant guilty of a lesser offense without returning a finding of "not guilty" on the offense charged in the indictment.

Generally, the case law fails to distinguish between two quite different matters. First is the order in which a jury may discuss—or perhaps "consider"—offenses covered in the instructions. Second is the question of what, if any, definitive vote is required before a jury may find a defendant guilty of a lesser included offense. The California Criminal Jury Instruction drew the distinction by telling the jury:

> If all of you find that the defendant is not guilty of a greater charged crime, you may find (him/her) guilty of a lesser crime if you are convinced beyond a reasonable doubt that the defendant is guilty of that lesser crime. . . . It is up to you to decide the order in which you consider each crime and the relevant evidence, but I can accept a verdict of guilty of a lesser crime only if you have found the defendant not guilty of the corresponding greater crime.

Judicial Council of California Criminal Jury Instructions (2014 ed.) CALCRIM No. 3517.

Barrios failed to consider that the legislature may have given the state a right to have a jury make a final decision on a lesser included offense only if the jury has unanimously voted "not guilty" on the charged offense. Article 37.08 of the Texas Code of Criminal Procedure provides:

> In a prosecution for an offense with lesser included offenses, the jury may find the defendant not guilty of the greater offense, but guilty of any lesser included offense.

Tex. Code Crim. Proc. art. 37.08.

This arguably limits the verdicts a trial court can accept if a case is "a prosecution for an offense with lesser included offenses." A verdict other than "guilty" of the charged offense or "not guilty" of any other offense must reflect that the jury "find[s] the defendant not guilty of the greater offense, but guilty of [a] lesser included offense." The provision could easily, but does not, authorize a verdict of "guilty of a lesser included offense." Reading article 37.08 in this way would be consistent with article 37.14, which makes clear that conviction of a lesser included offense is in substance an acquittal of the charged crime. *See* Tex. Code Crim. Proc. arts. 37.08, 37.14.

Barrios is also arguably consistent with this approach. In its penultimate discussion of what may be "a better practice," the court assumed that the instructions should "make[] clear to the jury that, at its discretion, it may consider the lesser-included

offenses before making a final decision as to the greater offense." *Barrios*, 283 S.W.3d at 353. This appears to assume the jury will have to make a final decision as to the charged offense, apparently before voting on the lesser included offense. But the instruction must make clear that before making that final decision on the charged offense, the jurors may read the instructions about the lesser included offenses and, of course, discuss these as possible alternatives to the charged offense. Jurors, in other words, may consider in deciding how to vote on the charged offense that a "not guilty" verdict on that offense will move their analysis to whether the defendant should be convicted of a lesser offense. Discussion of this before an up-or-down vote on the charged offense, the instructions should make clear, is permissible.

If the state has a right to have a jury reach a unanimous decision of "not guilty" on the charged offense before voting to convict of a lesser included offense, it may certainly waive that right. Such a waiver apparently was made in *Kirk v. State*, 421 S.W.3d 772, 784–86 (Tex. App.—Fort Worth 2014, pet. ref'd), when the trial court gave an instruction at the state's behest after the jury had deadlocked, informing them that they could consider lesser offenses.

Committee's Approach. The Committee believed that the jury should be told early in the instructions that the case presents it with the task of addressing more than the charged offense. As a result, the Committee's recommendation is that the matter of lesser included offenses be addressed in the accusation unit of the instructions, immediately following the statement of the charges brought against the defendant in the charging instrument.

The Committee was persuaded that Texas law gives the state a right to have a jury instructed that it may not convict a defendant of a lesser included offense unless the jury first reaches a unanimous vote of "not guilty" of the charged offense. The Committee recognized, however, that some disagree with this reading of current law. Consequently, it offers two instructions. The instruction at CPJC 6.3 embodies the Committee's conclusion that the jury should be told it may return a verdict of "guilty" of a lesser included offense only after acquitting the defendant of the greater offense. The instruction at CPJC 6.4 tells the jury that it may alternatively find the defendant guilty of a lesser included offense if it has made all reasonable efforts to reach a unanimous verdict on the greater offense but was unable to reach such a verdict.

Both instructions are designed to tell juries that despite any limitation on voting for a conviction on a lesser included offense, the jurors are free to *discuss* or *consider* all of the offenses covered in the instructions at any time during their deliberations.

The instructions also continue traditional Texas practice of adding a "benefit-of-the-doubt" instruction. Most or all of the substance of this may be covered by other portions of the instruction. But given the importance of the presumption of innocence and the risk of juror confusion during the complex analysis required by lesser included

offense situations, the Committee thought the better course was to include the provision.

The order of the verdict forms merits a brief comment. Generally, the Committee has suggested that the "not guilty" alternative be the first alternative presented to the jury. When lesser included offenses are involved, however, this did not seem a practical approach. The instructions direct the jury to make decisions in a particular order, and the verdict forms, in the Committee's view, should be presented to the jury in the order in which those decisions need to be made. As a result, the "not guilty" verdict form is the last one presented to the jury.

CPJC 6.3 Instruction—Lesser Included Offense—Acquit First of Greater Offense

INSTRUCTIONS OF THE COURT

Accusation

[Insert relevant accusation unit for specific offense. The following example is for the offense of murder under Texas Penal Code section 19.02(b)(1).]

The state accuses the defendant of having committed the offense of murder. Specifically, the allegation is that the defendant [*insert specific allegations, e.g.*, intentionally or knowingly caused the death of [*name*] by shooting him with a gun].

Relevant Statutes

[Insert relevant statutes and definitions units from charged and lesser included offenses. In the following example, the charged offense is murder, under Texas Penal Code section 19.02(b)(1), and the lesser included offenses are manslaughter, under Texas Penal Code section 19.04, and criminally negligent homicide, under Texas Penal Code section 19.05.]

A person commits the offense of murder if the person intentionally or knowingly causes the death of an individual.

To prove that the defendant is guilty of murder, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant caused the death of an individual, and
2. the defendant did this intentionally or knowingly.

A person commits the offense of manslaughter if the person recklessly causes the death of an individual.

To prove that the defendant is guilty of manslaughter, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant caused the death of an individual, and
2. the defendant did this recklessly.

A person commits the offense of criminally negligent homicide if the person causes the death of an individual by criminal negligence.

To prove that the defendant is guilty of criminally negligent homicide, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant caused the death of an individual, and
2. the defendant did this by criminal negligence.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of murder, or must prove, beyond a reasonable doubt, the lesser included accusation of manslaughter or the lesser included accusation of criminally negligent homicide.

Definitions

Intentionally Causing the Death of an Individual

A person intentionally causes the death of an individual if the person has the conscious objective or desire to cause that death.

Knowingly Causing the Death of an Individual

A person knowingly causes the death of an individual if the person is aware that his conduct is reasonably certain to cause that death.

Recklessly Causing the Death of an Individual

A person recklessly causes the death of an individual if—

1. there is a substantial and unjustifiable risk that his conduct will cause that death;
2. this risk is of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the person's standpoint; and
3. the person is aware of but consciously disregards that risk.

Causing the Death of an Individual by Criminal Negligence

A person causes the death of an individual by criminal negligence if—

1. there is a substantial and unjustifiable risk that his conduct will cause that death;

2. this risk is of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the person's standpoint; and

3. the person ought to be aware of that risk.

Application of Law to Facts

[Include relevant application of law to facts unit from charged offenses. In the following example, the charged offense is murder, under Texas Penal Code section 19.02(b)(1), and the lesser included offenses are manslaughter, under Texas Penal Code section 19.04, and criminally negligent homicide, under Texas Penal Code section 19.05.]

Although the state has charged the defendant with the offense of murder, you may find the defendant not guilty of that charged offense but guilty of any lesser included offense. In this case, the offenses of manslaughter and criminally negligent homicide are lesser included offenses of the charged and greater offense of murder.

You may discuss the three offenses in any order you choose, starting with the offense of murder or the offense of manslaughter or the offense of criminally negligent homicide.

Before you may find the defendant guilty of either manslaughter or criminally negligent homicide, however, you must first find him "not guilty" of murder.

Before you may find the defendant guilty of criminally negligent homicide, you must find him "not guilty" of murder and manslaughter.

To find the defendant guilty of murder, you must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, in [*county*] County, Texas, on or about [*date*], caused the death of [*name*] [*insert specific allegations, e.g.*, by shooting [*name*] with a gun]; and

2. the defendant did this either intentionally or knowingly.

You must all agree on elements 1 and 2 listed above. If you all agree the state has proved, beyond a reasonable doubt, both of the two elements listed above,

you must find the defendant "guilty" of murder and so indicate on the attached verdict form, titled "Verdict—Guilty of Murder."

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of elements 1 and 2 listed above, you must find the defendant "not guilty" of murder. You may then determine whether the state has proved, beyond a reasonable doubt, the lesser included offenses of manslaughter or criminally negligent homicide.

To find the defendant guilty of manslaughter, you must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, in [*county*] County, Texas, on or about [*date*], caused the death of [*name*] [*insert specific allegations, e.g.*, by shooting [*name*] with a gun]; and

2. the defendant did this recklessly.

You must all agree on elements 1 and 2 listed above. If you all agree the state has proved, beyond a reasonable doubt, both of the two elements listed above, you must find the defendant "guilty" of manslaughter and so indicate on the attached verdict form, titled "Verdict—Guilty of Manslaughter."

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of elements 1 and 2 listed above, you must find the defendant "not guilty" of manslaughter.

To find the defendant guilty of criminally negligent homicide, you must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, in [*county*] County, Texas, on or about [*date*], caused the death of [*name*] [*insert specific allegations, e.g.*, by shooting [*name*] with a gun]; and

2. the defendant did this by criminal negligence.

You must all agree on elements 1 and 2 listed above. If you all agree the state has proved, beyond a reasonable doubt, both of the two elements listed above, you must find the defendant "guilty" of criminally negligent homicide and so indicate on the attached verdict form, titled "Verdict—Guilty of Criminally Negligent Homicide."

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of elements 1 and 2 listed above, you must find the defendant "not guilty" of criminally negligent homicide.

If you believe from the evidence, beyond a reasonable doubt, that the defendant is guilty of either murder or manslaughter, but you have a reasonable doubt about which of these offenses he is guilty of, you must resolve that doubt in the defendant's favor. In that situation, you must find him guilty of the lesser offense of manslaughter.

Similarly, if you believe from the evidence, beyond a reasonable doubt, that he is guilty of either manslaughter or criminally negligent homicide, but you have a reasonable doubt about which of those offenses he is guilty of, you must resolve that doubt in the defendant's favor. In that situation, you must find him guilty of the lesser offense of criminally negligent homicide. Of course, if you have a reasonable doubt about whether he is guilty of any of these three offenses, you must acquit the defendant and find him "not guilty."

[Insert any other instructions raised by the evidence.]

VERDICT—GUILTY OF MURDER

We, the jury, find the defendant, [*name*], guilty of murder, as charged in the indictment.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

VERDICT—GUILTY OF MANSLAUGHTER

We, the jury, find the defendant, [*name*], not guilty of murder as charged in the indictment, but guilty of the lesser offense of manslaughter.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

VERDICT—GUILTY OF CRIMINALLY NEGLIGENT HOMICIDE

We, the jury, find the defendant, [*name*], not guilty of murder as charged in the indictment, and not guilty of the lesser offense of manslaughter, but guilty of the lesser offense of criminally negligent homicide.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

VERDICT—NOT GUILTY

We, the jury, find the defendant, [*name*], not guilty.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

[Continue with punishment instructions as needed.]

COMMENT

For this instruction, the charged offense is murder under Tex. Penal Code § 19.02(b)(1) and the uncharged offenses are manslaughter under Tex. Penal Code § 19.04 and criminally negligent homicide under Tex. Penal Code § 19.05.

This instruction requires acquittal of the greater offense before conviction of one of the lesser included offenses.

CPJC 6.4 Instruction—Lesser Included Offense—Reasonable Effort

INSTRUCTIONS OF THE COURT

Accusation

[Insert relevant accusation unit for specific offense. The following example is for the offense of murder under Texas Penal Code section 19.02(b)(1).]

The state accuses the defendant of having committed the offense of murder. Specifically, the allegation is that the defendant [*insert specific allegations, e.g.*, intentionally or knowingly caused the death of [*name*] by shooting him with a gun].

Relevant Statutes

[Insert relevant statutes and definitions units from charged and lesser included offenses. In the following example, the charged offense is murder, under Texas Penal Code section 19.02(b)(1), and the lesser included offenses are manslaughter, under Texas Penal Code section 19.04, and criminally negligent homicide, under Texas Penal Code section 19.05.]

A person commits the offense of murder if the person intentionally or knowingly causes the death of an individual.

To prove that the defendant is guilty of murder, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant caused the death of an individual, and
2. the defendant did this intentionally or knowingly.

A person commits the offense of manslaughter if the person recklessly causes the death of an individual.

To prove that the defendant is guilty of manslaughter, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant caused the death of an individual, and
2. the defendant did this recklessly.

A person commits the offense of criminally negligent homicide if the person causes the death of an individual by criminal negligence.

To prove that the defendant is guilty of criminally negligent homicide, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant caused the death of an individual, and
2. the defendant did this by criminal negligence.

Burden of Proof

The state must prove, beyond a reasonable doubt, the accusation of murder, or must prove, beyond a reasonable doubt, the lesser included accusation of manslaughter or the lesser included accusation of criminally negligent homicide.

Definitions

Intentionally Causing the Death of an Individual

A person intentionally causes the death of an individual if the person has the conscious objective or desire to cause that death.

Knowingly Causing the Death of an Individual

A person knowingly causes the death of an individual if the person is aware that his conduct is reasonably certain to cause that death.

Recklessly Causing the Death of an Individual

A person recklessly causes the death of an individual if—

1. there is a substantial and unjustifiable risk that his conduct will cause that death;
2. this risk is of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the person's standpoint; and
3. the person is aware of but consciously disregards that risk.

Causing the Death of an Individual by Criminal Negligence

A person causes the death of an individual by criminal negligence if—

1. there is a substantial and unjustifiable risk that his conduct will cause that death;

2. this risk is of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the person's standpoint; and

3. the person ought to be aware of that risk.

Application of Law to Facts

[Include relevant application of law to facts unit from charged offense. In the following example, the charged offense is murder, under Texas Penal Code section 19.02(b)(1), and the lesser included offenses are manslaughter, under Texas Penal Code section 19.04, and criminally negligent homicide, under Texas Penal Code section 19.05.]

Although the state has charged the defendant with the offense of murder, you may find the defendant not guilty of that charged offense but guilty of a lesser included offense. In this case, the offenses of manslaughter and criminally negligent homicide are lesser included offenses of the charged and greater offense of murder.

You may discuss the three offenses in any order you choose, starting with the offense of murder or the offense of manslaughter or the offense of criminally negligent homicide.

In deciding the defendant's guilt or innocence, however, you should first address whether the state has proved the charged offense of murder. If you find the defendant guilty of murder, you should so indicate on the verdict form and your task is ended.

To find the defendant guilty of murder, you must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, in [*county*] County, Texas, on or about [*date*], caused the death of [*name*] [*insert specific allegations, e.g.*, by shooting [*name*] with a gun]; and

2. the defendant did this either intentionally or knowingly.

You must all agree on elements 1 and 2 listed above. If you all agree the state has proved, beyond a reasonable doubt, both of the two elements listed above, you must find the defendant "guilty" of murder and so indicate on the attached verdict form, titled "Verdict—Guilty of Murder."

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of elements 1 and 2 listed above, you must find the defendant "not guilty" of murder. If you find the defendant is not guilty of murder, or if after all reasonable efforts to do so you are not able to reach a unanimous verdict on the charged offense of murder, you should next address whether the state has proved the lesser included offense of manslaughter. If you find the defendant guilty of manslaughter, you should so indicate on the appropriate verdict form and your task is ended.

To find the defendant guilty of manslaughter, you must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, in [*county*] County, Texas, on or about [*date*], caused the death of [*name*] [*insert specific allegations, e.g.*, by shooting [*name*] with a gun]; and

2. the defendant did this recklessly.

You must all agree on elements 1 and 2 listed above. If you all agree the state has proved, beyond a reasonable doubt, both of the two elements listed above, you must find the defendant "guilty" of manslaughter and so indicate on the attached verdict form, titled "Verdict—Guilty of Manslaughter."

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of elements 1 and 2 listed above, you must find the defendant "not guilty" of manslaughter. If you find the defendant is not guilty of manslaughter, or if after all reasonable efforts to do so you are not able to reach a unanimous verdict on the lesser included offense of manslaughter, you should next address whether the state has proved the lesser included offense of criminally negligent homicide. If you find the defendant guilty of criminally negligent homicide, you should so indicate on the appropriate verdict form and your task is ended.

To find the defendant guilty of criminally negligent homicide, you must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, in [*county*] County, Texas, on or about [*date*], caused the death of [*name*] [*insert specific allegations, e.g.*, by shooting [*name*] with a gun]; and

2. the defendant did this by criminal negligence.

You must all agree on elements 1 and 2 listed above. If you all agree the state has proved, beyond a reasonable doubt, both of the two elements listed above,

you must find the defendant "guilty" of criminally negligent homicide and so indicate on the attached verdict form, titled "Verdict—Guilty of Criminally Negligent Homicide."

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of elements 1 and 2 listed above, you must find the defendant "not guilty."

If you believe from the evidence, beyond a reasonable doubt, that the defendant is guilty of either murder or manslaughter, but you have a reasonable doubt about which of these offenses he is guilty of, you must resolve that doubt in the defendant's favor. In that situation, you must find him guilty of the lesser offense of manslaughter.

Similarly, if you believe from the evidence, beyond a reasonable doubt, that the defendant is guilty of either manslaughter or criminally negligent homicide, but you have a reasonable doubt about which of those offenses he is guilty of, you must resolve that doubt in the defendant's favor and find him guilty of the lesser offense of criminally negligent homicide. Of course, if you have a reasonable doubt about whether he is guilty of any of these three offenses, you must acquit the defendant and say by your verdict "not guilty."

[Insert any other instructions raised by the evidence.]

VERDICT—GUILTY OF MURDER

We, the jury, find the defendant, [*name*], guilty of murder, as charged in the indictment.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

VERDICT—GUILTY OF MANSLAUGHTER

We, the jury, find the defendant, [*name*], guilty of the lesser offense of manslaughter.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

VERDICT—GUILTY OF CRIMINALLY NEGLIGENT HOMICIDE

We, the jury, find the defendant, [*name*], guilty of the lesser offense of criminally negligent homicide.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

VERDICT—NOT GUILTY

We, the jury, find the defendant, [*name*], not guilty.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

[Continue with punishment instructions as needed.]

COMMENT

For this instruction, the charged offense is murder under Tex. Penal Code § 19.02(b)(1) and the uncharged offenses are manslaughter under Tex. Penal Code § 19.04 and criminally negligent homicide under Tex. Penal Code § 19.05.

This instruction, however, does not require acquittal of the charged offense before conviction of one of the lesser included offenses. Instead, it requires reasonable efforts to reach a unanimous decision on the greater offense.

CPJC 7.1 Jury Charges on Presumptions

Scattered throughout the Texas Penal Code are various presumptions that may help the state prove its case, as distinguished from those that may benefit the defense (*see, e.g.*, Tex. Penal Code § 9.32(b)). One must be careful that presumptions that favor the state may raise constitutional issues.

Texas Penal Code section 22.05(c) provides that in a prosecution for deadly conduct, the elements of recklessness and danger are "presumed" if the defendant knowingly points a firearm at or in the direction of another, whether or not the defendant believed the firearm was loaded. Tex. Penal Code § 22.05(c). Similarly, section 31.03(c)(3) establishes a presumption that a defendant knows he is in possession of stolen property once one or more predicate facts are proven. Tex. Penal Code § 31.03(c)(3). *See also* Tex. Penal Code § 28.03(c)(3) (presumption that person who receives "economic benefit" of a public service has committed forbidden conduct), § 22.02(c) (presumption that defendant knew person assaulted was a public servant or security officer if person was wearing "distinctive uniform" or badge).

These presumptions effectively explain to a jury how it may consider certain evidence, and, as such, are an exception to the general rule in article 36.14 of the Texas Code of Criminal Procedure that the trial court may not single out certain evidence. *See* Tex. Code Crim. Proc. art. 36.14. Although presumptions may be useful to a jury, in drafting instructions on them the Committee has been mindful of four considerations.

First, and most important, trial courts must be very careful to avoid mandatory presumptions. As the Supreme Court noted in *Sandstrom v. Montana*, 442 U.S. 510, 517 (1979), the dictionary definition of "presume" is "to suppose to be true *without proof*" (emphasis added). But since the Due Process Clause requires the prosecution to *prove* every element of its case, an instruction mandating that the jury find against a defendant as to an element is forbidden. *Sandstrom*, 442 U.S. at 525 (instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts" unconstitutional). Even if the trial court instructs the jury that a presumption of this sort "may be rebutted," the instruction still violates the requirements of due process. *Francis v. Franklin*, 471 U.S. 307, 316 (1985).

The second danger in instructing juries on presumptions is that the trial court may fail to give the instruction set out in section 2.05(a)(2) of the Penal Code, required for all presumptions that favor the state. That provision requires that the jury be told that "the facts giving rise to the presumption must be proven beyond a reasonable doubt" and that even if such facts are proven beyond a reasonable doubt, "the jury *may* find that the element of the offense sought to be presumed exists, *but is not bound to so find*." Tex. Penal Code § 2.05(a)(2)(A), (B) (emphasis added). Section 2.05 also directs the jury to disregard the presumption if it has a reasonable doubt as to the facts giving rise to the presumption. And finally, the judge is to remind the jury that even if

it finds the element subject to the presumption has been proven, the state must prove all the other elements of the offense beyond a reasonable doubt. Tex. Penal Code § 2.05(a)(2)(C), (D).

Section 2.05 essentially turns what look like mandatory presumptions into permissive inferences, which are generally permissible. The jury is told that it *may* infer the element in question from the predicate fact or facts, but that it is *not required* to do so. As the Supreme Court said in *Francis*, "a mandatory presumption instructs the jury that it *must* infer the presumed fact if the State proves certain facts," while a permissive inference "*suggests to the jury a possible conclusion* to be drawn if the State proves predicate facts, but it does not *require* the jury to draw that conclusion." *Francis*, 471 U.S. at 314 (emphasis added).

If the trial court ignores section 2.05 and simply instructs the jury in the language of the applicable Penal Code provision, reversible error is likely if the defendant objects. Even without an objection, the instruction may be deemed to have caused "egregious" harm, at least when the element "proven" by the presumption was contested at trial. *See, e.g., Hollander v. State*, 414 S.W.3d 746 (Tex. Crim. App. 2013) (in prosecution for tampering with metering device, trial court instructed jury using language in Tex. Penal Code § 28.03(c); egregious harm because court did not instruct jury that state had to show predicate fact—that defendant received "economic benefit"—beyond a reasonable doubt, as required by section 2.05(a)(2)).

Most courts appear to charge the jury only in the language of section 2.05(a)(2). The Committee believes, however, that if the jury is instructed it may "presume" something, there is still a danger that the jury may give too much weight to the word "presume," even though it is told it need not do so. The sample jury instructions at CPJC 7.2 through 7.4 represent the Committee's attempt to draft an instruction without any possible taint of a mandatory instruction.

Third, trial judges should be alert to the possibility that, in a given case, even a permissive instruction may be unconstitutional. In *Leary v. United States*, 395 U.S. 6, 36 (1969), the Supreme Court held that a presumption would violate the Due Process Clause unless the "presumed fact" was "more likely than not to flow from the proved fact on which it is made to depend." The court found that it was error to instruct the jury that if it found Leary possessed marijuana, it could infer he knew that it had been imported illegally. *Leary*, 395 U.S. at 52–53.

In accord with the reasoning of *Leary*, the Dallas court of appeals found that the section 28.03(c) presumption was unconstitutional as applied in *Gersh v. State*, 714 S.W.2d 80 (Tex. App.—Dallas 1986), *pet. ref'd*, 738 S.W.2d. 287 (Tex. Crim. App. 1987) (finding that Dallas court "reached the correct result for the correct reasons"). In *Gersh* the only evidence to show that the defendant had tampered with a gas meter was the statutory presumption. *Gersh*, 714 S.W.2d at 81. The court pointed out, however, that just because the gas bill came to him, it did not follow that he did the tampering.

His wife, for example, received the same benefits and thus had the same motive. *Gersh*, 714 S.W.2d at 82. A trial court, then, should never take it for granted that a permissive inference instruction will necessarily show that, more likely than not, the presumed fact flows from the predicate fact. *See also Tot v. United States*, 319 U.S. 463 (1943) (presumption that person convicted of a crime of violence and in possession of a firearm received that firearm in interstate or foreign commerce held unconstitutional).

Fourth, what of presumptions that are not provided for in the Penal Code? In *Brown v. State*, 122 S.W.3d 794 (Tex. Crim. App. 2003), a capital murder case, the defendant admitted he had killed the deceased but denied that he had the intent to kill him. Over objection, the trial court instructed the jury, "Intent or knowledge may be inferred by acts done or words spoken." *Brown*, 122 S.W.3d at 796. Writing for the court of criminal appeals, Judge Cochran observed that this presumption was not a statutory one, rather a judicial review device for assessing the sufficiency of the evidence, and "not an explicit legal tool for the jury." *Brown*, 122 S.W.3d at 802–03. Accordingly, the court held that it was an improper comment on the evidence, in violation of article 36.14. *Brown*, 122 S.W.3d at 798–801.

The error in *Brown* was deemed harmless, however, and the court appears to have rejected, at least for the time being, a bright-line rule disapproving of instructions on presumptions not named in the Penal Code. *Brown*, 122 S.W.3d at 802 n.40.

This chapter provides instructions for three of the presumptions found in the Texas Penal Code. The requirements for each presumption are specific to the Code section that creates it; however these instructions may be used as models for instructions on other presumptions.

CPJC 7.2 Instruction—Presumption of Knowledge—Aggravated Assault on Public Servant Wearing Distinctive Uniform or Badge

[Insert instructions for underlying offense.]

Presumption of Knowledge

In some cases, Texas law provides for what are called "presumptions." A "presumption" is simply a conclusion that you may, but are not required to, reach when the state proves, beyond a reasonable doubt, an underlying fact.

In this case, the law provides for a presumption that the defendant knew that the person he allegedly assaulted was a public servant if the state proves, beyond a reasonable doubt, that at the time of the incident, the public servant, [*name*], was wearing a distinctive uniform or badge indicating his employment as a [*insert type of public servant, e.g.*, police officer].

If you find that the state has proven, beyond a reasonable doubt, that [*name*] was wearing a distinctive uniform or a badge indicating he was employed as a [*insert type of public servant, e.g.*, police officer] at the time of the alleged assault, then you may infer from this fact that the defendant knew he was a public servant. You are not required to infer this, however, even if you have found that [*name*] was wearing a distinctive uniform or badge indicating he was a [*insert type of public servant, e.g.*, police officer].

If you have a reasonable doubt about whether [*name*] was wearing a distinctive uniform or a badge indicating he was employed as a [*insert type of public servant, e.g.*, police officer] at the time of the alleged assault, you may not infer that the defendant knew that he was a public servant. The presumption does not apply in such a case, and you must not consider it for any purpose.

If you decide that the presumption does not apply, or that you do not wish to apply it, you must decide whether other evidence—not including the presumption—proves beyond a reasonable doubt that the defendant knew that [*name*] was a public servant.

If you decide to use the presumption, you may find that the defendant knew that [*name*] was a public servant, but you must still decide, however, whether the state has proven, beyond a reasonable doubt, the other elements of aggravated assault, as listed above.

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

The presumption that one knew the person assaulted was a public servant if that person was wearing a distinctive uniform or badge is provided for by Tex. Penal Code § 22.02(c).

The statute does not provide that a distinctive uniform or badge must be *plainly* visible to a defendant. Nevertheless, to avoid constitutional concerns, the Committee recommends that the instruction only be given when the evidence shows that the badge or uniform was plainly visible.

CPJC 7.3 Instruction—Presumption of Recklessness and Danger—Knowingly Pointing a Firearm at Another Person

[Insert instructions for underlying offense.]

Presumption of Recklessness

In some cases, Texas law provides for what are called "presumptions." A "presumption" is simply a legal conclusion that you may, but are not required to, reach when the state proves, beyond a reasonable doubt, an underlying fact.

In this case, the law provides for a presumption that the defendant was reckless and that his conduct placed another in danger if he knowingly pointed a firearm at or in the direction of another person, whether or not he believed the firearm was loaded.

If you find the state has proven, beyond a reasonable doubt, that the defendant knowingly pointed a firearm at or in the direction of [*name*], you may infer from this fact that he was reckless and that his conduct placed [*name*] in danger, regardless of whether he believed the firearm was unloaded. You are not required to infer this, however, even if you find that he knowingly pointed a firearm at or in the direction of [*name*].

If you have a reasonable doubt about whether the defendant knowingly pointed a firearm at or in the direction of [*name*], you may not infer that he was reckless or that his conduct placed [*name*] in danger. The presumption does not apply in such a case, and you must not consider it for any purpose.

If you decide that the presumption does not apply, or that you do not wish to apply it, you must decide whether other evidence—not including the presumption—proves beyond a reasonable doubt that the defendant was reckless and that his conduct placed [*name*] in danger.

If you decide to use the presumption, you may find that the defendant was reckless, and that his conduct placed [*name*] in danger, but you must still decide, however, whether the state has proven, beyond a reasonable doubt, the other elements of the offense of deadly conduct, as listed above.

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

The presumption of recklessness and danger if one knowingly points a firearm at or in the direction of another is provided for by Tex. Penal Code § 22.05(c).

CPJC 7.4 Instruction—Presumption of Intent—Theft of Service

[Insert instructions for underlying offense.]

Presumption of Intent

In some cases, Texas law provides for what are called "presumptions." A "presumption" is simply a conclusion that you may, but are not required to, reach when the state proves, beyond a reasonable doubt, an underlying fact.

In this case, the law provides for a presumption that the defendant intended to avoid payment if you find, beyond a reasonable doubt, that the defendant absconded without paying for [*insert type of service, e.g.*, a meal at a restaurant], as alleged in the indictment.

If you find, beyond a reasonable doubt, that the defendant absconded without paying for [*insert type of service, e.g.*, a meal at a restaurant], as alleged in the indictment, you may infer from this fact that he intended to avoid payment. You are not required to infer this, however, even if you find, beyond a reasonable doubt, that he absconded without paying for [*insert type of service, e.g.*, the meal].

If you have a reasonable doubt about whether the defendant absconded without paying for [*insert type of service, e.g.*, the meal], you may not infer that he intended to avoid payment for [*insert type of service, e.g.*, the meal]. The presumption does not apply in such a case, and you are not to consider it for any purpose.

If you decide that the presumption does not apply, or that you do not wish to use it, you must decide whether other evidence—not including the presumption—proves beyond a reasonable doubt that the defendant intended to avoid payment.

If you decide to use the presumption, you may find that the defendant intended to avoid payment. You must still decide, however, whether the state has proven, beyond a reasonable doubt, the other elements of theft of service, as listed above.

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

The presumption that a person who absconded without paying for a service had the intent to avoid payment is provided for by Tex. Penal Code § 31.04(b)(1).

CPJC 8.1 General Matters

Under article 38.23(a) of the Texas Code of Criminal Procedure, when the evidence raises the issue, juries in criminal cases must be instructed to determine whether particular evidence was obtained in violation of the Constitution or laws of the state of Texas or of the United States of America. Tex. Code Crim. Proc. art. 38.23(a). There are two major issues posed by this provision. First, when is an instruction appropriate? Second, when appropriate, how should that instruction submit the matter to the jury? The two matters are interrelated.

General Rule as to When Instruction Is Appropriate. *Madden v. State*, 242 S.W.3d 504 (Tex. Crim. App. 2007), set out the general rule:

> There are three requirements that a defendant must meet before he is entitled to the submission of a jury instruction under article 38.23(a):
>
> 1. The evidence heard by the jury must raise an issue of fact;
>
> 2. The evidence on that fact must be affirmatively contested; and
>
> 3. That contested factual issue must be material to the lawfulness of the challenged conduct in obtaining the evidence.

Madden, 242 S.W.3d at 510.

Fact Issues Must Be Ones of "Historical" Fact. Under *Madden*, for an issue of fact to require jury submission, it must be an issue as to *historical* fact. *Robinson v. State*, 377 S.W.3d 712, 722 (Tex. Crim. App. 2012). An issue as to the application of the law to particular facts does not justify submission. In *Robinson*, for example, defendant Robinson contended the evidence at issue was tainted by a traffic stop for failing to signal a turn. He specifically contended a signal was not required under the circumstances. All the witnesses agreed on the configuration of the intersection at which the stop was made. They disagreed on whether Robinson's maneuver through this intersection was a "turn" within the meaning of the legal requirement that a turn be signaled. The *Robinson* evidence did not, therefore, raise a question of historical fact and a jury instruction was neither required nor appropriate.

In *Spence v. State*, 325 S.W.3d 646 (Tex. Crim. App. 2010), another traffic stop case, the witnesses agreed that Spence's license plate was wedged between the front window and dashboard of his vehicle. There was, however, disagreement as to whether this was compliant with the statutory demand that such a plate be displayed "at the front . . . of the vehicle." This did not involve a dispute as to historical fact. "Proper placement of a license plate is a question of law, not one of disputed historical fact. Since both parties agreed on the location of the license plate, an article 38.23 instruction was not warranted." *Spence*, 325 S.W.3d at 654.

Affirmative Contest on the Matter of Historical Fact. *Madden*'s second requirement was discussed further in that decision:

> To raise a disputed fact issue warranting an Article 38.23(a) jury instruction, there must be some affirmative evidence that puts the existence of that fact into question. In this context, a cross-examiner's questions do not create a conflict in the evidence, although the witnesses's [sic] answers to those questions might.

Madden, 242 S.W.3d at 513.

Contested Factual Issue Must Be Material to the Lawfulness of the Challenged Conduct. *Madden*'s third requirement is not met if—despite disputed historical facts—other, uncontested facts justify the trial judge in finding the evidence at issue was obtained in compliance with the law. *Spence*, 325 S.W.3d at 654 (dispute as to where defendant parked did not justify Tex. Code Crim. Proc. art. 38.23 instruction because license plate violation made stop legal). In *Madden* itself, the court held that even if some evidence presented a contested issue on whether the officer observed indications that Madden was excessively nervous, no instruction of the legality of the continued detention was appropriate. Other, uncontested evidence provided "ample basis" for the detention. *Madden*, 242 S.W.3d at 516–17.

Jury Submission Not Dependent on Challenge to Admissibility. A defendant need not challenge the admissibility of evidence to be entitled to a jury instruction on the legality of the obtaining of that evidence. Neither a motion to suppress the evidence nor an objection when the evidence is offered is a prerequisite to a request for a jury instruction. Nor is a jury instruction rendered unnecessary if, when the evidence is offered, the defense says, "no objection." *Holmes v. State*, 248 S.W.3d 194, 199–202 (Tex. Crim. App. 2008).

CPJC 8.2 Other Aspects of Recent Case Law

When jury submission of a Texas Code of Criminal Procedure article 38.23(a) question is appropriate, and how such a question should be submitted, is addressed in several major recent decisions—*Madden v. State*, 242 S.W.3d 504 (Tex. Crim. App. 2007); *Hamal v. State*, 390 S.W.3d 302 (Tex. Crim. App. 2012); *Robinson v. State*, 377 S.W.3d 712 (Tex. Crim. App. 2012)—that deserve further exploration.

Madden. In *Madden*, defendant Madden sought jury instructions concerning both the propriety of the initial traffic stop and of the continued detention after it could no longer be supported as a traffic stop for speeding. The trial judge submitted an instruction on whether the original traffic stop was proper. Madden claimed error in the judge's refusal to submit the propriety of continuing the stop to await a dog.

Arguing that the refused instruction should have been given, Madden relied on what he contended was a dispute in the evidence as to whether the officer, Lily, observed indications of nervousness in Madden. No error was found for three reasons: (1) Madden did not request an instruction asking the jury to decide a question of historical fact but only one asking it to decide a matter of law—"whether Officer Lily had 'reasonable suspicion' to continue to detain" Madden (*Madden*, 242 S.W.3d at 511); (2) there was no conflict in the evidence as to whether Lily observed indications of nervousness in Madden; and (3) whether Lily observed indications of nervousness in Madden was not necessary to reasonable suspicion because other facts established that reasonable suspicion. The Committee recommends reading both this refused instruction, which serves as an illustration of an article 38.23(a) instruction failing to properly put to the jury the contested question of historical fact relied on as justifying jury submission, and the actual instruction given and approvingly noted by the unanimous court of criminal appeals.

In the course of the court's discussion, the *Madden* majority contrasted the case for submission of a question concerning the continuation of the stop with the case for submission of a question concerning the propriety of the original stop. It approved of both submission of the issue of the propriety of the original stop and the instructions submitting it.

Submission of the issue of the propriety of the original stop was proper, *Madden* explained, because there was a disputed question of a material historical fact. Lily testified he clocked Madden at sixty-one miles per hour. Other evidence (Madden's statements on the video) indicated that Madden had his cruise control set at fifty-five miles per hour and was driving no faster than that; this evidence permitted the inference that Lily was lying or mistaken in his testimony. *See Hamal v. State*, 390 S.W.3d 302, 307 (Tex. Crim. App. 2012) (*Madden* presented a factual dispute concerning what information the officer received because the defendant's statement "was some evidence that the police officer was not telling the truth in saying that he clocked the defendant's speed at 61 m.p.h.").

Regarding the instruction given on the original stop, *Madden* commented:

> This instruction is admirable in that it specifically directs the jury's attention to the one historical fact—Officer Lily's reasonable belief or "suspicion" that appellant was going faster than 55 m.p.h.—in dispute and tells the jury to decide this fact. The factual issue for the jury is not whether appellant *was* speeding, the issue is whether Officer Lily had a reasonable belief that he was speeding. Even police officers may be mistaken about an historical fact such as "speeding," as long as that mistake was not unreasonable. Of course, evidence that appellant was not, in fact, speeding is highly probative of whether Officer Lily was reasonable in thinking that he *was* speeding. The trial court's instructions correctly set out the proper factual issue for the jury to decide. The rest of the instruction simply gives the legal background for the issue and explains why this is such an important fact to decide.

Madden, 242 S.W.3d at 509.

Hamal. In *Hamal*, the issue was whether the trial judge committed fundamental error by failing to submit a jury instruction concerning the actions of an officer, Riggs, in prolonging a traffic stop to enable a drug-sniffing dog to arrive. These actions required reasonable suspicion that the driver, Hamal, was in possession of drugs for the officer's actions to be legal and thus for the evidence to be admissible. The state relied on three matters as supporting the officer's action: (1) the officer had been informed that Hamal had nine arrests, including four arrests for possession of controlled substances, and the most recent arrest was only nine months before the stop; (2) Hamal lied about her criminal record when she answered "no" to the officer's question, "You ever been in trouble for anything . . . ?" (*Hamal*, 390 S.W.3d at 304 n.1); and (3) Hamal was nervous during the stop.

The evidence before the jury indicated that Riggs told Hamal he thought she had lied and Hamal responded that she had not understood the question, and she then acknowledged prior arrests.

The court of appeals held a jury instruction was required because the evidence presented a fact issue akin to that in *Madden*: "whether Trooper Riggs was reasonable in believing [after Hamal answered his question and also after she informed him that she had misunderstood the question] that Hamal had heard and understood what he was asking and had lied about having ever been arrested." *Hamal*, 390 S.W.3d at 305.

Two members of the court of criminal appeals agreed, finding the situation indistinguishable from *Madden*. The majority, however, disagreed. In *Madden*, the *Hamal* majority reasoned, the factual dispute concerned a matter of material historical fact—whether the officer did in fact clock Madden going sixty-one miles per hour. The opinion in *Hamal* explained:

> In *Madden* . . . there was a factual dispute regarding what information the officer received before the stop. The officer testified that he had clocked the defendant's vehicle at 61 m.p.h. in a 55 m.p.h. zone. On the patrol-car video recording, the defendant stated that he was driving 55 m.p.h. The defendant's statement was some evidence that the police officer was not telling the truth in saying that he clocked the defendant's speed at 61 m.p.h. If the police officer had not in fact clocked the defendant's vehicle as speeding, then he would not have had reasonable suspicion to conduct a traffic stop.

Hamal, 390 S.W.3d at 307.

No such dispute was presented in *Hamal*:

> [T]here was no factual dispute [about what information Trooper Riggs received before and during the stop]. There was no dispute in the testimony about what the video depicts. There was no conflict in the evidence regarding what appellant and Trooper Riggs said and did, and it was uncontroverted that appellant was nervous.

Hamal, 390 S.W.3d at 307.

Hamal also appeared to establish that the officer's actual belief (and perhaps the reasonableness of that belief) was not a relevant consideration:

> [T]he factual issue in dispute is not . . . whether the trooper was reasonable in believing that appellant understood the question and then lied to him. An officer's subjective belief is irrelevant to reasonable suspicion, so it does not matter what the trooper actually believed.

Hamal, 390 S.W.3d at 307. The court further commented:

> Nor is the issue even whether a hypothetical reasonable police officer would believe that the suspect understood the question. The inquiry is whether a reasonable police officer would believe that the suspect *might* be lying. If a false answer to a particular question would suggest a suspect's involvement in criminal activity, then a possibly false answer can help to establish reasonable suspicion.

Hamal, 390 S.W.3d at 307.

Robinson. At actual issue in *Robinson*, as discussed in CPJC 8.1, was whether the conflict concerned an historical fact. The court's discussion, however, made clear that "a police officer's reasonable mistake of historical fact can . . . be the legitimate subject of an Article 38.23(a) instruction." *Robinson*, 377 S.W.3d at 720 (emphasis removed).

Robinson explained further:

> A police officer's reasonable mistake about the facts may yet legitimately justify his own conclusion that there is probable cause to arrest or reasonable suspicion to detain. This is so because a mistake about the facts, *if* reasonable, will not vitiate an officer's actions in hindsight so long as his actions were lawful under the facts as he reasonably, albeit mistakenly, perceived them to be. And if there is a dispute about whether a police officer was genuinely mistaken, or was not telling the truth, about a material historical fact upon which his assertion of probable cause or reasonable suspicion hinges, an instruction under Article 38.23(a) would certainly be appropriate.

Robinson, 377 S.W.3d at 720–21. In an explanatory footnote, the court described *Holmes v. State*, 248 S.W.3d 194 (Tex. Crim. App. 2008), as

> providing, in example, that contested fact issues such as "that Officer Frank did not reasonably believe that the defendant was holding a garden hoe; that Officer Frank did not reasonably believe that the defendant might have been involved in a 'disturbance' with Alice Manning; [and] that Officer Frank did not reasonably believe that the defendant was attempting to evade detention by trotting or running away" would all be sufficient to entitle the defendant to an Article 38.23 instruction.

Robinson, 377 S.W.3d at 721 n.25.

Case Analysis. *Madden*, in dictum, approved an instruction telling the jury that the issue was whether the state had proved beyond a reasonable doubt that the officer had reasonable suspicion that the defendant was violating the law. *Hamal* suggests that jury submission in such cases is justified only by the dispute as to the underlying historical fact, for example, did the officer obtain a reading from his radar or clocking device of a speed over fifty-five miles per hour?

Is jury submission ever supportable because an issue exists as to what conclusions a reasonable person would draw from uncontested historical facts? *Robinson*'s discussion suggests so, by indicating that a claim of reasonable mistake as to an historical fact may support jury submission. *Hamal* suggests not because the court seems to have indicated that the jury submission was justified by disagreement as to whether a reasonable person would have regarded Hamal's answer regarding her arrest record as likely enough to be a lie, indicating she was in possession of drugs. The cases arguably contain mixed signals as to how issues should be framed for jury submission. In part, the issue is whether jury submission should attempt to focus the jury's analysis on the issue of historical fact justifying jury submission in the first place.

Madden's facts involving the issue actually submitted to the jury provide an example. *Hamal*, discussing the facts in *Madden*, suggests that jury submission was justified only by a dispute as to an underlying historical fact—did the officer obtain a reading from his clocking device of a speed over fifty-five miles per hour? This in turn suggests that is the question that should be identified in the instruction as the issue for the

jury: has the state proven beyond a reasonable doubt that the officer did obtain such a reading?

On the other hand, *Madden* itself approved the instruction actually given, in which this issue of historical fact was never mentioned. The instruction simply told the jury to determine whether the officer had reasonable suspicion that Madden was driving over fifty-five miles per hour on a highway with a posted speed limit of fifty-five miles per hour.

CPJC 8.3 Definitions of Terms

A matter of continuing uncertainty is the extent to which Texas Code of Criminal Procedure article 38.23(a) instructions should or must include nonstatutory definitions of terms related to the lawfulness of conduct by which evidence is obtained. Most important is whether instructions should define the terms *probable cause* or *reasonable suspicion* as those relate to legal standards governing law enforcement conduct.

If juries are to address only issues of historical fact, such definitions would seldom if ever be necessary for juries to properly analyze article 38.23(a) issues. In fact, such definitions might invite juries to go beyond their proper function and address matters not for their resolution, such as whether particular facts constitute probable cause or reasonable suspicion.

Inclusion of Definitions. The need for a definition of "probable cause" was before the court of criminal appeals in *Middleton v. State*, 125 S.W.3d 450 (Tex. Crim. App. 2003). Officers obtained the challenged evidence pursuant to a traffic stop for failure to stop at a stop sign; a police officer testified he saw Middleton run the stop sign, and Middleton testified he stopped. The trial judge instructed the jury:

> The court further instructs you that before you may consider the testimony of Steve Stanford concerning the search of the Defendant's vehicle, you must first find beyond a reasonable doubt that the officer had probable cause to believe and did believe that the defendant did not bring the vehicle he was operating to a stop at the intersection of Cates and Crittendon in Bridgeport, Texas, and if you do not so find beyond a reasonable doubt, or if you have a reasonable doubt, you will disregard such testimony and evidence.

Middleton, 125 S.W.3d at 452.

Middleton argued the trial court erred in refusing his request to add to the instruction a definition of "probable cause." Three court of criminal appeals judges agreed. *Middleton*, 125 S.W.3d at 460 (Price J., joined by Meyers and Johnson, JJ., dissenting) ("Because the term probable cause has different meanings in different contexts and is not commonly defined in such a way that permits jurors to know its meaning and apply it easily, the term should be defined for purposes of an article 38.23 instruction.").

The plurality opinion announcing the judgment of the court, however, found no error given the facts of the case. It explained:

> [E]ven if "probable cause" has acquired a technical legal meaning, that does not necessarily mean that it had to be defined. In this case, there was no risk that the jurors would arbitrarily apply their own personal definition, nor was a definition of the term required to assure a fair understanding of the evidence.

> This case involved a single, and simple, factual dispute—whether or not Middleton stopped at the stop sign. Its resolution determined whether the seized evidence could be considered. There were no other facts which could have established probable cause.

Middleton, 125 S.W.3d at 454 (plurality opinion). Two judges concurred in the result without opinions.

The *Middleton* plurality analysis leaves open the possibility that definitions of "probable cause" might be appropriate and even necessary if the issues for the juries in particular cases are whether "a multitude of factors" constituted probable cause. Under the later analyses of *Madden v. State*, 242 S.W.3d 504 (Tex. Crim. App. 2007) and *Hamal v. State*, 390 S.W.3d 302 (Tex. Crim. App. 2012), limiting submission to questions of historical fact, however, such issues would seem seldom, if ever, appropriate for jury submission.

Under *Madden* and *Hamal*, discussed at CPJC 8.1 and CPJC 8.2, the jury issue in *Middleton* would apparently be whether the officer reasonably believed he saw Middleton go through the intersection without first coming to a complete stop. Putting this to the jury would not require a definition of "probable cause."

Definition of "Probable Cause." If "probable cause" is to be defined in the instructions, how should the term be explained to the jury?

The definition must be "objective." *E.g., State v. Mendoza*, 365 S.W.3d 666, 671 (Tex. Crim. App. 2012) ("It is the officer's 'reasonable belief'—one that would be held by an objectively reasonable and prudent police officer that governs the question of reasonable suspicion or probable cause.").

Case law from the court of criminal appeals articulates probable cause in a variety of ways. *E.g., Turrubiate v. State*, 399 S.W.3d 147, 151 (Tex. Crim. App. 2013) (citing *McNairy v. State*, 835 S.W.2d 101, 106 (Tex. Crim. App. 1991) ("Probable cause [to search] exists when reasonably trustworthy circumstances within the knowledge of the police officer on the scene would lead him to reasonably believe that evidence of a crime will be found.")).

Often the courts' discussions incorporate the "fair probability" standard articulated in *Illinois v. Gates*, 462 U.S. 213, 238, 244 n.13 (1983). This is undoubtedly the most appropriate approach. *See Bonds v. State*, 403 S.W.3d 867, 873 (Tex. Crim. App. 2013) ("Probable cause exists when, under the totality of the circumstances, there is a fair probability or substantial chance that contraband or evidence of a crime will be found at the specified location."); *State v. Duarte*, 389 S.W.3d 349, 354 (Tex. Crim. App. 2012) ("Probable cause exists when, under the totality of the circumstances, there is a 'fair probability' that contraband or evidence of a crime will be found at the specified location."); *Meekins v. State*, 340 S.W.3d 454, 467 n.1 (Tex. Crim. App. 2011) ("Probable cause to search exists when there is a 'fair probability' of finding inculpatory evidence at the location being searched.").

The objective aspect of probable cause (and, as discussed below, reasonable suspicion) is limited to the conclusion, that is, whether there is a fair probability that the suspect committed the suspected offense. What facts can be considered are determined by a purely subjective standard—whether the officer was actually and subjectively aware of those facts. This was made clear by *State v. Duran*, 396 S.W.3d 565, 572 (Tex. Crim. App. 2013). A traffic stop for crossing the center line, *Duran* held, could not be supported by facts not actually known by the officer. Such a stop cannot be upheld on a finding that a reasonable officer would have observed the driver cross the center line. It must rest on what the stopping officer "actually did see."

If probable cause is to be defined for juries, must it or should it be defined in a manner incorporating the nuances developed in the case law discussing how judges are to analyze these situations in determining the admissibility of evidence? Perhaps these nuances are seldom actually controlling in jury submission cases, and definitions attempting to incorporate them are likely to be too confusing to be practical.

On the other hand, there seems no basis for regarding the law controlling the legality of evidence acquisition as dependent on whether the issue is one for the judge or the jury.

The most appropriate definitions incorporating the case law's nuances, therefore, would seem to be along the following lines:

> *Probable Cause*
>
> "Probable cause" as required for an arrest means facts known to the officer that would lead a reasonable law enforcement officer to conclude there is a reasonable probability that a specific person has engaged in criminal activity.
>
> "Probable cause" as required for a search means facts known to the officer that would lead a reasonable law enforcement officer to conclude there is a reasonable probability that contraband or evidence of criminal activity will be found.

Definition of "Reasonable Suspicion." If "reasonable suspicion" is defined in the instructions, how should that term be explained to the jury? Reasonable suspicion is arguably more difficult to define than probable cause, particularly without reference to the "rule" that whatever it is, it demands less than probable cause.

The instructions given in *Madden* provided:

> By the term "reasonable suspicion," as used herein, is meant specific articulable facts which, when taken together with rational inferences from those facts, would warrant a man of reasonable caution to believe that an offense has been or is being committed.

Madden, 242 S.W.3d at 509 n.7.

But this requires facts warranting a belief that an offense is being committed. Thus it seems to demand at least as much as, and perhaps more than, probable cause.

Often the case law defines "reasonable suspicion" in terms of facts justifying a *suspicion* rather than a conclusion (or perhaps a "belief"). *Abney v. State*, 394 S.W.3d 542, 548 (Tex. Crim. App. 2013) (reasonable suspicion "exists if the officer has specific articulable facts that, when combined with rational inferences from those facts, would lead him to reasonably suspect that a particular person has engaged or is (or soon will be) engaging in criminal activity" (quoting *Garcia v. State*, 43 S.W.3d 527, 530 (Tex. Crim. App. 2001)); *Hamal*, 390 S.W.3d at 306 (reasonable suspicion exists "when an officer is aware of 'specific articulable facts that, when combined with rational inferences from those facts, would lead him to reasonably suspect that a particular person has engaged or is (or soon will be) engaging in criminal activity' ") (quoting *York v. State*, 342 S.W.3d 528, 536 (Tex. Crim. App. 2011)); *Neal v. State*, 256 S.W.3d 264, 280 (Tex. Crim. App. 2008) (reasonable suspicion "exists if the officer has specific articulable facts that, when combined with rational inferences from those facts, would lead him to reasonably suspect that a particular person has, or soon will be, engaged in criminal activity") (quoting *Garcia*, 43 S.W.3d at 530).

As with probable cause, only those facts actually known to the officer are to be considered. Whether the known facts are sufficient, however, is to be determined by an objective standard—would those facts lead a reasonable officer to conclude there is a sufficient likelihood the suspect is guilty?

The most appropriate definition, therefore, would seem to be along the following lines:

> *Reasonable Suspicion*
>
> Reasonable suspicion means facts known to the officer that would lead a reasonable law enforcement officer to reasonably suspect that a specific person has engaged in criminal activity, is engaging in criminal activity, or is about to engage in such activity.

CPJC 8.4 Burden of Persuasion

Article 38.23(a) of the Texas Code of Criminal Procedure directs that, when instructed under the article, a jury is to be told that it must disregard challenged evidence if it "has a reasonable doubt" as to whether the evidence was obtained in violation of law. Clearly, the state has the burden of proving beyond a reasonable doubt that evidence that is the subject of an article 38.23(a) instruction was obtained in a manner consistent with the law.

Instruction Directing Disregard of the Evidence or Acquittal. Article 38.23(a) explicitly directs that when an instruction is given, "the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the [law], then . . . the jury shall disregard any such evidence so obtained." Tex. Code Crim. Proc. art. 38.23(a). Obviously, instructions in general should tell the jury that if it finds the state has not proved the evidence was obtained in a manner consistent with the applicable law, it should disregard the evidence. Such instructions should not necessarily go so far as to indicate a defendant should be acquitted simply because certain evidence may be found to have been obtained in violation of the law. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997) (disapproving instruction directing jury that "you are not to consider the [challenged evidence], and thereby find the defendant . . . not guilty").

On the other hand, the trial judge might determine the other evidence before the jury would be legally insufficient for a conviction without the evidence that is the subject of the article 38.23(a) instruction. In this event, the defendant is entitled to be found "not guilty" if the jury resolves the article 38.23(a) issue in his favor, and the jury can and should be so instructed. This is similar to a directed verdict for insufficient evidence. *Vrba v. State*, 69 S.W.3d 713, 719 (Tex. App.—Waco 2002, pet. ref'd).

CPJC 8.5 Structure of Instructions

The major question the Committee addressed was whether Texas Code of Criminal Procedure article 38.23(a) instructions should explicitly pose only the narrow issue of historical fact that justified submission of the matter to the jury.

The problem is illustrated by the instruction at CPJC 8.6, which is based on the issue actually submitted to the jury in *Madden v. State*, 242 S.W.3d 504 (Tex. Crim. App. 2007): the legality of the initial traffic stop for speeding. *Hamal v. State*, 390 S.W.3d 302 (Tex. Crim. App. 2012), described the factual issue in *Madden* as whether the officer in fact clocked Madden driving at more than fifty-five miles per hour, as the officer testified he did. Probably the factual issue is more accurately put as whether the officer reasonably believed he had so clocked the defendant. Jury submission of this matter could take either of two approaches.

First, the instruction could direct the jury to find whether the state has proved beyond a reasonable doubt the fact necessary to permit the jury to consider the evidence at issue: Did the state prove beyond a reasonable doubt that the officer reasonably believed he had clocked the defendant driving faster than fifty-five miles per hour? The instruction could simply pose this question without explanation or elaboration. On the other hand, the instruction might explain that if this fact is proven, that the officer had reasonable suspicion as required by the applicable law, then the stop was proper and the challenged evidence was not obtained in violation of the law.

Second, the instruction could direct the jury to determine whether the state proved, beyond a reasonable doubt, that the officer had reasonable suspicion as required by the applicable law. This could be supplemented with an explanation that the officer had reasonable suspicion if the officer reasonably believed he had clocked the defendant driving faster than fifty-five miles per hour.

After considerable discussion, a majority of the Committee adopted the first approach as the generally-preferable one. The majority reasoned that, insofar as possible, jury submission should ask the jury only to decide the usually narrow issue of disputed historical fact that made jury submission appropriate. Thus, in the instruction at CPJC 8.6, the Committee recommends that the jury be told that it must address whether the state has proved, beyond a reasonable doubt, that the officer who acquired the evidence at issue reasonably believed he had clocked the defendant driving over the posted speed limit.

The Committee majority also favored this approach because it permits simplifying the instructions in a manner that is likely to minimize jury confusion. A jury should, the Committee concluded, be given—in relatively general terms—the legal context of the issue the jury is asked to address. But the jury need not be given complicated, confusing, and perhaps detracting definitions of some legal terms. A focus on the question of disputed historical fact makes such explanatory elaboration unnecessary.

CPJC 8.6, for example, tells the jury that a traffic stop requires reasonable suspicion. It does not, however, give the jury a general and abstract definition of that term. Rather, it conveys to the jury the trial judge's determination that preceded the jury's consideration—that the required reasonable suspicion existed in this case if, but only if, the state proved the officer reasonably believed he had clocked the defendant driving at a speed exceeding the posted speed limit. This is really all the jury has to know.

The Committee was concerned that going further and giving the jury a general and abstract definition of "reasonable suspicion" or "probable cause" would lead jurors to go beyond their proper task and attempt to address for themselves what they believed reasonable suspicion meant or should mean in the specific factual situation.

In many situations, the Committee believed, the instructions need not give the jury a detailed explanation of the definition of the offenses on which the officer took action. CPJC 8.6, therefore, does not define in abstract terms the law of speeding. CPJC 8.7 does not define in abstract terms the law concerning the need for a signal before turning a vehicle.

In some situations, however, providing juries with the necessary background may require such an abstract presentation of that law. This is more likely to be the case where the issue is the propriety of an arrest. Thus CPJC 8.9—involving an arrest for disorderly conduct—does include an abstract presentation of those portions of the disorderly conduct statute invoked by the state's theory that the arrest was a proper one. Similarly, CPJC 8.10 sets out the applicable portions of the Department of Public Safety rules addressing the procedure for conducting breath alcohol testing.

The Committee was unaware of any firm authority on whether the requirement of jury unanimity applies to determinations that the state has proved evidence was obtained in compliance with law. Traditionally, Texas courts appear to have assumed this is the case. In any event, the case law offers no authoritative alternative to unanimity. Thus the Committee's proposed instructions tell jurors that they must all agree that the state has met its burden.

As is discussed in CPJC 8.4, trial judges may, in some cases, properly determine that if the challenged evidence cannot be considered by the jury, the remaining evidence is not sufficient to support a conviction. In these cases, the instructions may tell the jury that if the state has not met its burden of proof, the defendant should be found "not guilty." Each instruction contains alternatives; which alternative should be used depends on whether the trial judge has made such a determination.

CPJC 8.6 Instruction—Exclusionary Rules—Evidence Obtained as Result of Traffic Stop for Speeding

[Insert instructions for underlying offense.]

Disregard of Evidence If Unlawfully Obtained

You have heard evidence obtained as a result of a traffic stop and detention of [*name of defendant*] by [*name of officer*]. Specifically, you have heard [*insert description of evidence at issue, e.g.*, testimony that [*name of officer*], during that stop, discovered cocaine in the vehicle driven by [*name of defendant*]].

You may consider this evidence only if you resolve a preliminary question in favor of the state.

No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the state of Texas, or of the Constitution or laws of the United States of America, shall be used against the accused on the trial of any criminal case.

The state must prove, beyond a reasonable doubt, that the evidence was not obtained in violation of the law.

A police officer may, under the law, stop and detain a motorist without a warrant when the officer has reasonable suspicion that the motorist has committed a criminal offense, including a traffic offense.

A police officer who reasonably believes he has clocked a motorist driving at a speed exceeding the posted speed limit has reasonable suspicion that the motorist has committed the criminal offense of driving at a speed that is not reasonable or prudent.

Before you may consider the evidence obtained as a result of [*name of officer*]'s stop and detention of [*name of defendant*], you must all agree that the state has proven, beyond a reasonable doubt, that [*insert description of fact to be proved, e.g.*, [*name of officer*] reasonably believed he had clocked the defendant driving at a speed greater than 55 miles per hour on a portion of the highway with a posted speed limit of 55 miles per hour immediately before [*name of officer*] stopped him].

If you find that fact beyond a reasonable doubt, then you may consider all of the evidence obtained as a result of [*name of officer*]'s stop and detention of the defendant.

If you do not find that fact beyond a reasonable doubt, then you will disregard all evidence obtained as a result of [*name of officer*]'s stop and detention of the defendant [*include if the remaining evidence is not sufficient to support a conviction*: and you will find [*name of defendant*] "not guilty"].

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

This instruction is based on the facts in *Madden v. State*, 242 S.W.3d 504 (Tex. Crim. App. 2007), in which jury submission was appropriate because there was conflicting evidence on whether the officer did in fact clock the defendant driving at a speed exceeding the posted speed limit of fifty-five miles per hour.

CPJC 8.7 Instruction—Exclusionary Rules—Evidence Obtained as Result of Traffic Stop for Failure to Signal Turn

[Insert instructions for underlying offense.]

Disregard of Evidence If Unlawfully Obtained

You have heard evidence obtained as a result of a traffic stop and detention of [*name of defendant*] by [*name of officer*]. Specifically, you have heard [*insert description of evidence at issue, e.g.*, testimony that [*name of officer*], during that stop, discovered cocaine in the vehicle driven by [*name of defendant*]].

You may consider this evidence only if you resolve a preliminary question in favor of the state.

No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the state of Texas, or of the Constitution or laws of the United States of America, shall be used against the accused on the trial of any criminal case.

The state must prove, beyond a reasonable doubt, that this evidence was not obtained in violation of the law.

A police officer may, under the law, stop and detain a motorist without a warrant when the officer has reasonable suspicion that the motorist has committed a criminal offense, including a traffic offense.

An officer has reasonable suspicion to believe a traffic offense has been committed if the officer is aware of facts that would lead a reasonable law enforcement officer to suspect that a person driving a vehicle turned without signaling continuously for the last 100 feet of movement of the car before the turn.

Before you may consider any of the evidence that was obtained as a result of [*name of officer*]'s stop and detention of [*name of defendant*], you must all agree that the state has proven, beyond a reasonable doubt, that [*insert description of fact to be proved, e.g.*, [*name of officer*] reasonably believed he had seen the defendant drive a vehicle and make a turn without signaling the turn continuously for the 100 feet of movement before the turn].

If you find that fact beyond a reasonable doubt, then you may consider all of the evidence obtained as a result of [*name of officer*]'s stop and detention of the defendant.

If you do not find that fact beyond a reasonable doubt, then you will disregard all evidence obtained as a result of [*name of officer*]'s stop and detention of the defendant [*include if the remaining evidence is not sufficient to support a conviction*: and you will find [*name of defendant*] "not guilty"].

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

This instruction is based on the facts in *Mills v. State*, 296 S.W.3d 843 (Tex. App.—Austin 2009, pet. ref'd), in which jury submission was justified by a conflict in the evidence as to whether the officer could, and therefore did, see the vehicle as it traveled the 100 feet before the intersection at which it turned and that the officer observed that the driver did not signal the turn. This instruction involves a stop for violating Tex. Transp. Code § 545.104.

CPJC 8.8 Instruction—Exclusionary Rules—Evidence Obtained as Result of Extending Traffic Stop for Dog Sniff

[Insert instructions for underlying offense.]

Disregard of Evidence If Unlawfully Obtained

You have heard evidence obtained as a result of the continuation of the detention of [*name of defendant*] after a traffic stop by [*name of officer*]. Specifically, you have heard [*insert description of evidence at issue, e.g.*, testimony that [*name of officer*], during the continued detention of [*name of defendant*], discovered cocaine in the vehicle driven by [*name of defendant*]].

You may consider this evidence only if you resolve a preliminary question in favor of the state.

No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the state of Texas, or of the Constitution or laws of the United States of America, shall be considered against the accused on the trial of any criminal case.

The state must prove, beyond a reasonable doubt, that this evidence was not obtained in violation of the law.

An officer who makes a proper traffic stop of a driver may detain the driver pursuant to that traffic stop only for as long as is necessary to diligently complete the purposes of the traffic stop. The officer may detain the driver further only if the officer has reasonable suspicion that the driver is engaged in criminal activity other than the traffic violation.

If [*name of officer*] reasonably believed [*insert description of conduct, e.g.*, he had observed [*name of defendant*]'s hands shake and his face twitch, [*name of officer*] had the reasonable suspicion necessary to permit him to extend the detention of the defendant].

Before you may consider any of the evidence that was obtained as a result of [*name of officer*]'s continued detention of the defendant, you must find the state has proved, beyond a reasonable doubt, that [*insert description of fact to be proved, e.g.*, [*name of officer*] reasonably believed he had observed [*name of defendant*]'s hands shake and his face twitch].

If you find that fact beyond a reasonable doubt, then you may consider all of the evidence obtained as a result of [*name of officer*]'s continued detention of [*name of defendant*].

If you do not find that fact beyond a reasonable doubt, then you will disregard all evidence obtained as a result of [*name of officer*]'s continued detention of [*name of defendant*] [*include if the remaining evidence is not sufficient to support a conviction*: and you will find [*name of defendant*] "not guilty"].

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

This instruction is based on the facts in *Madden v. State*, 242 S.W.3d 504 (Tex. Crim. App. 2007), in which there was testimony that during the traffic stop portion of the detention, defendant Madden's hands did not shake and his face did not twitch, and reasonable suspicion necessary to extend the stop existed only if there were facts from which a reasonable officer could conclude Madden was unusually nervous. Specifically, jury submission was justified by a conflict in the evidence as to whether the officer did observe Madden's hands shake and face twitch.

CPJC 8.9 Instruction—Exclusionary Rules—Evidence Obtained as Result of Arrest for Disorderly Conduct

[Insert instructions for underlying offense.]

Disregard of Evidence If Unlawfully Obtained

You have heard evidence obtained as a result of an arrest of [*name of defendant*] by [*name of officer*] for disorderly conduct. Specifically, you have heard [*insert description of evidence at issue, e.g.*, testimony that as a result of that arrest, law enforcement officers found a handgun in [*name of defendant*]'s possession].

You may consider this evidence only if you resolve a preliminary question in favor of the state.

No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the state of Texas, or of the Constitution or laws of the United States of America, shall be used against the accused on the trial of any criminal case.

The state must prove, beyond a reasonable doubt, that the evidence was not obtained in violation of the law.

A police officer may, without an arrest warrant, arrest a person when the officer has probable cause to believe that the person has committed the offense of disorderly conduct within the officer's presence or view. An officer who makes an arrest may, incident to that arrest, search the person of the individual arrested.

A person commits the offense of disorderly conduct if the person intentionally or knowingly uses abusive, indecent, profane, or vulgar language in a public place, and that language by its very utterance tends to incite an immediate breach of the peace.

[*Name of officer*] had probable cause permitting him to arrest [*name of defendant*] if [*name of officer*] reasonably believed both—

1. [*insert specific allegations of disorderly conduct, e.g.*, [*name of defendant*] was shouting obscenities at him as he talked with [*name of defendant*] in the bank parking lot]; and

2. [*name of defendant*]'s [*insert specific allegations of disorderly conduct, e.g.*, shouting] tended to incite an immediate breach of the peace.

Before you may consider any of the evidence that was obtained as a result of an arrest of [*name of defendant*] by [*name of officer*] for disorderly conduct, you must all agree that the state has proved, beyond a reasonable doubt, that—

1. [*name of officer*] reasonably believed that [*insert specific allegations of disorderly conduct, e.g.*, [*name of defendant*] was shouting obscenities at him as he talked with [*name of defendant*] in the bank parking lot]; and

2. [*name of officer*] reasonably believed that [*name of defendant*]'s [*insert specific allegations of disorderly conduct, e.g.*, shouting] tended to incite an immediate breach of the peace.

If you find both elements 1 and 2 beyond a reasonable doubt, then you may consider all of the evidence obtained as a result of the arrest of [*name of defendant*] by [*name of officer*] for disorderly conduct.

If you do not find both elements 1 and 2 beyond a reasonable doubt, then you will disregard all evidence obtained as a result of the arrest of [*name of defendant*] by [*name of officer*] for disorderly conduct [*include if the remaining evidence is not sufficient to support a conviction*: and you will find [*name of defendant*] "not guilty"].

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

This instruction is based on the facts in *Washington v. State*, 663 S.W.2d 506 (Tex. App.—Houston [1st Dist.] 1983, pet. ref'd), in which jury submission was justified by a conflict in the evidence as to whether during a discussion with the arresting police officer, the defendant became agitated and shouted obscenities at the officer. In *Washington*, the gun was found in an automobile. This instruction assumes it was found on his person to avoid problems posed by the search of a vehicle incident to an arrest. The arrest was supported as one under Tex. Penal Code § 42.01.

CPJC 8.10 Instruction—Exclusionary Rules—Evidence Obtained as Result of Implied Consent Intoxilyzer Test

[Insert instructions for underlying offense.]

Disregard of Evidence If Unlawfully Obtained

You have heard evidence that was obtained as a result of the taking and analysis of a breath sample from [*name of defendant*] by [*name of officer*]. Specifically, you have heard [*insert description of evidence at issue, e.g.*, testimony that the breath sample taken from [*name of defendant*] indicated [*name of defendant*] had an alcohol concentration of 0.17].

You may consider this evidence only if you resolve a preliminary question in favor of the state.

No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the state of Texas, or of the Constitution or laws of the United States of America, shall be used against the accused on the trial of any criminal case.

The state must prove, beyond a reasonable doubt, that the evidence offered in this case was not obtained in violation of the law.

Law enforcement authorities may take a breath specimen of a person arrested for driving while intoxicated and may analyze that specimen by use of an intoxilyzer. The law imposes two requirements: First, the intoxilyzer operator must remain in the presence of the person taking the breath test at least fifteen minutes before the test. Second, the intoxilyzer operator must exercise reasonable care to ensure that the person taking the test does not place any substances in the mouth. During this period, however, the intoxilyzer operator need not conduct direct observation of the person taking the test.

Before you may consider evidence obtained as a result of a breath test taken by [*name of defendant*], you must all agree that the state has proved, beyond a reasonable doubt, that—

1. [*name of officer*] remained in the presence of [*name of defendant*] for at least fifteen minutes before he administered the breath test to [*name of defendant*]; and

2. [*name of officer*] exercised reasonable care to ensure that [*name of defendant*] did not place any substances in his mouth.

If you find both elements 1 and 2 beyond a reasonable doubt, then you may consider the breath test results as part of the evidence in this case.

If you do not find both elements 1 and 2 beyond a reasonable doubt, then you will disregard all evidence of the breath test and its results.

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

This instruction is based on the facts in *Atkinson v. State*, 923 S.W.2d 21 (Tex. Crim. App. 1996), in which jury issues were raised by conflicts in the evidence as to whether the officer complied with each of the requirements set out in the instructions requested.

Section 724.016 of the Texas Transportation Code provides:

> (a) A breath specimen taken at the request or order of a peace officer must be taken and analyzed under rules of the department by an individual possessing a certificate issued by the department certifying that the individual is qualified to perform the analysis.
>
> (b) The department may:
>
> (1) adopt rules approving satisfactory analytical methods; and
>
> (2) ascertain the qualifications of an individual to perform the analysis.
>
> (c) The department may revoke a certificate for cause.

Tex. Transp. Code § 724.016.

Atkinson makes clear that this statute incorporates the rules of the Department of Public Safety. Further, a specimen taken in violation of those rules renders the testing results inadmissible under article 38.23(a) of the Texas Code of Criminal Procedure. In a proper case, a defendant is entitled to jury submission of whether failure to follow the department rules requires the jury to disregard the results. The department rule implemented by the instruction is 37 Tex. Admin. Code § 19.4(c)(1).

CHAPTER 9 OUT-OF-COURT STATEMENTS

PART I. GENERAL MATTERS

PART II. STATE LAW VOLUNTARINESS ISSUES

PART III. WARNINGS, WAIVERS, AND RELATED MATTERS

PART IV. WRITTEN STATEMENTS

PART V. ORAL RECORDED STATEMENTS

PART VI. FEDERAL DUE-PROCESS VOLUNTARINESS ISSUES

I. General Matters

CPJC 9.1 Jury Submission of Issues Relating to Out-of-Court Statements

Jury submission of issues relating to out-of-court statements by the defendant is governed by articles 38.21, 38.22, and 38.23 of the Texas Code of Criminal Procedure, as construed by two recent decisions of the court of criminal appeals: *Oursbourn v. State*, 259 S.W.3d 159 (Tex. Crim. App. 2008) and *Contreras v. State*, 312 S.W.3d 566 (Tex. Crim. App. 2010). Tex. Code Crim. Proc. art. 38.21–.23.

Oursbourn indicated that there are three types of jury submissions, distinguished by the source of the possible legal bar to the jury's consideration of the state's evidence that the defendant admitted incriminating facts. These three types of submissions are (1) a claim that the statement is involuntary under Texas state law; (2) a claim that the statement is tainted by a lack of the warning or waiver required by article 38.22(b) or (c) of the Texas Code of Criminal Procedure; and (3) a claim that the statement is involuntary under federal due-process standards.

"General" and "Specific" Instructions. *Oursbourn* distinguished between "general" and "specific" instructions. Instructions under sections 6 or 7 of article 38.22 of the Texas Code of Criminal Procedure are to be general ones, while normal due-process instructions under article 38.23(a) are to be specific ones. Tex. Code Crim. Proc. art. 38.22–.23; *Oursbourn*, 259 S.W.3d at 174. A general instruction is one that sets out a general legal standard and poses for the jury the question of whether that standard has been met. A specific instruction, in contrast, focuses the jury's attention on whether a specific factual matter has been proved. It does not focus the jury's attention on applying the legal standard making the factual issue determinative.

Matters Not for Jury Submission. Jury submission is appropriate only when there is authority in statutory or case law for submission of the matter at issue. Several matters are clearly ones not appropriate for jury submission.

Compliance with Miranda Requirements. *Oursbourn* in some places seemed to equate or at least relate the requirements of federal Fifth Amendment law as construed by *Miranda v. Arizona*, 384 U.S. 436 (1966), and its progeny and the requirements of Texas Code of Criminal Procedure article 38.22. *Oursbourn*, 259 S.W.3d at 169 ("A defendant may claim that his statement was not freely and voluntarily made and thus may not be used as evidence against him under several different theories: . . . (2) *Miranda v. Arizona* as expanded in Article 38.22, §§ 2 and 3 (the Texas confession statute). . . .").

The court of criminal appeals has held, however, that a statement tainted by a violation of *Miranda* requirements is not obtained in violation of the Constitution. Thus exclusion is not required by article 38.23(a). *Baker v. State*, 956 S.W.2d 19, 23–24

(Tex. Crim. App. 1997); *Contreras*, 312 S.W.3d at 580–81. *Contreras* specifically commented:

> [B]ecause *Miranda* claims do not fall within the ambit of article 38.23, a defendant is not entitled to a jury instruction under that statute. Article 38.22, not article 38.23, is the appropriate vehicle for obtaining a jury instruction regarding a purported violation of *Miranda*, to the extent such a vehicle is available.

Contreras, 312 S.W.3d at 583.

In *Contreras*, the defendant "received instructions regarding the administration of warnings and waiver of rights, including the right to counsel, under article 38.22." *Contreras*, 312 S.W.3d at 580. He was held not entitled to an additional instruction under article 38.23 that would have required the jury to disregard his confession if it determined that he had requested an attorney but interrogation continued nevertheless.

The bottom line is that jury submission is only available on the basis of facts showing noncompliance with the requirements of article 38.22. Evidence that officers failed to give warnings required by *Miranda* but not by article 38.22 cannot require jury submission.

Exceptions to Oral Statement Rule. Whether the jury may or should consider evidence that a defendant, as a result of custodial interrogation, made an oral self-incriminating statement, given the oral nature of that statement, is not a matter for jury submission. *See Moon v. State*, 607 S.W.2d 569, 572 (Tex. Crim. App. 1980) (whether oral statement has been partially corroborated under section 3(c) of article 38.22 is not for the jury). If evidence of an oral statement comes in under section 3(a)(1) of article 38.22 of the Texas Code of Criminal Procedure because the statement was recorded, the trial judge may in a proper case submit to the jury whether the defendant was warned of his rights and voluntarily waived those rights as required by section 2(b) of article 38.22. Tex. Code Crim. Proc. art. 38.22, § 3(b). If a statement is admissible under section 3(c) of article 38.22, the only warnings and waivers required are those mandated by *Miranda*. *Robertson v. State*, 871 S.W.2d 701, 714 (Tex. Crim. App. 1993) ("The only warnings which must precede an oral confession admitted under section 3(c) are the *Miranda* warnings."). The same is true if the statement is admitted under the res gestae exceptions. These requirements cannot generate jury submission.

Statutory Requirement for Recordings of Oral Statements. When evidence of an oral statement is held admissible because the trial judge finds the statement meets section 3(a)'s requirements for a recorded oral statement, what issues might be appropriate for jury consideration? *Maldonado v. State*, 998 S.W.2d 239, 246 (Tex. Crim. App. 1999), held no jury instruction was appropriate concerning whether the recording was accurate and had not been altered as required by section 3(a)(3) of article 38.22. However, *Maldonado* may have addressed only an instruction under article 38.23(a) and thus left open whether section 7 of article 38.22 may permit a jury instruction.

Most likely, however, the court of criminal appeals would apply *Maldonado*'s reasoning to an argument for submission based on section 7 of article 38.22. Thus a defendant has no right to jury submission of whether—

1. the recording device was capable of making an accurate recording (as required by Tex. Code Crim. Proc. art. 38.22, § 3(a)(3));

2. the operator was competent (as required by Tex. Code Crim. Proc. art. 38.22, § 3(a)(3));

3. the recording is accurate and has not been altered (as required by Tex. Code Crim. Proc. art. 38.22, § 3(a)(3));

4. all voices on the recording are identified (as required by Tex. Code Crim. Proc. art. 38.22, § 3(a)(4)); or

5. the attorney representing the defendant is timely provided with a true, complete, and accurate copy of all recordings of the defendant made under article 38.22 (as required by Tex. Code Crim. Proc. art. 38.22, § 3(a)(5)).

See Tex. Code Crim. Proc. art. 38.22, §§ 3(a), 7.

Unanimity. The Committee was unaware of case law addressing whether juries must be unanimous regarding whether the state has proved what it needs to establish in order to permit the juries to consider out-of-court statements. Traditionally, instructions have often told jurors they must agree this is the case, apparently pursuant to a general assumption that jurors must be unanimous on most matters submitted to them. The instructions in this chapter therefore are designed to convey to jurors they must be unanimous on statement-related matters. This is done by telling jurors they must all agree on the critical matter.

CPJC 9.2 The Corpus Delicti Rule

Committee's Position. The corpus delicti rule requires independent evidence of a crime's commission besides a defendant's admission to the offense before that statement can be used to convict him. Critics of this common law rule argue it is both under- and over-inclusive. *Miller v. State*, 457 S.W.3d 919, 924–25 (Tex. Crim. App. 2015). The federal courts and several other states have abolished the doctrine in favor of a "trustworthiness standard." *Miller*, 457 S.W.3d at 925, 927 (citing *Opper v. United States*, 348 U.S. 84, 93 (1954), *Smith v. United States*, 348 U.S. 147, 156–57 (1954), *United States v. Calderon*, 348 U.S. 160, 167 (1954)). Nevertheless, the doctrine remains the law in Texas. *Miller*, 457 S.W.3d at 926.

Whether a jury instruction is appropriate for this judge-made rule of evidentiary sufficiency is another question. The Committee concluded that a judge rarely errs in refusing to give the instruction and that trial courts should usually be advised against giving it. Despite these concerns, the Committee felt that a pattern corpus delicti instruction would help guide trial courts that wished to give it in a particular case.

While some members initially favored a comprehensive instruction specific to the offense that would operate as an additional application paragraph and instruct the jury on what elements formed the corpus delicti for that offense, the Committee ultimately decided that—if a trial judge persisted in giving a corpus delicti instruction—a simpler instruction like the following was preferable:

> A person cannot be convicted of a crime based only on his uncorroborated, out-of-court statements. You may only rely on the defendant's out-of-court statements if you find there is other evidence which, considered alone or with these statements, shows that the crime charged occurred. This other evidence does not have to show that the defendant was the one who committed the offense. But if you do not believe that any evidence other than the defendant's out-of-court statements shows that a [*crime charged, e.g.*, murder] occurred, you will find the defendant "not guilty."

What Kind of Statements Require Corroboration. The corpus delicti rule only applies when a defendant has made an out-of-court statement. *Carrizales v. State*, 414 S.W.3d 737, 743 (Tex. Crim. App. 2013) (holding corpus delicti rule does not apply when no defendant statement at issue). The rule does apply to both full confessions and other defendant admissions. *See Franks v. State*, 90 S.W.3d 771 (Tex. App.—Fort Worth 2002, pet. ref'd); *Bradford v. State*, 515 S.W.3d 433, 440 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd) (citing cases).

The corpus delicti rule does not apply to in-court confessions. *Martin v. State*, 3 S.W.2d 90, 90 (Tex. Crim. App. 1927). Nor does the rule apply to extraneous offenses

introduced at a trial's punishment stage. *Bible v. State*, 162 S.W.3d 234, 246–47 (Tex. Crim. App. 2005).

Analyses of Appellate Opinions. The Committee located two lines of precedent about when a corpus delicti instruction should be given. The first group of cases held that a trial court does not err if it refuses to instruct a jury on the corpus delicti rule when it is established by other evidence. *Baldree v. State*, 784 S.W.2d 676, 686–87 (Tex. Crim. App. 1989); *Willard v. State*, 11 S.W. 453 (Tex. Crim. App. 1889). The second group of cases reversed for failure to give the instruction, but without any reasoning why a jury instruction would best remedy the evidentiary insufficiency. *Johnson v. State*, 36 S.W.2d 748, 750 (Tex. Crim. App. 1931); *Silva v. State*, 278 S.W. 216 (Tex. Crim. App. 1925); *Dunlap v. State*, 98 S.W. 845, 846 (Tex. Crim. App. 1906).

In 1990, the court of criminal appeals stated in a footnote in *Gribble v. State*, 808 S.W.2d 65, 72 n.15 (Tex. Crim. App. 1990), that "when evidence independent of the confession *is* alone sufficient to prove corpus delicti, the jury need not even be instructed that an extrajudicial confession must be corroborated." The court observed that this principle likely began as "an isolated holding of harmlessness based on overwhelming evidence," and that over time, it "transformed . . . into a general doctrine of no error based on the sufficiency of evidence." *Gribble*, 808 S.W.2d at 72 n.15. Appellate courts continue to apply the rule that sufficient evidence of the corpus delicti other than the defendant's extrajudicial statement obviates the need for a jury instruction. *See, e.g.*, *Lara v. State*, 487 S.W.3d 244, 249 (Tex. App.—El Paso 2015, pet. ref'd); *Aguilera v. State*, 425 S.W.3d 448, 458 (Tex. App.—Houston [1st Dist.] 2011, no pet.).

II. State Law Voluntariness Issues

CPJC 9.3 When Submission Is Required under Texas Code of Criminal Procedure Article 38.22, Section 6

Evidence before the jury may raise an issue as to whether a statement is voluntary as required by Texas law, embodied in article 38.21 of the Texas Code of Criminal Procedure and perhaps also in Texas constitutional law. Jury submission of such an issue is directed and governed by Tex. Code Crim. Proc. art. 38.22, § 6.

A claim that a statement is involuntary under Texas law does not have to be based on a contention that the involuntariness was due to law enforcement overreaching, although, of course, it may. It may also involve "'sweeping inquiries into the state of mind of a criminal defendant who has confessed' . . . that are not of themselves relevant to [federal] due process claims." *Oursbourn v. State*, 259 S.W.3d 159, 172 (Tex. Crim. App. 2008) (quoting *Colorado v. Connelly*, 479 U.S. 157 (1986)).

Jury submission is not limited to situations in which the evidence before the jury raises a contested issue of historical fact. Rather, if the defense identifies evidence before the jury from which a reasonable jury could find the statement was not voluntarily made, submission is required. *Vasquez v. State*, 225 S.W.3d 541, 544–45 (Tex. Crim. App. 2007).

CPJC 9.4 Content of Instruction Regarding Voluntariness

The apparent general nature of a voluntariness instruction raises some question whether that general approach should be modified if specific aspects of state voluntariness law are invoked.

Oursbourn v. State, 259 S.W.3d 159 (Tex. Crim. App. 2008), commented concerning the content of an instruction on this type of issue:

> [S]ection 6 expressly dictates the content of that instruction to be as follows: "unless the jury believes beyond a reasonable doubt that the statement was voluntarily made, the jury shall not consider such statement for any purpose nor any evidence obtained as a result thereof."

Oursbourn, 259 S.W.3d at 175. *Oursbourn* also made clear the instruction is to be general rather than specific.

Apparently this type of instruction need not, and seemingly must not, address specific considerations bearing on voluntariness. In *Rocha v. State*, 16 S.W.3d 1 (Tex. Crim. App. 2000), for example, the court of criminal appeals held the trial court properly refused to add the following to a general statement of voluntariness in the jury instructions:

> Now, if you find from the evidence or you have a reasonable doubt at the time of the statement of the defendant such statement there was to Officer Avila, the defendant was ill, was under medication or otherwise reduced to a condition, physical and mental impairment such as to render such admission, if any, not wholly voluntary, then you will completely disregard such admission as evidence for any purpose.

Rocha, 16 S.W.3d at 19–20.

The court explained:

> [The] requested instruction did constitute an impermissible comment on the weight of the evidence. [The] instruction focused on illness and medication as factors that may render his confession involuntary. . . . An instruction that focuses on a particular factor that may render a statement involuntary is an impermissible comment on the weight of the evidence.

Rocha, 16 S.W.3d at 19–20.

Rocha was decided before *Oursbourn*. Nothing in *Oursbourn*, however, casts doubt on the continued vitality of *Rocha*'s analysis. *See also Gallo v. State*, 239 S.W.3d 757, 769 (Tex. Crim. App. 2007) ("The trial court instructed the jury in compliance with Articles 38.21, 38.22, and 38.23. It would have been improper for the trial court to include the issue of mental retardation in its voluntariness instruction. An instruction

that focuses on a particular factor that may render a statement involuntary is an impermissible comment on the weight of the evidence.").

Special Problem—Promises. Texas law—apparently Texas voluntariness law—has long set out a specific analysis for determining when a promise made to a suspect will render a confession inadmissible. A promise will render a confession "invalid" and inadmissible if, but only if, it is "(1) positive, (2) made or sanctioned by someone in authority, and (3) of such an influential nature that it would cause a defendant to speak untruthfully." *Monge v. State*, 315 S.W.3d 35, 42–43 (Tex. Crim. App. 2010) (quoting *Henderson v. State*, 962 S.W.2d 544, 564 (Tex. Crim. App. 1997)).

Should a Texas law voluntariness instruction ever address promises as a basis for a contention of state law involuntariness? If an instruction should address this, should it specifically inform the jury of the analysis summarized in *Monge*? Traditional instructions on statements often mentioned promises. *E.g., Cross v. State*, 101 S.W. 213, 214 (Tex. Crim. App. 1907) ("[T]he [trial] court distinctly told the jury that the statements must have been made voluntarily, and without being induced by any threats or promise of assistance, before same could be used and considered by the jury against appellant.").

Fisher v. State, 379 S.W.2d 900 (Tex. Crim. App. 1964), perhaps the leading early promise case, indicates at least some instructions on promise law are required. *Fisher* held the trial court erred in failing to give the requested instruction or "one of similar import." The requested instruction was:

> You are further instructed that if you believe from the evidence, or have a reasonable doubt thereof, that prior to the making of the alleged confession [the employer] told the defendant or promised him, the said defendant, that [the employer] would not press charges against the defendant, and such promise or statement was operating on the mind of the defendant at the time said confession was made, and the defendant was induced thereby to make the confession, then the same should be entirely disregarded by the jury and not be considered against the defendant.

Fisher, 379 S.W.2d at 901. *See also Blake v. State*, 379 S.W.2d 899, 900 (Tex. Crim. App. 1964) (error not to instruct jury "that the oral confession of the appellant to his employer could not be considered if induced by his employer's promise or threat"); *Cordes v. State*, 257 S.W.2d 704, 705 (Tex. Crim. App. 1953) (instruction error because it did not make clear promise of help alone would make confession involuntary).

In contrast, *Burdine v. State*, 719 S.W.2d 309 (Tex. Crim. App. 1986), rejected Burdine's complaint that the trial court erred by not submitting the issue of whether a statement was obtained through a promise. The jury was instructed:

> You are instructed that under our law a confession of a defendant made while the defendant was in jail or in custody of an officer and while under

> interrogation shall be admissible in evidence if it appears that the same was freely and voluntarily made without compulsion or persuasion.

Burdine, 719 S.W.2d at 320.

"[T]he jury was properly charged on the issue of voluntariness," the court held, "and no error in the trial judge's instructions has been shown." *Burdine*, 719 S.W.2d at 320. Alternatively, it noted the lack of a trial objection and added: "Assuming, *arguendo*, that the charge on voluntariness was erroneous, the error was clearly insufficient to meet the 'egregious harm' standard under *Almanza*." *Burdine*, 719 S.W.2d at 320 n.8.

The Committee concluded that current law is unclear on whether a Texas law voluntariness instruction can or should be specific when the evidence before the jury raises a question of whether it was stimulated by a promise. It decided to offer no instruction calling the jury's attention to this aspect of state law voluntariness. A trial judge who believes such specificity is permissible and appropriate could easily add a paragraph telling the jury that a statement is involuntary if it was stimulated by a promise meeting the three requirements set out in the case law.

Burden of Proof. Under section 6 of article 38.22 of the Texas Code of Criminal Procedure, the burden of proof is on the state, and it must prove the statement is voluntary by proof beyond a reasonable doubt.

"Fruits" of an Involuntary Statement. Section 6 of article 38.22 of the Texas Code of Criminal Procedure makes clear that if a defendant has challenged the propriety of the jury's consideration of evidence the defendant contends was acquired as a result of an involuntary statement, the jury should be instructed on this. Specifically, the jury should be told that if it finds the state has not proven the challenged statement is voluntary, the jury "shall not consider such statement for any purpose nor any evidence obtained as a result thereof." Tex. Code Crim. Proc. art. 38.22, § 6. *See Morales v. State*, 427 S.W.2d 51, 55 (Tex. Crim. App. 1968) ("[T]he [trial] court should have responded to appellant's objection to the charge that the court had failed to instruct the jury to disregard 'any evidence obtained as a result thereof' if the jury found the confessions were not voluntarily made.").

CPJC 9.5 and CPJC 9.6 are two versions of a state law voluntariness instruction. The first is appropriate for use when the defendant challenges only the jury's ability to consider the statement itself. The second is for use where the defendant also challenges the jury's ability to consider other evidence the defendant contends is "fruit" of an involuntary statement.

If the jury is instructed concerning evidence the defendant claims was obtained as a result of an involuntary statement, the facts may raise questions regarding independent source, attenuation of taint, or other matters sometimes raised when exclusionary rule issues are raised before the judge. In such jury submission situations, the instructions may need to address these matters.

CPJC 9.5 Instruction—Texas Law Voluntariness

[Insert instructions for underlying offense.]

Voluntariness of Statement

You have heard evidence that the defendant made a statement [*describe statement, e.g.*, to Detective [*name*] on [*date*]]. If you find the defendant did make the statement, you may consider that statement against the defendant only if you resolve a preliminary question in favor of the state.

A statement of an accused may be considered against the accused only if the statement was freely and voluntarily made without compulsion or persuasion.

Therefore, you may consider any statement you believe the defendant made only if you all agree the state has proved, beyond a reasonable doubt, that the defendant made the statement freely and voluntarily without compulsion or persuasion.

Unless you find the state has proved, beyond a reasonable doubt, that the statement [*describe statement, e.g.*, to Detective [*name*] on [*date*]] was in fact made and that it was made freely and voluntarily, you must not consider the statement for any purpose.

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

The general statutory requirement that a statement of an accused may be used in evidence against him only if freely and voluntarily made is set out in Tex. Code Crim. Proc. art. 38.21. The submission of jury instructions regarding the voluntariness of out-of-court statements generally is governed by Tex. Code Crim. Proc. art. 38.22, § 6.

CPJC 9.6 Instruction—Texas Law Voluntariness—Fruits of Contested Statement at Issue

[Insert instructions for underlying offense.]

Voluntariness of Statement

You have heard evidence that the defendant made a statement [*describe statement, e.g.*, to Detective [*name*] on [*date*]]. You have also heard testimony that certain evidence—specifically [*describe evidence, e.g.*, a firearm]—was obtained as a result of that statement. If you find the defendant did make the statement, you may consider that statement and any evidence obtained as a result of that statement against the defendant only if you resolve a preliminary question in favor of the state.

A statement of an accused and evidence obtained as a result of such a statement may be considered against the accused only if the statement was freely and voluntarily made without compulsion or persuasion.

Therefore, you may consider any statement you believe the defendant made and any evidence obtained as a result of such a statement only if you first all agree the state has proved, beyond a reasonable doubt, that the defendant made the statement freely and voluntarily without compulsion or persuasion.

Unless you find the state has proved, beyond a reasonable doubt, that the statement [*describe statement, e.g.*, to Detective [*name*] on [*date*]] was in fact made and that it was made freely and voluntarily, you must not consider the statement or [*describe evidence, e.g.*, the firearm] obtained as a result of that statement for any purpose.

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

The general statutory requirement that a statement of an accused may be used in evidence against him only if freely and voluntarily made is set out in Tex. Code Crim. Proc. art. 38.21. The submission of jury instructions regarding the voluntariness of out-of-court statements generally is governed by Tex. Code Crim. Proc. art. 38.22, § 6.

III. Warnings, Waivers, and Related Matters

CPJC 9.7 When Submission Is Required under Texas Code of Criminal Procedure Article 38.22, Section 7

Under *Oursbourn v. State*, 259 S.W.3d 159 (Tex. Crim. App. 2008), a defendant may challenge the jury's ability to consider a statement not on the ground that the statement is involuntary but rather on the basis that it is tainted by law enforcement's failure to comply with the requirements of article 38.22 of the Texas Code of Criminal Procedure. *Oursbourn* stated clearly that an article 38.22, section 7 instruction, like an article 38.23 instruction, is appropriate only if the evidence before the jury presents "a genuine factual dispute." *Oursbourn*, 259 S.W.3d at 176. Thus the less stringent standard used in section 6 cases should *not* be applied.

Does this standard apply if the defendant's challenge is that his waivers were not knowing, intelligent, and voluntary as required by the statute? As discussed in CPJC 9.3, *Vasquez v. State*, 225 S.W.3d 541 (Tex. Crim. App. 2007), does not require a dispute regarding historical facts for submission of a general state law voluntariness question under section 6. Perhaps the rationale of *Vasquez* applies in section 7 cases and gives a defendant a right to jury submission where reasonable persons could differ on whether—on uncontested historical facts—the defendant's waivers were voluntary, knowing, or intelligent. The Committee was unable to predict how this issue would be resolved if it was squarely presented to the court of criminal appeals.

CPJC 9.8 Content of Instruction Regarding Warnings and Waivers

Oursbourn v. State, 259 S.W.3d 159 (Tex. Crim. App. 2008), described a Texas Code of Criminal Procedure article 38.23, section 7 instruction as a "general" one. Thus the instruction should not focus the jury's attention on the disputed factual question that generated jury submission but rather should set out the requirements and ask the jury to determine whether the state has proved those met. *See Oursbourn*, 259 S.W.3d at 173–74.

Burden of Proof. Section 7 of Tex. Code Crim. Proc. art. 38.22 does not specify the burden of proof. This is in contrast to section 6 of article 38.22 and article 38.23, both of which place the burden of proof on the state and specify that it is beyond a reasonable doubt. *See* Tex. Code Crim. Proc. art. 38.22–.23. Case law does not resolve the matter. The Committee concluded the instruction should follow general practice, which is to assume the burden is on the state to prove compliance with the statutory requirements by proof beyond a reasonable doubt.

Custodial Interrogation. The statutory requirements apply only if the statement at issue was the result of custodial interrogation. Should the instructions state explicitly that the jury need not address whether the requirements are met if it concludes the statement was not the result of custodial interrogation? If that is in doubt, must the state prove either custody or interrogation or both were lacking? The Committee concluded an instruction should simply make clear that custodial interrogation is required but not address the matter further.

Evidence Obtained as Result of Statement. Section 6 of Tex. Code Crim. Proc. art. 38.22, as explained earlier, explicitly provides that when the voluntariness of a statement is submitted to the jury, the instructions are to tell the jury that if it does not find the statement voluntary it is not to consider the statement "nor any evidence obtained as a result thereof." *See* Tex. Code Crim. Proc. art. 38.22, § 6. Section 7 of the statute does not contain similar language. Does section 7 somehow incorporate the "fruit of the poisonous tree" aspect of section 6? Most likely not. The section 7 instructions therefore do not include this. *See* Tex. Code Crim. Proc. art. 38.22, § 7.

Possible Right to Counsel Aspects. Should a jury ever be instructed *under article 38.22* of the Texas Code of Criminal Procedure to disregard a statement because law enforcement officers continued questioning the defendant after the defendant requested counsel? *Contreras* commented that "Article 38.22 . . . is the appropriate vehicle for obtaining a jury instruction regarding a purported violation of *Miranda*, to the extent such a vehicle is available." *Contreras v. State*, 312 S.W.3d 566, 583 (Tex. Crim. App. 2010).

In *Contreras*, the evidence before the jury was that the written statement signed by the defendant was the product of a three-hour process. This process included a two-hour oral interview and a one-hour process of writing out, reviewing, and signing the

statement. The defendant testified that during the interview he said, "I need to speak to an attorney," but the officers kept questioning him. An officer testified Contreras did not invoke any of his rights.

Would the defendant in *Contreras* in fact have been entitled to a jury instruction under article 38.22? There seems no basis for him to argue that a violation of Supreme Court *Miranda* case law itself generates an article 38.22 issue. But perhaps article 38.22 adopts as part of Texas statutory law some requirements (other than warning ones) similar or identical to those the Supreme Court *Miranda* case law establishes as part of federal law.

The underlying issues are, first, whether article 38.22 establishes or at least recognizes a state law right to counsel. Second, if so, does that right include *Miranda*-like right aspects such as the right to have custodial interrogation cease if and when a suspect expresses a desire for counsel? The terms of sections 2 and 3 of article 38.22 do not, of course, explicitly recognize anything beyond rights to the warnings. Perhaps, however, it is unlikely the legislature intended to confer a state law right to warnings of certain rights but not those rights themselves. *See* Tex. Code Crim. Proc. art. 38.22, §§ 2, 3.

The literal terms of the statute require warnings only before the making of the statement offered into evidence and not before interrogation that leads to making of the statement. One of the required warnings, however, is "the right to have a lawyer present to advise [the defendant] prior to and during any questioning." *See* Tex. Code Crim. Proc. art. 38.22, § 2(a)(4). Perhaps this language of the statute can be read as embodying *Miranda*-like rights applicable before custodial interrogation. It is very unlikely the legislature intended to create a state law right to be warned of a right to counsel applicable before and during custodial interrogation but not also a state law right to counsel during that activity.

Of course, it is also unlikely the legislature intended to create a state law right to counsel applicable before and during custodial interrogation, but a right to be warned of this only after considerable custodial interrogation yet before making the incriminating statement sought by law enforcement to offer at trial. The warning of the right to counsel during interrogation can only be effective if it is required before interrogation.

It may be that article 38.22 incorporates only *Miranda*-like rights to warnings and waivers. Or it may be that any state law right to counsel during custodial interrogation does not include a *Miranda*-like state law right to have interrogation cease on a request for counsel. The statute might be read, for example, as including a right to have interrogation cease only if the suspect invokes the statutory right to terminate the interview.

If article 38.22 establishes rights beyond those to warnings and waivers, should or must an article 38.22, section 7 instruction set out those rights and require the jury to find the state has proved those rights were respected? Perhaps evidence that officers

continued custodial interrogation after the suspect requested counsel—as a matter of article 38.22 law—goes only to whether any waivers made by the suspect after that time were knowing, intelligent, and voluntary as is required by the statute. If this is the case, the next question is whether this may, should, or must be reflected in the jury instructions.

The Committee was unable to agree on whether article 38.22 would be construed as creating a *Miranda*-like right to counsel that might trigger a defendant's right to a jury instruction on whether that right was violated as, for example, by officers' continued questioning after the defendant invoked the right to the presence and assistance of counsel. Some members of the Committee believed the Committee should not offer instructions based on legal grounds not clearly established. They opposed inclusion of an instruction based on the assumption that article 38.22 creates a *Miranda*-like right to counsel. A majority of the Committee, however, decided the Committee could usefully offer an instruction possibly appropriate to enforce any such statutory right as might exist. Such a draft might stimulate resolution of the underlying question of whether Texas law does in fact establish a right to counsel applicable during custodial interrogation.

Effectiveness of Waivers Required by Article 38.22 of the Texas Code of Criminal Procedure. When the issue is the admissibility of a statement under either section 2 or section 3 of Texas Code of Criminal Procedure article 38.22, the effectiveness of a waiver required by the statute is determined by state law that differs in some degree from the law that determines the effectiveness of waiver required by *Miranda* law. The court of criminal appeals explained:

> In *Oursbourn v. State* . . . we recognized that a claim that a purported waiver of the *statutory* rights enumerated in Article 38.22 is involuntary "need not be predicated on police overreaching" [as is required for a claim that a purported waiver of constitutional *Miranda* rights was involuntary]. Circumstances unattributable to the police that nevertheless adversely impact an accused's ability to resist reasonable police entreaties to waive his statutory rights, such as intoxication, are "factors" in the voluntariness inquiry, though they "are usually not enough, by themselves, to render a statement inadmissible under Article 38.22."

Leza v. State, 351 S.W.3d 344, 352 (Tex. Crim. App. 2011) (quoting *Oursbourn*, 259 S.W.3d 159).

Insofar as jury submission of statement issues requires juries to address whether waivers were in fact voluntary, state law as set out in *Oursbourn* and *Leza* would seem to govern. Whether jury instructions should address this has not been addressed in the case law. The Committee chose not to speculate on whether in such cases the jury instructions should go beyond the general ones that mention but do not elaborate on the need for knowing, intelligent, and voluntary waivers.

CPJC 9.9 Instruction—Possible State Law Right to Counsel During Custodial Interrogation

[Insert instructions for underlying offense.]

Right to Counsel

You have heard evidence that the defendant made a written statement [*describe statement, e.g.*, to Detective [*name*] on [*date*]]. If you find the defendant did make the statement, you may consider that statement against the defendant only if you resolve a preliminary question in favor of the state.

A person who is in custody and is interrogated by law enforcement officers has a right to have a lawyer present to advise him before and during the questioning. If during custodial interrogation the person invokes his right to the assistance of a lawyer, this right to counsel means that no further interrogation by law enforcement officers may take place until a lawyer representing the person is present.

A statement given as a result of custodial interrogation cannot be considered against the person making it if, during that custodial interrogation, the person invoked his right to a lawyer but the officers continued the interrogation while no lawyer representing the person was present to advise him.

Therefore, you may consider any statement you believe the defendant made only if you first all agree the state has proved, beyond a reasonable doubt, either—

1. the defendant did not, during the custodial interrogation that resulted in the statement, indicate he wished the assistance of a lawyer; or

2. after the defendant indicated he wished the assistance of a lawyer, interrogating officers did not continue the interrogation without the presence of a lawyer representing the defendant.

If you do not find the state has proved one of these things beyond a reasonable doubt, you must disregard and not consider for any purpose any statement the defendant may have made.

If you do find the state has proved at least one of these things beyond a reasonable doubt, you may consider the evidence that the defendant made the statement and give that evidence whatever weight you believe appropriate.

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

The general statutory requirement that a statement of an accused may be used in evidence against him only if freely and voluntarily made is set out in Tex. Code Crim. Proc. art. 38.21. The requirement that, before a written statement by an accused is admissible, the accused must receive notice of a state statutory right to counsel and the accused must knowingly, intelligently, and voluntarily waive that right, is found in Tex. Code Crim. Proc. art. 38.22, § 2(a), (b). The submission of jury instructions when the evidence raised an issue of the voluntariness of out-of-court statements generally is governed by Tex. Code Crim. Proc. art. 38.22, § 7.

IV. Written Statements

CPJC 9.10 When Submission of Written Statements Is Required

Section 2 of article 38.22 of the Texas Code of Criminal Procedure addresses the requirements for admissibility of a written statement made by an accused as a result of custodial interrogation. Under section 7 of the statute, these requirements may also be the basis for a jury question regarding whether the jury may consider admitted evidence of such a statement. *See* Tex. Code Crim. Proc. art. 38.22.

The terms of the statute providing for jury submission raise an important initial question concerning submission of such matters. Section 2 of article 38.22 requires warnings and waivers be "shown on the face of the statement." Should the jury instructions require this and only this, that is, that warnings and waivers are "shown" on the face of the document? Or should the instructions—perhaps in addition—require that the jury address whether the state has proved that in fact the required warnings were given and the necessary waivers made? In practice, jury instructions sometimes, and perhaps often, require the state to prove that adequate warnings were in fact given. *Contreras v. State*, 312 S.W.3d 566, 572 (Tex. Crim. App. 2010) (instructions on written statement required jury to find that "prior [to making the statement] the Defendant had been warned by the person to whom the statement was made [of certain specified matters]"). This, of course, goes beyond the literal requirements of the statute.

The Committee concluded that the case law has functionally approved submission in terms of whether warnings were actually given and waivers actually and effectively made. Hence, jury submission should be in such terms. Several considerations support this approach.

First, submission of whether the required matters are simply shown by the document admitted into evidence would often be quite meaningless. It is unlikely the legislature intended for juries to simply scrutinize the faces of admitted statements. Second, as discussed in CPJC 9.15, in the recorded oral statement situation the statute explicitly requires proof that sufficient warnings were actually given and waivers actually and effectively made. It is quite unlikely the legislature intended the state to have to prove actual warnings and waivers in recorded statement cases but not written statement ones.

The Committee therefore followed common practice and provided for submission of whether the state has proved warnings were actually given and waivers actually and effectively made.

Submission is then required as a general matter, only if the evidence establishes a factual dispute. The Committee could not determine whether a somewhat different standard would apply if a defendant challenged the state's evidence that his waivers were knowing, intelligent, and voluntary. Submission of the state law voluntariness of

the statement itself—as discussed in CPJC 9.3—does not require a contested question of historical fact. Would the propriety of submission be determined under this more relaxed standard if the defendant challenged the voluntariness of his waiver of the right to counsel? The Committee was not certain.

CPJC 9.11 Warning by Magistrate

Section 2 of article 38.22(a) of the Texas Code of Criminal Procedure provides for admission of a written statement on the basis of article 15.17 warnings given by a magistrate. Article 15.17(a) provides in part:

> The magistrate shall inform in clear language the person arrested, either in person or through the electronic broadcast system, of the accusation against him and of any affidavit filed therewith, of his right to retain counsel, of his right to remain silent, of his right to have an attorney present during any interview with peace officers or attorneys representing the state, of his right to terminate the interview at any time, and of his right to have an examining trial. The magistrate shall also inform the person arrested of the person's right to request the appointment of counsel if the person cannot afford counsel. The magistrate shall inform the person arrested of the procedures for requesting appointment of counsel.

Tex. Code Crim. Proc. art. 15.17(a).

Section 2 of article 38.22(a) apparently requires a magistrate's warning to include all of these. *See* Tex. Code Crim. Proc. art. 38.22(a).

CPJC 9.12 Instruction—Written Statement with Warning by Person to Whom Statement Was Made

[Insert instructions for underlying offense.]

Admissibility of Written Statement

You have heard evidence that the defendant made a written statement [*describe statement, e.g.*, to Detective [*name*] on [*date*]]. If you find the defendant did make the statement, you may consider that statement against the defendant only if you resolve a preliminary question in favor of the state.

A written statement by a defendant made as a result of custodial interrogation may be considered against the defendant only if both—

1. the accused, before making the statement, received from the person to whom the statement was made a warning that:

    a. he has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial;

    b. any statement he makes may be used as evidence against him in court;

    c. he has the right to have a lawyer present to advise him before and during any questioning;

    d. if he is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him before and during any questioning; and

    e. he has the right to terminate the interview at any time; and

2. the accused, before and during the making of the statement, knowingly, intelligently, and voluntarily waived the rights set out in the warning.

Therefore, you may consider any statement you believe the defendant made only if you first all agree the state has proved, beyond a reasonable doubt, that before making the statement, the defendant was given the warnings set out above, and before and during the making of the statement, the defendant knowingly, intelligently, and voluntarily waived the rights set out in the warning.

If you do not find the state has proved these things beyond a reasonable doubt, you must disregard and not consider for any purpose any statement the defendant may have made.

If you do find the state has proved these things beyond a reasonable doubt, you may consider the evidence that the defendant made the statement and give that evidence whatever weight you believe appropriate.

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

The general statutory requirement that a statement of an accused may be used in evidence against him only if freely and voluntarily made is set out in Tex. Code Crim. Proc. art. 38.21. The requirement that, before a written statement by an accused is admissible, the accused must receive notice of his state statutory rights and the accused must knowingly, intelligently, and voluntarily waive those rights, is found in Tex. Code Crim. Proc. art. 38.22, § 2(a), (b). The submission of jury instructions when the evidence raised an issue of the voluntariness of out-of-court statements generally is governed by Tex. Code Crim. Proc. art. 38.22, § 7.

CPJC 9.13 Instruction—Written Statement with Warning by Magistrate

[Insert instructions for underlying offense.]

Admissibility of Written Statement

You have heard evidence that the defendant made a written statement [*describe statement, e.g.*, to Detective [*name*] on [*date*]]. If you find the defendant did make the statement, you may consider that statement against the defendant only if you resolve a preliminary question in favor of the state.

A written statement by an accused made as a result of custodial interrogation may be considered against the defendant only if both—

1. the accused, before making the statement, received from a magistrate a warning that:
    a. he has been accused of a specified offense and of any affidavit filed accusing him;
    b. he has the right to retain counsel;
    c. he has the right to remain silent;
    d. he has a right to have an attorney present during any interview with peace officers or attorneys representing the state;
    e. he has a right to terminate the interview at any time;
    f. he has a right to have an examining trial; and
    g. he has a right to request the appointment of counsel if he cannot afford counsel by means of a procedure described by the magistrate; and
2. the accused, before and during the making of the statement, knowingly, intelligently, and voluntarily waived the rights set out in the warning.

Therefore, you may consider any statement you believe the defendant made only if you first all agree the state has proved, beyond a reasonable doubt, that before making the statement, the defendant was given the warnings set out above, and before and during the making of the statement, the defendant knowingly, intelligently, and voluntarily waived the rights set out in the warning.

If you do not find the state has proved these things beyond a reasonable doubt, you must disregard and not consider for any purpose any statement the defendant may have made.

If you do find the state has proved these things beyond a reasonable doubt, you may consider the evidence that the defendant made the statement and give that evidence whatever weight you believe appropriate.

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

The general statutory requirement that a statement of an accused may be used in evidence against him only if freely and voluntarily made is set out in Tex. Code Crim. Proc. art. 38.21. The requirement that, before a written statement by an accused is admissible, the accused must receive notice of his state statutory rights and the accused must knowingly, intelligently, and voluntarily waive those rights, is found in Tex. Code Crim. Proc. art. 38.22, § 2(a), (b). The submission of jury instructions when the evidence raised an issue of the voluntariness of out-of-court statements generally is governed by Tex. Code Crim. Proc. art. 38.22, § 7.

V. Oral Recorded Statements

CPJC 9.14 When Submission of Oral Statements Is Required

Despite the numerous statutory requirements applicable to evidence that an accused made an oral self-incriminating statement during custodial interrogation, relatively few of these requirements can generate issues for the jury.

Submission is required, as discussed at CPJC 9.10, only if the evidence establishes a factual dispute.

CPJC 9.15 Content of Instruction Regarding Oral Recorded Statements

Section 3(a) of article 38.22 of the Texas Code of Criminal Procedure explicitly requires for recorded oral statements that warnings have actually been given and waivers made. The proof must show that this actually occurred and that it occurred "during the recording." Tex. Code Crim. Proc. art. 38.22, § 3(a).

CPJC 9.16 Instruction—Warnings and Waiver Required for Recorded Oral Statement

[Insert instructions for underlying offense.]

Admissibility of Oral Statement

You have heard evidence that the defendant made an oral and recorded statement [*describe statement, e.g.*, to Detective [*name*] on [*date*]].

If you find the defendant did make the statement, you may consider that statement against the defendant only if you resolve a preliminary question in favor of the state.

An oral recorded statement by a defendant made as a result of custodial interrogation may be considered against the defendant only if before the statement but during the recording—

1. the defendant was warned that:

   a. he has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial;

   b. any statement he makes may be used as evidence against him in court;

   c. he has the right to have a lawyer present to advise him before and during any questioning;

   d. if he is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him before and during any questioning; and

   e. he has the right to terminate the interview at any time; and

2. the defendant knowingly, intelligently, and voluntarily waived the rights set out in the warning.

Therefore, you may consider any statement [*describe statement, e.g.*, to Detective [*name*] on [*date*]] you believe the defendant made only if you first all agree the state has proved, beyond a reasonable doubt, that before the statement but during the recording the defendant was given the warnings set out above and knowingly, intelligently, and voluntarily waived the rights set out in the warning.

If you do not find the state has proved these things beyond a reasonable doubt, you must disregard and not consider for any purpose any statement the defendant may have made.

If you do find the state has proved these things beyond a reasonable doubt, you may consider the evidence that the defendant made the statement and give that evidence whatever weight you believe appropriate.

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

The general statutory requirement that a statement of an accused may be used in evidence against him only if freely and voluntarily made is set out in Tex. Code Crim. Proc. art. 38.21. Tex. Code Crim. Proc. art. 38.22, § 3(a)(1) requires that, to be admissible, an oral statement made as a result of custodial interrogations must be recorded. In addition, for a recorded oral statement by an accused to be admissible, the accused must have received notice of his state statutory rights under Tex. Code Crim. Proc. art. 38.22, § 2(a); the accused must have knowingly, intelligently, and voluntarily waived those rights under Tex. Code Crim. Proc. art. 38.22, § 2(b); and the warnings given and waivers made must be recorded as required by Tex. Code Crim. Proc. art. 38.22, § 3(a)(2). The submission of jury instructions when the evidence raises an issue of the voluntariness of out-of-court statements generally is governed by Tex. Code Crim. Proc. art. 38.22, § 7.

VI. Federal Due-Process Voluntariness Issues

CPJC 9.17 When Submission of a Claim of Federal Due-Process Involuntariness Is Required

Federal due process, of course, bars consideration by the trier of fact of an out-of-court statement that is involuntary under that body of law. This law does not, however, itself provide for submission of voluntariness to juries. A statement rendered involuntary under this body of law by the overreaching of law enforcement officers is, however, obtained in violation of the Constitution of the United States of America within the meaning of Texas Code of Criminal Procedure article 38.23(a). Jury submission of a claim of involuntariness under this body of law is thus provided for and governed by the terms of Tex. Code Crim. Proc. art. 38.23(a). *Oursbourn v. State*, 259 S.W.3d 159 (Tex. Crim. App. 2008).

Since article 38.23(a)'s standard for jury submission is applied, submission is appropriate only if the evidence before the jury presents a contested issue regarding a fact controlling in the due-process analysis. The contest must be regarding a fact which, if true, would make the statement inadmissible as a matter of law.

"[D]ue process voluntariness instructions could come in myriad forms, depending upon the facts of particular cases." *Contreras v. State*, 312 S.W.3d 566, 575–76 (Tex. Crim. App. 2010). *Contreras* specifically seemed to distinguish two major kinds of due-process voluntariness instructions. These are considered separately in CPJC 9.19 and CPJC 9.21.

Normally, *Oursbourn* commented, a claim of due-process involuntariness will be based on a contention that the statement was obtained by "inherently coercive [law enforcement] practices." *Oursbourn*, 259 S.W.3d at 178. This apparently means a practice that, if used, renders the statement involuntary without inquiry into the actual impact of that practice on the defendant's decision to confess. There is no need for any "sweeping inquiries into the state of mind of a criminal defendant who has confessed." *Oursbourn*, 259 S.W.3d at 171 (quoting *Colorado v. Connelly*, 479 U.S. 157 (1986)).

CPJC 9.18 Contents of Instruction Regarding Federal Due-Process Voluntariness

According to *Oursbourn v. State*, 259 S.W.3d 159 (Tex. Crim. App. 2008), at least when the due-process claim was a "normal" one, the instruction should be "specific" or "fact-specific." This means it should ask the jury to determine only the specific fact issue presented—whether the state has proved beyond a reasonable doubt that law enforcement officers did not engage in the claimed inherently coercive practice. Specifically, *Oursbourn* offered:

> A fact-specific, exclusionary-rule instruction might look something like this:
>
> If you find from the evidence that Officer Obie held a gun to the defendant's head in an effort to make the defendant give him a statement, or if you have a reasonable doubt thereof, you will disregard the defendant's videotaped statement and not use it for any purpose whatsoever during your deliberations. However, if you find from the evidence, beyond a reasonable doubt, that Officer Obie did not hold a gun to the defendant's head in an effort to make the defendant give him a statement, then you may consider the defendant's videotaped statement during your deliberations.

Oursbourn, 259 S.W.3d at 177 n.69.

Contreras v. State, 312 S.W.3d 566 (Tex. Crim. App. 2010), held the trial judge erred in failing to give an instruction of this sort given the defense evidence that an officer, lacking grounds to arrest Contreras's wife, told Contreras police would arrest his wife unless he made a confession. *Contreras*, 312 S.W.3d at 576–77. Apparently the court concluded that if such a threat had been made, the statement would necessarily be involuntary under due-process standards. The discussion in *Contreras* noted that courts have split on whether such a threat is improper only if the threat is to make such an arrest despite the lack of the required probable cause for it.

Burden of Proof. Article 38.23(a) of the Texas Code of Criminal Procedure makes clear that the state has the burden of proof and it is proof beyond a reasonable doubt.

CPJC 9.19 Instruction—Normal Due-Process Voluntariness

[Insert instructions for underlying offense.]

Voluntariness of Statement If Obtained by Threat

You have heard evidence that the defendant made a statement [*describe statement, e.g.*, to Detective [*name*] on [*date*]]. You have also heard evidence that [*describe evidence indicating involuntarines, e.g.*, Detective [*name*], although lacking grounds to arrest the defendant's wife, told the defendant his wife would be arrested and prosecuted unless he made a statement]. If you find the defendant did make the statement, you may consider that statement against the defendant only if you resolve a preliminary question in favor of the state.

No evidence obtained in violation of the Constitution of the United States may be considered against the accused in the trial of any criminal case. A statement obtained by certain threats is obtained in violation of the Constitution of the United States because the statement is not voluntary.

If [*specify conduct, e.g.*, Detective [*name*], although lacking grounds to arrest the defendant's wife, did tell the defendant his wife would be arrested and prosecuted unless the defendant confessed], any statement the defendant made would not be voluntary and could not be considered by you against the defendant.

Therefore, you may consider any statement you believe the defendant made only if you first all agree the state has proved, beyond a reasonable doubt, that [*specify what state must prove, e.g.*, Detective [*name*] did not, although lacking grounds to arrest the defendant's wife, tell the defendant his wife would be arrested and prosecuted unless the defendant made a statement].

If you do not find the state has proved, beyond a reasonable doubt, that [*specify what state must prove, e.g.*, Detective [*name*] did not, although lacking grounds to arrest the defendant's wife, tell the defendant his wife would be arrested and prosecuted unless the defendant made a statement], you are to disregard the evidence that the defendant made any statement. You may not consider that evidence for any purpose.

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

Statements made in violation of any provisions of the Constitution or laws of the state of Texas, or of the Constitution or laws of the United States of America, are inadmissible as provided for by Tex. Code Crim. Proc. art. 38.23(a). Jury submission of a claim of involuntariness under this body of law is also provided for by this section.

CPJC 9.20 Claims of Due-Process Voluntariness Addressing Overbearing of the Will

Oursbourn v. State, 259 S.W.3d 159 (Tex. Crim. App. 2008), and *Contreras v. State*, 312 S.W.3d 566 (Tex. Crim. App. 2010), appeared to both contemplate a second type of due-process issue. That issue involved claims of law enforcement coercive activity that would render a statement involuntary under the federal constitutional due-process standard only if the evidence showed that activity had a particular impact on the defendant. Specifically, the statement would be involuntary only if the law enforcement activity so affected the defendant as to overcome his will.

An instruction on this issue should make clear to the jury that it must address both whether the claimed law enforcement conduct occurred and—if so—whether the impact of that activity rendered the statement involuntary. Such an instruction would be a Texas Code of Criminal Procedure article 38.23(a) instruction. Consequently, submission is appropriate only when the evidence presents a contested question regarding an historical question of fact. *Oursbourn*, 259 S.W.3d at 173.

Burden of Proof. Texas Code of Criminal Procedure article 38.23(a)'s clear provision that the state has the burden of proof and it is proof beyond a reasonable doubt applies in this situation. Tex. Code Crim. Proc. art. 38.23(a).

CPJC 9.21 Instruction—Due-Process Overbearing of the Will Voluntariness

[Insert instructions for underlying offense.]

Voluntariness of Statement If Obtained by Coercion

You have heard evidence that the defendant made a statement [*describe statement, e.g.*, to Officers [*name*] and [*name*] on [*date*]]. If you find the defendant did make the statement, you may consider that statement against the defendant only if you resolve a preliminary question in favor of the state.

No evidence obtained in violation of the Constitution of the United States may be considered against the accused in the trial of any criminal case.

A statement obtained by coercive police activity that overbears a defendant's will is involuntary and has been obtained in violation of the Constitution. If officers have engaged in coercive activity, whether that activity overbears a defendant's will must be determined in light of a totality of the circumstances.

The state must prove beyond a reasonable doubt that the statement was not obtained by means of coercive law enforcement conduct that rendered the statement involuntary. The state, in other words, must prove beyond a reasonable doubt that the statement was voluntary.

Therefore, you may consider any statement you believe the defendant made only if you first all agree the state has proved, beyond a reasonable doubt, at least one of the following:

1. [*Name(s) of law enforcement official(s)*] did not engage in coercive activity; or

2. any coercive activity in which [*name(s) of law enforcement official(s)*] engaged did not overcome the defendant's will and make his statement involuntary.

If you do not find the state has proved, beyond a reasonable doubt, at least one of the items above, you are to disregard the evidence that the defendant made any statement. You may not consider that evidence for any purpose.

[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

Statements made in violation of any provisions of the Constitution or laws of the state of Texas, or of the Constitution or laws of the United States of America, are inadmissible as provided for by Tex. Code Crim. Proc. art. 38.23(a). Jury submission of a claim of involuntariness under this body of law is also provided for by this section.

CPJC 10.1 Instruction—*Allen* Charge

All of you are equally honest and conscientious jurors who have heard the same evidence. All of you share an equal desire to arrive at a verdict.

If this jury finds itself unable to arrive at a unanimous verdict, it will be necessary for the court to declare a mistrial and discharge the jury. The case will still be pending, and it is reasonable to assume that it will be tried again before another jury at some future time. Any such future jury will be empaneled in the same way this jury has been empaneled and will likely hear the evidence that has been presented to this jury. The questions to be determined by that jury will be the same questions confronting you, and there is no reason to hope the next jury will find these questions any easier to decide than you have found them.

Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors.

During your deliberations, you should not hesitate to reexamine your own views and change your opinion if you become persuaded that it is wrong. However, you should not change an honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors or for the mere purpose of returning a verdict.

With this additional instruction, you are requested to continue deliberations in an effort to arrive at a verdict that is acceptable to all members of the jury, if you can do so without doing violence to your conscience. Do not do violence to your conscience, but continue deliberating.

COMMENT

The above *Allen* charge is recommended by the Committee for use in criminal cases. For a sample instruction for use in civil cases, see "Instructions to Deadlocked Jury" in each volume of the civil Pattern Jury Charges series (for instance, PJC 1.9 in *Texas Pattern Jury Charges—General Negligence, Intentional Personal Torts & Workers' Compensation*). That instruction is modeled on language discussed by the Texas Supreme Court in *Stevens v. Travelers Insurance Co.*, 563 S.W.2d 223, 230 (Tex. 1978).

Background. An *Allen* charge instructs a deadlocked jury to continue deliberating to reach a verdict if the jurors can conscientiously do so and is usually given in response to a specific request from the jury. *West v. State*, 121 S.W.3d 95, 107 (Tex. App.—Fort Worth 2003, pet. ref'd); *Jackson v. State*, 753 S.W.2d 706, 712 (Tex. App.—San Antonio 1988, pet. ref'd). *See Allen v. United States*, 164 U.S. 492, 501 (1896). This supplemental charge "reminds the jury that if it is unable to reach a verdict, a mistrial will result, the case will still be pending, and there is no guarantee that

a second jury would find the issue any easier to resolve." *Barnett v. State*, 189 S.W.3d 272, 277 n.13 (Tex. Crim. App. 2006). Both the United States Supreme Court and the Texas Court of Criminal Appeals have sanctioned the use of an *Allen* charge. *See Allen*, 164 U.S. at 501–02; *Howard v. State*, 941 S.W.2d 102, 123 (Tex. Crim. App. 1996).

The Supreme Court initially approved five "elements" of an *Allen* charge: (1) that in a large proportion of cases, absolute certainty could not be expected; (2) that, although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, jurors should examine the question submitted with "a proper regard and deference to the opinions of each other"; (3) that it was the jurors' duty to decide the case if they could conscientiously do so; (4) that jurors should listen, with a disposition to be convinced, to each other's arguments; and (5) that, "if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority." *Allen*, 164 U.S. at 501.

Allen was decided as a matter of the Supreme Court's supervisory power over the federal courts and not as a matter of constitutional law. *See Allen*, 164 U.S. at 501–02; *Tucker v. Catoe*, 221 F.3d 600, 609 n.5 (4th Cir. 2000). Thus, a trial court will generally not err by failing to submit an *Allen* charge.

The Danger of Coercion. Modern courts have repeatedly expressed concern that the jury instructions in *Allen v. United States* may interfere with jury deliberations and coerce a verdict. The Supreme Court has rejected any use of coercion in the charge. *See Lowenfield v. Phelps*, 484 U.S. 231, 237–38; *Jenkins v. United States*, 380 U.S. 445, 446 (1965) ("[T]he principle that jurors may not be coerced into surrendering views conscientiously held is so clear as to require no elaboration."). The Fifth Circuit court of appeals has followed suit:

> There is no justification whatever for its coercive use. The jury system rests in good part on the assumption that the jurors should deliberate patiently and long, if necessary, and arrive at a verdict—if, but only if, they can do so conscientiously. It is improper for the court to interfere with the jury by pressuring a minority of the jurors to sacrifice their conscientious scruples for the sake of reaching agreement.

Green v. United States, 309 F.2d 852, 853–54 (5th Cir. 1962). In civil cases, the Texas Supreme Court has also disapproved any use of coercion and has rejected language directed at minority jurors. *See Stevens v. Travelers Insurance Co.*, 563 S.W.2d 223, 228 (Tex. 1978).

Improper coercion may arise from the text of the charge itself or from the circumstances in which the charge is given. *Howard*, 941 S.W.2d at 123 (citing *Lowenfield*, 484 U.S. at 237). An *Allen* charge may be facially coercive if it conveys the court's opinion on the case or pressures jurors into reaching a particular verdict. *Arrevalo v. State*, 489 S.W.2d 569, 571 (Tex. Crim. App. 1973); *West*, 121 S.W.3d at 107–08. It should not tell the jury that one side or the other possesses superior judgment, nor tell one side to distrust its judgment. *See West*, 121 S.W.3d at 109.

The context in which an *Allen* charge is given may render an otherwise facially proper charge coercive. For example, if the jury voluntarily offers a polling of the members, subsequently giving an *Allen* charge is likely to be found not coercive. However, if the trial court *sua sponte* polls the jury and then issues an *Allen* charge, the context may render the charge itself coercive even if by its plain language it is not. *Compare Howard*, 941 S.W.2d at 123–24, *with Barnett v. State*, 161 S.W.3d 128, 134–35 (Tex. App.—Fort Worth 2005), *aff'd*, 189 S.W.3d 272. Thus, trial courts should refrain from polling the jury or singling out jurors. In the event that a jury offers polling information unsolicited, the Committee recommends trial courts exercise caution, lest a jury takes the *Allen* charge as a statement of the trial court's opinion of the case.

The Committee recommends that trial courts and practitioners follow the trend to omit coercive elements of the charge, especially those directed at minority viewpoints in the jury. *See Lowenfield*, 484 U.S. at 237; *Howard*, 941 S.W.2d at 123; *Barnett*, 189 S.W.3d at 277 n.13. At most, a charge that "suggests that all jurors reevaluate their opinions in the face of disparate viewpoints cannot be said to be coercive on its face." *Howard*, 941 S.W.2d at 123. Nevertheless, the Committee believes the better practice to be the omission of coercive elements, and a review of caselaw indicates that a trial court will not be reversed by following this path. The pattern charge reflects this advice.

Procedure. An *Allen* charge should be given in writing and in open court, and it should be first submitted to the parties for objections and exceptions. *Verret v. State*, 470 S.W.2d 883, 887 (Tex. Crim. App. 1971). *See* Tex. Code Crim. Proc. art. 36.27. An oral communication alone would be improper. *Verret*, 470 S.W.2d at 887.

A trial court does not need to wait until the jury indicates it is deadlocked to give an *Allen* charge. *See Loving v. State*, 947 S.W.2d 615 (Tex. App.—Austin 1997, no pet.). Some authorities believe that giving the *Allen* charge as part of the court's general charge will inoculate against possible coercion. *See Loving*, 947 S.W.2d at 619; *see also* American Bar Association, Criminal Justice Section, Criminal Justice Standards Committee, Standard 15-5.4(a) [hereinafter ABA Standard]. Then, if the jury is unable to agree, repetition of the *Allen* language already given would be appropriate. *See* ABA Standard 15-5.4(b). This approach is not without its critics. *See, e.g.*, *Green*, 309 F.2d at 853–54. The Texas Court of Criminal Appeals has yet to opine on this split. *See Henderson v. State*, 593 S.W.2d 954, 957 (Tex. Crim. App. 1980). The Committee recommends not including *Allen* language in the general charge.

An *Allen* charge may be used at the guilt–innocence phase and at the punishment phase of a trial. *See Deaton v. State*, No. 03-08-00455-CR, 2009 WL 1811068, at *8–11 (Tex. App.—Austin June 26, 2009, pet. ref'd) (not designated for publication); *Hairston v. State*, No. 14-04-01016-CR, 2006 WL 1026880, at *2–3 (Tex. App.—Houston [14th Dist.] Apr. 20, 2006, pet. ref'd) (not designated for publication). If given at punishment, and if the charge mentions the possibility of mistrial, the charge need not specify that the mistrial would apply to the punishment stage only, though it might be better practice to do so. *Draper v. State*, 335 S.W.3d 412, 417 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd).

Texas law imposes no time limits on the amount of time a jury may deliberate, when an *Allen* charge may be given, or when mistrial may be declared, absent an abuse of discretion. *Guidry v. State*, 9 S.W.3d 133, 155 (Tex. Crim. App. 1999). It is not error to give an *Allen* charge before a jury has unequivocally stated it is deadlocked. *Olvera v. State*, No. 13-13-00464-CR, 2014 Tex. App. LEXIS 7764, at *5 (Tex. App.—Corpus Christi July 17, 2014, no pet.) (not designated for publication); *Loving*, 947 S.W.2d at 620; *see Black v. State*, No. 05-10-01558-CR, 2012 WL 206501, at *2 (Tex. App.—Dallas Jan. 25, 2012, pet. ref'd) (not designated for publication). Thus, a judge can generally give no *Allen* charge, one *Allen* charge, or several, and trial courts will not err by refusing to give an *Allen* charge.

[Chapter 11 is reserved for expansion.]

CHAPTER 12 PUNISHMENT INSTRUCTIONS

PART I. GENERAL MATTERS

PART II. GENERAL PUNISHMENT INSTRUCTIONS

PART III. COMMUNITY SUPERVISION INSTRUCTIONS

PART IV. SPECIFIC FELONY PUNISHMENT INSTRUCTIONS

I. General Matters

CPJC 12.1 General Approach to Punishment Stage Instructions

Under current practice, punishment stage jury instructions seldom attempt to do more than explain to juries the options regarding punishment available to them. The instructions make absolutely no effort to guide juries in selecting an appropriate punishment.

Initially, the Committee considered whether to recommend a basic change in current practice by offering punishment stage instructions that would attempt to assist juries in assessing appropriate punishment.

The legal background of current practice and possible alternatives is complex. There is no statutory directive that trial courts attempt to give such guidance. The Texas Code of Criminal Procedure provides only that "if the jury has the responsibility of assessing the punishment, the court shall give such additional written instructions as may be necessary." Tex. Code Crim. Proc. art. 37.07, § 3(b). The Committee found no more specific directives from the legislature.

Constitutional considerations do not mandate a jury instruction guiding the jury's discretion. The court of criminal appeals summarily rejected a defendant's contention that his due-process rights were violated because "the trial court's charge on punishment failed to provide any criteria, test, or guidance as to factors to be considered by the jury in assessing [the defendant's] punishment." *Ward v. State*, 474 S.W.2d 471, 478 (Tex. Crim. App. 1972).

Defendants have occasionally sought jury instructions providing guidance based on Tex. Penal Code § 1.02 ("Objectives of [Penal] Code") or its predecessor. Sometimes they have been successful. *Ex parte Smith*, 185 S.W.3d 455, 461 (Tex. Crim. App. 2006) ("[A]pplicant requested an instruction on the objectives of the Penal Code as set out in Section 1.02; the trial court granted that request."); *Hall v. State*, 235 S.W.2d 638, 638 (Tex. Crim. App. 1951) ("At appellant's request, the trial court did embody in his charge Article 2, Vernon's P.C., that 'The object of punishment is to suppress crime and reform the offender.'").

The appellate case law on such an instruction is somewhat tangled. In *Hutcherson v. State*, 136 S.W. 53, 56 (Tex. Crim. App. 1911), the court held that the trial court did not err in refusing to instruct the jury in terms of the then-current statute that "the object of punishment, under the law is to suppress crime and reform the offender, and any punishment having any other object is not authorized by law." Such an instruction, it added, would have been "neither appropriate nor proper." Reaching the same result forty-six years later, the court commented that such an instruction would be "improper." The court explained that any instruction on "the facts in evidence in this case in support of the offense charged and the penalty authorized to be assessed"

would be "a comment on the weight of the evidence and tend to convey the opinion of the court to the jury as to the disposition that should be made of the case." *White v. State*, 306 S.W.2d 903, 907 (Tex. Crim. App. 1957). *Accord Crain v. State*, 394 S.W.2d 165, 169 (Tex. Crim. App. 1964) (opinion on initial submission).

The 1974 Penal Code, in section 1.02, set out a more extensive explanation of the purposes of the Code and the objectives that the Code is intended to achieve and that are to be considered in construing the Code. But a trial judge was held not to have "erred in refusing to charge the jurors informing them of the objectives of the penal code as set out in V.T.C.A. Penal Code, Section 1.02." *Hart v. State*, 634 S.W.2d 714, 716–17 (Tex. Crim. App. [Panel Op.] 1982). Under *White* and *Crain*, the court explained, "a charge on the objectives of the penal code is improper." The court added, "[I]n any event the refusal to submit such an instruction was not an abuse of discretion."

Considerable confusion was created by *Cane v. State*, 698 S.W.2d 138 (Tex. Crim. App. 1985). The judgment of the court of criminal appeals was announced in an opinion joined by only two judges. That opinion purported to announce a holding that "a charge on the objectives of the Penal Code as listed in § 1.02, [is] discretionary." *Hart* and its progeny, to the extent of conflict, were overruled. In explanation, Judge Campbell's opinion offered that—

> [t]he objectives of the Penal Code embodied in § 1.02, supra, are the clear statements of the legislature as to its objectives in formulating a set of laws governing criminal conduct. As such, those objectives arguably could be considered relevant to the disposition of any criminal case. An instruction on those objectives, much like an admonitory instruction, would be discretionary because it does not involve the law applicable to the facts of the case. The instruction is simply informational that the judge may, in his discretion, find to be helpful to the jury. We find no logic in the proposition that such an instruction would constitute a comment on the weight of the evidence or invite the jury to speculate on matters outside of the evidence. A trial judge, therefore, does not abuse his discretion in submitting a charge which includes § 1.02 of the Penal Code.

Cane, 698 S.W.2d at 140. Thus the court of appeals erred in applying *Hart* and finding error simply in the giving of the instruction. The instruction actually given in *Cane*, however, did not include *all* the objectives listed in section 1.02. A proper instruction, the lead opinion continued, would include all the statutory objectives of the Penal Code. Thus the trial court erred. Since Cane had not objected on this ground, the case was remanded for a determination of whether the defendant suffered egregious harm. Three of the eight judges participating concurred in the result but not in Judge Campbell's opinion announcing that result.

The precedential significance of *Cane* is in some doubt. *See Teague v. State*, 703 S.W.2d 199, 202 (Tex. Crim. App. 1986) (discussing *Cane* opinion). At most, however, *Cane* establishes two things. First, an instruction embodying section 1.02's provisions is not a prohibited comment on the evidence and thus a trial judge has discretion to give it. Second, if such an instruction is given it must inform the jury of all the substance of section 1.02 rather than selected portions of the statute.

The Committee considered offering an instruction to guide jurors in assessing appropriate punishment. Such an instruction might call the jurors' attention to the general purposes of the Penal Code as set out in section 1.02 and to the legislature's objectives clarified by the statute. Or the instruction might go further and inform the jury that it might—or must—take those considerations into account in assessing the punishment to be imposed on the defendant.

But the Committee concluded that it could draft no instruction that would be of practical value to jurors. The case law indicates that any such instruction would have to include most and perhaps all of the statutory provisions. An instruction calling attention to some of these might well add to the difficulty of the jurors' tasks.

Thus the Committee recommends continuation of the existing practice under which the instructions are limited to informing juries regarding their options. No effort should be made in the instructions, either by referring to section 1.02 or otherwise, to offer jurors guidance on how they should go about assessing an appropriate punishment in a particular case.

Finally, punishment instructions are often necessarily fact specific. The instructions in this chapter are therefore illustrative only, giving examples of how instructions may be constructed to submit various punishment options.

CPJC 12.2 Enhancement

Describing Enhancement Allegations. Traditionally, enhancement allegations were included in the charging instrument. The jury instructions, then, could easily refer to them "as alleged in the indictment."

In 1997, the court of criminal appeals made clear that enhancement allegations need not be in the charging instrument. *Brooks v. State*, 957 S.W.2d 30 (Tex. Crim. App. 1997). As a result, the traditional method of referring to the enhancement allegations is no longer generally applicable.

The Committee chose to make the punishment stage instruction consistent with the guilt stage instruction by referring to the state's "accusations."

Required Finality of Enhancement Offenses. The statutory provisions for enhancing punishment by proof of prior convictions vary on whether they explicitly require that the conviction be final and when any required finality must have occurred. Case law under earlier statutory provisions makes clear that even in the absence of an explicit statutory requirement of finality, one is inherent in the statutory schemes. Further, a conviction must have become final by the time of the commission of the offense for which the prior conviction is offered in enhancement. *Arbuckle v. State*, 105 S.W.2d 219, 219–21 (Tex. Crim. App. 1937). *Accord Doyle v. State*, 137 S.W.2d 26, 26 (Tex. Crim. App. 1940). Recent discussions have assumed the continuing vitality of these early analyses. *Beal v. State*, 91 S.W.3d 794, 795–96 (Tex. Crim. App. 2002); *Jordan v. State*, 36 S.W.3d 871, 873 (Tex. Crim. App. 2001).

The Committee assumed, therefore, that the enhancement provisions all required finality in this traditional sense.

Finality is a jury issue. Despite the considerable discussion of finality in the appellate case law, there has been little or no litigation regarding the extent to which juries should be instructed on the requirement of finality.

> It is settled that the burden is on the State to make a prima facie showing that any prior conviction alleged for enhancement, or for punishing an accused as a repeat offender, became final before the commission of the primary offense, and once such a showing is made, the burden shifts to the defendant to prove otherwise.

Diremiggio v. State, 637 S.W.2d 926, 928 (Tex. Crim. App. 1982).

Generally, the prima facie case mentioned in *Diremiggio* is made by proof of a judgment showing imposition of a sentence. *Cf. Thornton v. State*, 576 S.W.2d 407, 408–09 (Tex. Crim. App. 1979).

The Committee concluded that under existing law the state must prove that enhancement offense convictions are final. It also concluded that issues concerning finality are seldom raised and that jury instructions defining finality would be cumber-

some and potentially confusing and distracting. Consequently, it recommends that as a general rule no definition of finality be included in the instructions.

Defining Finality in Enhancement Cases. If the evidence in a particular case raises a question about finality, additional instructions defining finality may be necessary.

If, for example, the evidence raises the possibility that imposition of sentence was suspended, finality requires the state to prove that community supervision was revoked and sentence imposed. *Ex parte Murchison*, 560 S.W.2d 654, 656 (Tex. Crim. App. 1978) ("[A] conviction is final for enhancement purposes where the imposition of sentence has been suspended, probation granted, but a revocation of the probation is alleged and proved by the State."). *Accord Franklin v. State*, 219 S.W.3d 92, 96 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (conviction for which sentence was suspended became final on date that probation was revoked and defendant was sentenced to term of imprisonment).

If the evidence raises the possibility that an appeal was taken—for example, there is evidence of notice of appeal—the state must also show that any appeal was disposed of in a manner rendering the conviction final. *Jones v. State*, 711 S.W.2d 634, 635–36 (Tex. Crim. App. 1986). "[A]n appealed prior conviction . . . becomes final when the appellate court issues its mandate affirming the conviction." *Beal*, 91 S.W.3d at 796.

In cases of these sorts, the instruction would probably have to define finality. This might be accomplished by including all or some of the following language:

> **Final Conviction**
>
> A final conviction is the entry of a judgment reflecting the defendant's conviction of an offense and the imposition of a sentence for that offense.
>
> *[Include the following if the evidence indicates the sentence may have been suspended.]*
>
> If the judgment reflects that the sentence was suspended and the defendant placed on probation or community supervision, the conviction is final only if that probation or community supervision was revoked and the trial court entered a further order imposing a sentence for the offense.
>
> *[Include the following if the evidence indicates an appeal may have been taken.]*

> If an appeal was taken by the defendant, the conviction is final only if after that appeal the conviction was affirmed and a mandate affirming the conviction was issued by the appellate court.

When Defendant Pleads "True" to Enhancement. When the defendant pleads "true" to enhancement allegations, the existing practice is to inform the jury of the enhancement allegations and the defendant's plea, to direct the jury to find the allegations true, and to instruct them to assess punishment from a range that assumes the allegations have been proved. Verdict forms generally set out that the jury finds the allegations true.

Whether this is necessary is not clear. In *Harvey v. State*, 611 S.W.2d 108 (Tex. Crim. App. 1981), the court of criminal appeals indicated the following:

> Where one prior conviction is alleged in the indictment for enhancement purposes and the accused chooses to enter a plea of "true" or "guilty" to the allegation at the punishment stage of the trial, then it is permissible for the trial court to charge the jury on punishment as though the primary offense, for which the accused has been convicted, carries the enhancement punishment . . . .

Harvey, 611 S.W.2d at 112.

Nothing in *Harvey* indicated that a jury finding was necessary or that the jury needed to be told of the enhancement. *See Washington v. State*, 59 S.W.3d 260, 264–65 (Tex. App.—Texarkana 2001, pet. ref'd) (under *Harvey*, trial court did not err in instructing jury that enhanced range of punishment was "the punishment authorized for this offense" since defendant pleaded true to enhancement allegation); *Mitchell v. State*, No. 2-05-426-CR, 2006 WL 3438012, at *2 (Tex. App.—Fort Worth Nov. 30, 2006) (per curiam) (not designated for publication) (when defendant pleaded "true" to enhancement allegation, punishment instruction was not fundamentally defective for failing to require jury to find that allegation was true).

Ordinarily, at the beginning of the punishment phase of the trial the enhancement allegations are read to the jury and the defendant enters a plea. When this is done, a policy of full disclosure to the jurors suggests that the instructions and verdict make clear to the jurors the consequences of the allegations and the defendant's plea.

Whether a trial judge properly could simply withhold from a sentencing jury the fact that the case involved enhancement is not clear. Perhaps if the defendant not only offers to plead true but also offers a stipulation on the prior convictions, the trial court can—and perhaps should—simply instruct the jury as if the enhanced punishment range was attached by statute to the offense of which the defendant was convicted. If that is properly done, of course, the punishment instruction should be phrased to avoid any reference to the enhancement allegations, the defendant's plea, or the offenses alleged.

Defendants might prefer to have sentencing juries unaware that the range of punishment submitted was triggered by prior convictions. On balance, however, in an enhancement case the state probably has a right to have the jury know that the case involves a penalty range higher than usual for the offense involved and that this higher penalty range is triggered by the defendant's prior conviction or convictions.

The Committee therefore recommends continuation of the existing practice.

II. General Punishment Instructions

CPJC 12.3 Instruction—Punishment—General

JURY INSTRUCTIONS

Members of the jury,

You have found the defendant, [*name*], guilty of the offense of [*offense*]. Now you must determine the punishment to be imposed on the defendant.

Both sides will soon present final arguments on punishment. Before they do so, I must now give you the instructions you must follow in determining the defendant's punishment.

You will have a written copy of these instructions to take with you and to use during your deliberations.

First I will tell you about some general principles of law that must govern your decision of the case. Then I will tell you about the specific law applicable to this case. Finally, I will instruct you on the rules that must control your deliberations.

GENERAL PRINCIPLES

Jury as Fact Finder

As the jurors, you review the evidence and determine the facts and what they prove. You judge the believability of the witnesses and what weight to give their testimony.

In judging the facts and the believability of the witnesses, you must apply the law provided in these instructions.

Evidence

In determining the sentence to be imposed on the defendant, you may take into consideration all the evidence admitted before you. This includes the evidence admitted during the first stage of the trial concerning the defendant's guilt as well as any evidence admitted during this punishment stage.

The evidence consists of the testimony and exhibits admitted in the trial. You must consider only evidence to reach your decision. You must not consider, discuss, or mention anything that is not evidence in the trial. You must not con-

sider or mention any personal knowledge or information you may have about any fact or person connected with this case that is not evidence in the trial.

Statements made by the lawyers are not evidence. The questions asked by the attorneys are not evidence. Evidence consists of the testimony of the witnesses and materials admitted into evidence.

Nothing the judge has said or done in this case should be considered by you as an opinion about the facts of this case or influence you to vote one way or the other.

You should give terms their common meanings, unless you have been told in these instructions that the terms are given special meanings. In that case, of course, you should give those terms the meanings provided in the instructions.

While you should consider only the evidence, you are permitted to draw reasonable inferences from the testimony and exhibits that are justified in the light of common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts that have been established by the evidence.

You are to render a fair and impartial verdict based on the evidence admitted in the case under the law that is in these instructions. Do not allow your verdict to be determined by bias or prejudice.

Admitted Exhibits

You may, if you wish, examine exhibits. If you wish to examine an exhibit, the foreperson will inform the court and specifically identify the exhibit you wish to examine. Only exhibits that were admitted into evidence may be given to you for examination.

Testimony

Certain testimony will be read back to you by the court reporter if you request. To request that testimony be read back to you, you must follow these rules. The court will allow testimony to be read back to the jury only if the jury, in a writing signed by the foreperson, (1) states that it is requesting that testimony be read back, (2) states that it has a disagreement about a specific statement of a witness or a particular point in dispute, and (3) identifies the name of the witness who made the statement. The court will then have the court reporter read back only that part of the statement that is in disagreement.

[Include the following if the defendant did not testify and the defendant does not object.]

Defendant's Right to Remain Silent

The defendant has a constitutional right to remain silent. The defendant may testify on his own behalf. The defendant may also choose not to testify. The defendant's decision not to testify cannot be held against him, and it is not evidence of guilt. You must not speculate, guess, or even talk about what the defendant might have said if he had taken the witness stand or why he did not. The foreperson of the jury must immediately stop any juror from mentioning the defendant's decision not to testify.

[Include the following only if evidence of unadjudicated wrongful acts is admitted in the guilt/innocence or punishment phase of trial.]

Burden of Proof for Wrongful Acts

During the trial, you heard evidence that the defendant may have committed wrongful acts that did not result in any criminal charges or that did not result in criminal convictions. [*If requested by a party and permitted by judge, include judge's description of specific acts.*] You are not to consider any evidence of any particular wrongful act unless you find, beyond a reasonable doubt, that the defendant did, in fact, commit that wrongful act. Those of you who believe the defendant did the wrongful act may consider it.

Assessing the Punishment

You must arrive at the amount of punishment by a full, fair, and free expression of the opinion of the individual jurors. You must not decide the punishment by lot or by chance. For example, you may not agree beforehand to be bound by the result of a procedure by which each juror gives the number of years the juror thinks should be served, these are then added, and the result is divided by twelve.

To reach a verdict, all twelve of you must agree.

RULES THAT CONTROL DELIBERATIONS

You must follow these rules while you are deliberating and until you reach a verdict. After the closing arguments by the attorneys, you will go into the jury room.

The foreperson should conduct the deliberations in an orderly way. Each juror has one vote, including the foreperson. The foreperson must supervise the voting, vote with other members on the verdict, and sign the verdict sheet.

While deliberating and until excused by the trial court, all jurors must follow these rules:

1. You must not discuss this case with any court officer, or the attorneys, or anyone not on the jury.

2. You must not discuss this case unless all of you are present in the jury room. If anyone leaves the room, you must stop your discussions about the case until all of you are present again.

3. You must communicate with the judge only in writing, signed by the foreperson and given to the judge through the officer assigned to you.

4. You must not conduct any independent investigations, research, or experiments.

5. You must tell the judge if anyone attempts to contact you about the case before you reach your verdict.

After you have arrived at your verdict, you are to use one of the forms attached to these instructions. You should have your foreperson sign his or her name to the particular form that conforms to your verdict.

After the closing arguments by the attorneys, you will begin your deliberations to decide your verdict.

SPECIFIC LAW APPLICABLE TO THIS CASE

[Insert appropriate specific instructions and verdict form.]

COMMENT

The directive that the trial judge instruct the jury when the jury is to assess punishment is set out in Tex. Code Crim. Proc. art. 37.07, § 3(b). The provisions for instructions on parole and good conduct time are set out in Tex. Code Crim. Proc. art. 37.07, § 4.

Burden of Proof Generally. Under present practice, punishment instructions sometimes include a statement that "[t]he burden of proof in all criminal cases rests upon the state throughout the trial and never shifts to the defendant." *See Flores v. State*, No. 01-99-0138-CR, 2001 WL 170961, at *2 (Tex. App.—Houston [1st Dist.] Feb. 22, 2001, pet. ref'd) (not designated for publication). The Committee concluded that this was not appropriate. The law provides that neither side has a burden of proof at sentencing, and the sometimes-given instruction misleadingly suggests otherwise. *Garcia v. State*, 901 S.W.2d 724, 731 (Tex. App.—Houston [14th Dist.] 1995, pet. ref'd).

The court of criminal appeals has held that such an instruction is not necessary. *Halford v. State*, 400 S.W.2d 339, 340 (Tex. Crim. App. 1966). The Committee concluded it was also inappropriate.

In some exceptional cases, a burden of proof is assigned to one party. When this is the case, this burden can be explained to the jury in that portion of the instructions dealing with the specific facts of the case.

Prohibition against Determining Verdict by Lot. The Texas Rules of Appellate Procedure state that the defendant must be granted a new trial "when the verdict has been decided by lot or in any manner other than a fair expression of the jurors' opinion." Tex. R. App. P. 21.3(c). The Committee therefore included the prohibition of a decision by lot or chance in the instructions. *Driver v. State*, 38 S.W. 1020, 1024 (Tex. Crim. App. 1897) ("[W]e . . . suggest that, inasmuch as it is not of infrequent occurrence that cases come before this court in which it appears that the verdict of the jury has been arrived at by lot, the district judges should instruct the jury as to the impropriety of this manner of arriving at their verdicts.").

The instruction also addresses the major procedure barred by the prohibition. The jurors cannot agree beforehand to be bound by the result of a procedure by which each juror gives the number of years the juror thinks should be served, these are added, and then the result is divided by twelve. It is permissible for the jurors to do this as a basis for arriving at a number that they will then discuss on its merits. *Cravens v. State*, 117 S.W. 156, 158 (Tex. Crim. App. 1908) (not violation if no agreement beforehand).

Burden of Proof for Extraneous Offenses. Article 37.07, section 3(a)(1), of the Texas Code of Criminal Procedure provides that "evidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing, including . . . evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act." Tex. Code Crim. Proc. art. 37.07, § 3(a).

Whether or not the defendant requests the instruction, the trial court must instruct the jury in the punishment phase of trial that extraneous offenses must be proved

beyond a reasonable doubt, if extraneous-offense evidence has been admitted in the trial. *See Huizar v. State*, 12 S.W.3d 479, 484 (Tex. Crim. App. 2000). The appellate court must apply the egregious-harm standard to review error in failing to instruct the jury on the burden to prove extraneous offenses when the defendant fails to object to the charge. *See Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984).

Courts have held that the extraneous-offense instruction is not required at the punishment phase in certain instances. The instruction is not required when the evidence is in the form of a prior conviction introduced at the punishment phase. *Bluitt v. State*, 137 S.W.3d 51, 54 (Tex. Crim. App. 2004) ("While the prior convictions must be properly proved, to require that prior convictions be re-proved beyond a reasonable doubt would be an absurd result, as the very fact of conviction is evidence that the burden of proving guilt beyond a reasonable doubt has already been met in a prior proceeding."). The instruction is not required when the defendant introduces the extraneous-offense evidence in the guilt/innocence phase of trial. *Elder v. State*, 100 S.W.3d 32, 35 (Tex. App.—Eastland 2002, pet. ref'd). The instruction is not required when the punishment evidence is in the form of victim-impact testimony and cross-examination of character witnesses. *Rayme v. State*, 178 S.W.3d 21, 25 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd).

One intermediate court has held that the beyond-a-reasonable-doubt instruction is required when evidence of other offenses is admitted during the guilt/innocence phase as same-transaction contextual evidence and the evidence is reoffered at the punishment phase of a trial. *Moore v. State*, 165 S.W.3d 118, 125 (Tex. App.—Fort Worth 2005, pet. ref'd). However, Judge Cochran of the court of criminal appeals has stated that article 37.07, section 3(a), "does not set out any 'same transaction contextual evidence' exception to the statutorily-required reasonable-doubt jury instruction." *King v. State*, 125 S.W.3d 517, 519 (Tex. Crim. App. 2003) (Cochran, J., concurring in refusal of appellant's petition for discretionary review).

Although prior convictions need not include the burden-of-proof instruction for extraneous offenses, the Committee recommends that when there is no objection from the defense, the trial court include the instruction for all other extraneous offenses admitted anytime during the trial.

CPJC 12.4 Instruction—Jury Punishment on a Plea of Guilty

Members of the jury,

The defendant, [*name*], has pleaded guilty of the offense of [*offense*]. You are instructed to find the defendant guilty. You must also determine the punishment to be imposed on the defendant.

Both sides will soon present final arguments on punishment. Before they do so, I must now give you the instructions you must follow in determining the defendant's punishment.

You will have a written copy of these instructions to take with you and to use during your deliberations.

First I will tell you about some general principles of law that must govern your decision of the case. Then I will tell you about the specific law applicable to this case. Finally, I will instruct you on the rules that must control your deliberations.

GENERAL PRINCIPLES

Jury as Fact Finder

As the jurors, you review the evidence and determine the facts and what they prove. You judge the believability of the witnesses and what weight to give their testimony.

In judging the facts and the believability of the witnesses, you must apply the law provided in these instructions.

Evidence

The evidence consists of the testimony and exhibits admitted in the trial. You must consider only evidence to reach your decision. You must not consider, discuss, or mention anything that is not evidence in the trial. You must not consider or mention any personal knowledge or information you may have about any fact or person connected with this case that is not evidence in the trial.

Statements made by the lawyers are not evidence. The questions asked by the attorneys are not evidence.

Nothing the judge has said or done in this case should be considered by you as an opinion about the facts of this case or influence you to vote one way or the other.

You should give terms their common meanings, unless you have been told in these instructions that the terms are given special meanings. In that case, of course, you should give those terms the meanings provided in the instructions.

While you should consider only the evidence, you are permitted to draw reasonable inferences from the testimony and exhibits that are justified in the light of common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts that have been established by the evidence.

You are to render a fair and impartial verdict based on the evidence admitted in the case under the law that is in these instructions. Do not allow your verdict to be determined by bias or prejudice.

Admitted Exhibits

You may, if you wish, examine exhibits. If you wish to examine an exhibit, the foreperson will inform the court and specifically identify the exhibit you wish to examine. Only exhibits that were admitted into evidence may be given to you for examination.

Testimony

Certain testimony will be read back to you by the court reporter if you request. To request that testimony be read back to you, you must follow these rules. The court will allow testimony to be read back to the jury only if the jury, in a writing signed by the foreperson, (1) states that it is requesting that testimony be read back, (2) states that it has a disagreement about a specific statement of a witness or a particular point in dispute, and (3) identifies the name of the witness who made the statement. The court will then have the court reporter read back only that part of the statement that is in disagreement.

[Include the following if the defendant did not testify and the defendant does not object.]

Defendant's Right to Remain Silent

The defendant has a constitutional right to remain silent. The defendant may testify on his own behalf. The defendant may also choose not to testify. The defendant's decision not to testify cannot be held against him, and it is not evidence of guilt. You must not speculate, guess, or even talk about what the defendant might have said if he had taken the witness stand or why he did not.

The foreperson of the jury must immediately stop any juror from mentioning the defendant's decision not to testify.

[Include the following only if evidence of unadjudicated wrongful acts is admitted.]

Burden of Proof for Wrongful Acts

During the trial, you heard evidence that the defendant may have committed wrongful acts that did not result in any criminal charges or that did not result in criminal convictions. [*If requested by a party and permitted by judge, include judge's description of specific acts.*] You are not to consider any evidence of any particular wrongful act unless you find, beyond a reasonable doubt, that the defendant did, in fact, commit that wrongful act. Those of you who believe the defendant did the wrongful act may consider it.

Assessing the Punishment

You must arrive at the amount of punishment by a full, fair, and free expression of the opinion of the individual jurors. You must not decide the punishment by lot or by chance. For example, you may not agree beforehand to be bound by the result of a procedure by which each juror gives the number of years the juror thinks should be served, these are then added, and the result is divided by twelve.

To reach a verdict, all twelve of you must agree.

RULES THAT CONTROL DELIBERATIONS

You must follow these rules while you are deliberating and until you reach a verdict. After the closing arguments by the attorneys, you will go into the jury room.

The foreperson should conduct the deliberations in an orderly way. Each juror has one vote, including the foreperson. The foreperson must supervise the voting, vote with other members on the verdict, and sign the verdict sheet.

While deliberating and until excused by the trial court, all jurors must follow these rules:

1. You must not discuss this case with any court officer, or the attorneys, or anyone not on the jury.

2. You must not discuss this case unless all of you are present in the jury room. If anyone leaves the room, you must stop your discussions about the case until all of you are present again.

3. You must communicate with the judge only in writing, signed by the foreperson and given to the judge through the officer assigned to you.

4. You must not conduct any independent investigations, research, or experiments.

5. You must tell the judge if anyone attempts to contact you about the case before you reach your verdict.

After you have arrived at your verdict, you are to use one of the forms attached to these instructions. You should have your foreperson sign his or her name to the particular form that conforms to your verdict.

After the closing arguments by the attorneys, you will begin your deliberations to decide your verdict.

SPECIFIC LAW APPLICABLE TO THIS CASE

[Insert appropriate specific instructions. Continue with the following verdict form or use a verdict form tailored to the case, ensuring it also includes a finding of guilt.]

VERDICT

We, the jury, find the defendant, [*name*], guilty of the offense of [*offense*]. We assess the defendant's punishment at: (select one)

_____ [imprisonment/confinement] in [the Texas Department of Criminal Justice/a state jail/the county jail] for a term of ____ years and no fine.

_____ [imprisonment/confinement] in [the Texas Department of Criminal Justice/a state jail/the county jail] for a term of ____ years and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

COMMENT

When the defendant pleads guilty (or *nolo contendere*) and goes to the jury for punishment—a procedure commonly called a "slow plea"—the general practice is to present the indictment or information and have the defendant enter his plea before the jury. The punishment hearing follows, with the court instructing the jury to find the defendant guilty and assess punishment. Verdict forms generally set out that the jury finds the defendant guilty.

Whether it is necessary to have the jury find the defendant guilty is not clear; however, it may be prudent. In addition, the Committee recommends that instead of separate guilt and punishment phase instructions, the jury should be given only one set of jury instructions that includes a combined verdict form, incorporating both the guilty finding and the jury's recommended sentence. This is the procedure adopted in *Holland v. State*, 761 S.W.2d 307 (Tex. Crim. App. 1988). There, the defendant pleaded guilty to capital murder before a jury. He argued that it was error to instruct the jury to return a guilty verdict and then answer the special issues in the same jury instructions because it ruined the bifurcated nature of the proceedings. He argued there must be two separate deliberations or at least a separation of guilt from punishment. The court of criminal appeals stated that there was nothing wrong with the combined jury instructions: "it is proper for the trial judge in his charge to [1] instruct the jury to return a verdict of guilty, [2] charge the jury on the law as to the punishment issues, and then [3] instruct them to decide only those issues." *Holland*, 761 S.W.2d at 313; *see also Fairfield v. State*, 610 S.W.2d 771 (Tex. Crim. App. 1981).

Holland appears to be the standard for the general practice of instructing juries on a "slow plea." However, *Fuller v. State*, 253 S.W.3d 220 (Tex. Crim. App. 2008), indicates that no formal guilty verdict is necessary, even in a death penalty case. In *Fuller*, the trial court instructed the jury, orally and in writing, to find the defendant guilty, but the only verdict form submitted to the jury was for the special issues. No verdict on guilt was returned. The defendant argued that he did not receive a trial by jury. The court of criminal appeals stated that "[i]n all cases where a defendant enters a plea of guilty before a jury, no issue of the defendant's guilt is submitted to the jury." *Fuller*, 253 S.W.3d at 227 (quoting *Brinson v. State*, 570 S.W.2d 937 (Tex. Crim. App. 1978)). Despite *Fuller*'s holding, the court did not encourage the procedure the trial court had followed, noting that it "did not create the clearest format for the jury to follow." *Fuller*, 253 S.W.3d at 227 n.24.

A final word of caution: trial judges should not (in the case of a slow plea) accept a defendant's guilty plea outside the jury's presence, as occurred in *Guajardo v. State*, No. 05-15-00365-CR, 2016 WL 1615609 (Tex. App.—Dallas Apr. 20, 2016, no pet.) (not designated for publication). While the court of appeals affirmed the conviction, it held the trial court was without authority to find the defendant guilty since, without a jury trial waiver, only a jury could find the defendant guilty. Thus, when a defendant has not waived his right to a jury trial in a felony, the guilty plea should be made to the

jury, not to the court. *See also In re State ex rel. Tharp*, 393 S.W.3d 751 (Tex. Crim. App. 2012) (explaining that Tex. Code Crim. Proc. art. 37.07's bifurcated procedure only applies to jury trials on a plea of not guilty).

III. Community Supervision Instructions

CPJC 12.5 General Comments on Community Supervision

Definition of "Convicted of a Felony." The proposed instruction does not define "convicted of a felony" or specify that the conviction must in any sense be "final." In the vast majority of cases, there will be no need to elaborate on this term.

If the evidence raises an issue on these matters, the instruction might appropriately be expanded to explain that a person is convicted of a felony even if the imposition of sentence is suspended and the defendant is placed on community supervision or probation. *See Franklin v. State*, 523 S.W.2d 947, 947–48 (Tex. Crim. App. 1975). This is the case even if the prior conviction has been set aside or a pardon issued. *McDowell v. State*, 235 S.W.3d 294, 298 (Tex. App.—Texarkana 2007, no pet.) (noting possible exception when action includes "an express finding by the trial court that the defendant was exonerated from the previous finding of guilt").

On the other hand, a conviction must be final; an existing appeal from the conviction renders that conviction insufficient to bar community supervision. *Baker v. State*, 520 S.W.2d 782 (Tex. Crim. App. 1975). If the evidence of a conviction also indicates that it may be on appeal, the instruction should appropriately be expanded to make clear that, if this is the case, the defendant has not been convicted of the felony within the meaning of the legal standard.

Maximum Period of Supervision. The instructions tell the jury that the duration of the period of community supervision will be determined by the court and specify the length of time that may be imposed. Under the Code of Criminal Procedure, if the jury recommends community supervision, "the judge shall place the defendant on community supervision for any period permitted under Articles 42A.053(d) and (f), as appropriate." Tex. Code Crim. Proc. art. 42A.055(c). Articles 42A.053(d) and (f) provide that the maximum period of community supervision for certain felonies is five years; for all other felonies, ten years; and for a misdemeanor, two years. Tex. Code Crim. Proc. art. 42A.053(d), (f).

Details of Community Supervision. A major concern for the Committee was how much of the detailed and complicated community supervision law to pass along to juries. Under current practice, juries are sometimes told the following:

> "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 during which a sentence of imprisonment or a sentence of imprisonment and fine is probated and the imposition of sentence is suspended in whole or in part.
>
> A defendant who has been placed on community supervision and who subsequently violates his conditions of community supervision shall be

> brought before the court, and the court, after a hearing without a jury, may either continue or revoke community supervision, and if the community supervision is revoked, the court shall proceed to dispose of the case as if there had been no community supervision not to exceed the term of years assessed by the jury.

The Committee tried to translate this sort of largely statutory language into terminology more likely to be understood by jurors. It tried to include the most significant aspects of community supervision without providing a misleadingly incomplete or oversimplified picture of the process.

Reference to Sworn Motion Filed by Defendant. Article 42A.055(b) of the Code of Criminal Procedure states, "A defendant is eligible for community supervision under this article only if: (1) before the trial begins the defendant files a written sworn motion with the judge that the defendant has not previously been convicted of a felony in this or any other state and (2) *the jury enters in the verdict a finding that the information in the defendant's motion is true.*" Tex. Code Crim. Proc. art. 42A.055(b) (emphasis added).

In current practice, instructions often use the precise terms used in the Code of Criminal Procedure that (1) refer to the defendant's filing a sworn motion for community supervision, (2) refer to the defendant's motion that states that he has not previously been convicted of a felony in this or any other state, and (3) tell the jury that to recommend community supervision it must enter in the verdict a finding that the information in the defendant's motion is true. Some members of the Committee preferred this approach, in part because it permits a defendant who chooses not to testify to put the fact of his sworn representation of no prior convictions before the jury.

A majority of the Committee, however, concluded that under existing law the defendant is not entitled to have the jury informed that the defendant has met the legal requirement that this document be filed, as the defendant's having made this sworn statement is not relevant to any issue properly before the jury.

The fact of having filed the required sworn motion and statement of no prior felony convictions does not entitle a defendant to a jury instruction regarding the jury's power to recommend probation. There must be evidence before the jury that the defendant has never been convicted of a felony. *Palasota v. State*, 460 S.W.2d 137, 140–41 (Tex. Crim. App. 1970) ("The mere filing of the sworn motion for probation is not sufficient; there must be proof of appellant's eligibility for probation in support of such sworn motion."). *Accord Walker v. State*, 440 S.W.2d 653, 659 (Tex. Crim. App. 1969); *Beyince v. State*, 954 S.W.2d 878, 880 (Tex. App.—Houston [14th Dist.] 1997, no pet.).

The jury instruction need not, and should not, require the jury to find "as a prerequisite to awarding probation, that the defendant had filed an affidavit stating that he never has been convicted of a felony, and that the defendant had filed a motion for pro-

bation." *Booher v. State*, 668 S.W.2d 882, 883–84 (Tex. App.—Houston [1st Dist.] 1984, pet. ref'd) (defendant not harmed by jury instruction requiring such findings).

The fact that the defendant has made and filed the motion for probation that is before the jury does not constitute the evidence required for a jury instruction. *Green v. State*, 658 S.W.2d 303, 308–09 (Tex. App.—Houston [1st Dist.] 1983, pet. ref'd) ("The reading of the sworn motion proved that appellant had filed a sworn motion for probation alleging that he had never been convicted of a felony; however, it did not constitute proof of the matter asserted.").

In fact, the defendant is probably not entitled to introduce before the jury evidence that the sworn statement was made and the motion filed. *McMullen v. State*, No. 06-07-00058-CR, 2007 WL 2909454, at *2 (Tex. App.—Texarkana Oct. 8, 2007, no pet.) (not designated for publication) ("A sworn application for community supervision is hearsay and not admissible as evidence."). *Accord Carter v. State*, No. 05-93-00608-CR, 1994 WL 169578, at *1 (Tex. App.—Dallas May 4, 1994, no pet.) (not designated for publication) (trial court did not err in refusing to permit defendant to present testimony of court clerk that defendant had filed sworn motion for probation containing an assertion that he had never been convicted of felony "because such evidence would not have shown he was eligible for probation").

Therefore, rather than the jury finding the information in the defendant's *motion* is true, the Committee recommends that the verdict refer to the *contents* of the motion by stating that the jury finds the defendant has not previously been convicted of a felony in this or any other state.

CPJC 12.6 Instruction—Community Supervision—Felony Conviction

The defendant has asked that you recommend he be granted community supervision. You may in this case be able to recommend that the confinement assessed by you, any fine assessed by you, or both, be suspended and the defendant placed on community supervision.

"Community supervision" is often called "probation." The two terms mean the same thing.

If the defendant is placed on community supervision, the defendant will not be required during the period of community supervision to serve the period of confinement assessed by you. If you assess a fine and recommend that the fine be suspended, the defendant will not be required during the period of community supervision to pay that fine.

If the defendant successfully completes the period of community supervision, the court will discharge the defendant. A defendant so discharged will never have to serve the confinement assessed by you or pay any fine that you have recommended be suspended.

During the period of community supervision, conditions will be imposed on the defendant, and the defendant will be placed under a variety of programs. If the defendant is believed to have violated the conditions of community supervision, the defendant will be brought before the court. The court, after a hearing without a jury, will either continue or revoke the community supervision.

If the court revokes the community supervision, the court will dispose of the case as if there had been no community supervision. It will sentence the defendant to a term of confinement not exceeding the term assessed by this jury. It may also require the defendant to pay any fine assessed by this jury that the jury recommended be suspended.

The duration of the period of community supervision will be determined by the court. It may not be for a period of longer than [five/ten] years.

If you recommend that the defendant be placed on community supervision, the court must grant the defendant community supervision.

[Include the following if the applicable law requires certain mandatory conditions on community supervision.]

If the defendant is placed on community supervision, the court must impose certain conditions on the defendant. These mandatory conditions include the following:

[Insert list of conditions.]

In addition, if the defendant is granted community supervision, the court may impose any other reasonable condition that is designed to protect or restore the community; protect or restore the victim; or punish, rehabilitate, or restore the defendant. The conditions that the court may impose include, but are not limited to, the following:

[Insert list of conditions.]

During the period of community supervision, the court may, at any time, alter or modify the [*include if applicable:* nonmandatory] conditions imposed on the defendant.

[Include the following if the applicable law requires no mandatory conditions on community supervision.]

If the defendant is placed on community supervision, the court will determine what conditions to impose on the defendant. The conditions that the court may impose include, but are not limited to, the following:

[Insert list of conditions.]

During the period of community supervision, the court may, at any time, alter or modify the conditions imposed on the defendant.

You may recommend that the defendant be placed on community supervision only if both of two requirements are met:

1. The punishment you have assessed is not more than ten years' confinement, and

2. You find the defendant has never been convicted of a felony in this or any other state.

If you decide to recommend that the defendant be placed on community supervision, you should indicate whether you recommend suspension of the term of confinement, any fine, or both.

If you decide not to recommend that the court suspend the sentence and place the defendant on community supervision, you should use the verdict form that does not recommend community supervision.

VERDICT—NO RECOMMENDATION OF COMMUNITY SUPERVISION

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], assess his punishment at: (select one)

_____ imprisonment in the Texas Department of Criminal Justice for a term of _____ years and no fine.

_____ imprisonment in the Texas Department of Criminal Justice for a term of _____ years and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

VERDICT—RECOMMENDATION OF COMMUNITY SUPERVISION

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], assess his punishment at: (select one)

_____ imprisonment in the Texas Department of Criminal Justice for a term of _____ years and no fine.

_____ imprisonment in the Texas Department of Criminal Justice for a term of _____ years and a fine of $_____.

Having assessed punishment at no more than ten years' imprisonment, we further find that the defendant has never been convicted of a felony and recommend he be placed on community supervision. We recommend suspension of: (select one)

_____ the term of imprisonment only.

_____ any fine assessed only.

_____ the term of imprisonment and any fine assessed.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

COMMENT

Jury consideration of community supervision is set out in Tex. Code Crim. Proc. arts. 42A.055, 42A.056.

Caution: This instruction does not address all possible circumstances under which community supervision may be unavailable or in which there may be special requirements for its imposition. *See, e.g.*, Tex. Code Crim. Proc. arts. 42A.054, 42A.056, 42A.204. The parties must review the law carefully in light of the facts of the case at hand.

CPJC 12.7 Instruction—Community Supervision—Misdemeanor Conviction

The defendant has asked that you recommend he be granted community supervision. You may in this case be able to recommend that the confinement assessed by you, any fine assessed by you, or both, be suspended and the defendant placed on community supervision.

"Community supervision" is often called "probation." The two terms mean the same thing.

If the defendant is placed on community supervision, the defendant will not be required during the period of community supervision to serve the period of confinement assessed by you. If you assess a fine and recommend that the fine be suspended, the defendant will not be required during the period of community supervision to pay that fine.

If the defendant successfully completes the period of community supervision, the court will discharge the defendant. A defendant so discharged will never have to serve the confinement assessed by you or pay any fine that you have recommended be suspended.

During the period of community supervision, conditions will be imposed on the defendant, and the defendant will be placed under a variety of programs. If the defendant is believed to have violated the conditions of community supervision, the defendant will be brought before the court. The court, after a hearing without a jury, will either continue or revoke the community supervision.

If the court revokes the community supervision, the court will dispose of the case as if there had been no community supervision. It will sentence the defendant to a term of confinement not exceeding the term assessed by this jury. It may also require the defendant to pay any fine assessed by this jury that the jury recommended be suspended.

The duration of the period of community supervision will be determined by the court. It may not be for a period of longer than two years.

If you recommend that the defendant be placed on community supervision, the court must grant the defendant community supervision.

[Include the following if the applicable law requires certain mandatory conditions on community supervision.]

If the defendant is placed on community supervision, the court must impose certain conditions on the defendant. These mandatory conditions include the following:

[Insert list of conditions.]

In addition, if the defendant is granted community supervision, the court may impose any other reasonable condition that is designed to protect or restore the community; protect or restore the victim; or punish, rehabilitate, or restore the defendant. The conditions that the court may impose include, but are not limited to, the following:

[Insert list of conditions.]

During the period of community supervision, the court may, at any time, alter or modify the [*include if applicable:* nonmandatory] conditions imposed on the defendant.

[Include the following if the applicable law requires no mandatory conditions on community supervision.]

If the defendant is placed on community supervision, the court will determine what conditions to impose on the defendant. The conditions that the court may impose include, but are not limited to, the following:

[Insert list of conditions.]

During the period of community supervision, the court may, at any time, alter or modify the conditions imposed on the defendant.

You may recommend that the defendant be placed on community supervision only if you find the defendant has never been convicted of a felony in this or any other state.

If you decide to recommend that the defendant be placed on community supervision, you should indicate whether you recommend suspension of the term of confinement, any fine, or both.

If you decide not to recommend that the court suspend the sentence and place the defendant on community supervision, you should use the verdict form that does not recommend community supervision.

VERDICT—NO RECOMMENDATION OF COMMUNITY SUPERVISION

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], assess his punishment at: (select one)

_____ a fine of $_____ and no confinement in jail.

_____ confinement in the county jail for a term of _____ and no fine.

_____ confinement in the county jail for a term of _____ and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

VERDICT—RECOMMENDATION OF COMMUNITY SUPERVISION

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], assess his punishment at: (select one)

_____ a fine of $_____ and no confinement in jail.

_____ confinement in the county jail for a term of _____ and no fine.

_____ confinement in the county jail for a term of _____ and a fine of $_____.

We further find that the defendant has never been convicted of a felony and recommend he be placed on community supervision. We recommend suspension of: (select one)

_____ the term of confinement only.

_____ any fine assessed only.

_____ the term of confinement and any fine assessed.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

COMMENT

Jury consideration of community supervision is set out in Tex. Code Crim. Proc. arts. 42A.055, 42A.056.

Caution: This instruction does not address all possible circumstances under which community supervision may be unavailable or in which there may be special requirements for its imposition. *See, e.g.*, Tex. Code Crim. Proc. arts. 42A.054, 42A.056, 42A.204. The parties must review the law carefully in light of the facts of the case at hand.

IV. Specific Felony Punishment Instructions

CPJC 12.8 General Comments—Good Conduct Time and Parole Instructions—Section 3g Offenses and Deadly Weapon Findings

Section 4 of article 37.07 of the Code of Criminal Procedure mandates specific jury instructions on good conduct time and parole for three different types of cases. Tex. Code Crim. Proc. art. 37.07, § 4(a)–(c). Section 4(a) sets out an instruction for two situations. One covers cases in which the defendant has been convicted of an offense listed in article 42A.054(a). The other covers those cases in which "the judgment contains an affirmative finding [of use of a deadly weapon] under Article 42A.054(c) or (d) of [the Code of Criminal Procedure]." Tex. Code Crim. Proc. art. 37.07, § 4(a).

The manner in which the punishment stage instructions deal with the second type of situation depends on how the deadly weapon matter is submitted to the jury. If the issue is submitted at punishment, the jury instructions must include multiple versions of the good conduct time and parole law, one for consideration if the deadly weapon finding is made and the others for use if the finding is not made. A plurality opinion of the court of criminal appeals has described submission at the guilt stage as the better practice. *Hill v. State*, 913 S.W.2d 581, 586 (Tex. Crim. App. 1996) (plurality opinion). *See also Olivas v. State*, 202 S.W.3d 137, 142 n.9 (Tex. Crim. App. 2006) (court of appeals' holding that submission of deadly weapon issue at guilt was improper was not before court of criminal appeals, "but we note that the deadly weapon issue has been submitted in this manner in other cases").

The Committee agrees that the deadly weapon issue is better submitted to the jury at the guilt stage of the trial. This considerably simplifies the punishment stage instruction.

Awkwardly, section 4(a) requires submission of the instructions set out in that provision if the deadly weapon finding is contained in the judgment. Of course, the judge must decide the content of the punishment stage instructions before the judgment is drafted. If the jury's action in the guilt stage constitutes a deadly weapon finding, which the judge will be required to include in the judgment, the punishment stage instruction should include the section 4(a) language.

Some instructions for individual offenses contain multiple options. One is for cases in which either the offense of which the defendant was convicted is a section 3g(a)(1) offense or in which the judge has decided to include a deadly weapon finding in the judgment. The others are for other cases.

CPJC 12.9 Instruction—First-Degree Felony—Unenhanced

You have found the defendant, [*name*], guilty of [*offense*].

Relevant Statutes

This offense is punishable by—

1. a term of imprisonment for no less than five years and no more than ninety-nine years or for life, or

2. a term of imprisonment for no less than five years and no more than ninety-nine years or for life and a fine of no more than $10,000.

Parole and Good Conduct Time

[Include the following if the offense is one under Texas Code of Criminal Procedure article 37.07, section 4(b).]

Under the law applicable in this case, the defendant, if sentenced to a term of imprisonment, may earn time off the period of incarceration imposed through the award of good conduct time. Prison authorities may award good conduct time to a prisoner who exhibits good behavior, diligence in carrying out prison work assignments, and attempts at rehabilitation. If a prisoner engages in misconduct, prison authorities may also take away all or part of any good conduct time earned by the prisoner.

It is also possible that the length of time for which the defendant will be imprisoned might be reduced by the award of parole.

Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served plus any good conduct time earned equals one-fourth of the sentence imposed or fifteen years, whichever is less. Eligibility for parole does not guarantee that parole will be granted.

It cannot accurately be predicted how the parole law and good conduct time might be applied to this defendant if he is sentenced to a term of imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities.

You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant.

[Include the following if the offense is one under Texas Code of Criminal Procedure article 37.07, section 4(a).]

Under the law applicable in this case, the defendant, if sentenced to a term of imprisonment, may earn time off the period of incarceration imposed through the award of good conduct time. Prison authorities may award good conduct time to a prisoner who exhibits good behavior, diligence in carrying out prison work assignments, and attempts at rehabilitation. If a prisoner engages in misconduct, prison authorities may also take away all or part of any good conduct time earned by the prisoner.

It is also possible that the length of time for which the defendant will be imprisoned might be reduced by the award of parole.

Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served equals one-half of the sentence imposed or thirty years, whichever is less, without consideration of any good conduct time he may earn. If the defendant is sentenced to a term of less than four years, he must serve at least two years before he is eligible for parole. Eligibility for parole does not guarantee that parole will be granted.

It cannot accurately be predicted how the parole law and good conduct time might be applied to this defendant if he is sentenced to a term of imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities.

You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant.

Verdict

You are therefore to determine and state in your verdict—

1. the term in prison to be imposed on the defendant for no less than five years and no more than ninety-nine years or for life, or

2. the term in prison to be imposed on the defendant for no less than five years and no more than ninety-nine years or for life and a fine of no more than $10,000.

VERDICT

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], assess his punishment at: (select one)

_____ imprisonment in the Texas Department of Criminal Justice for a term of _____ years and no fine.

_____ imprisonment in the Texas Department of Criminal Justice for a term of _____ years and a fine of $_____.

_____ imprisonment in the Texas Department of Criminal Justice for life and no fine.

_____ imprisonment in the Texas Department of Criminal Justice for life and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

COMMENT

Punishment for a first-degree felony is set out in Tex. Penal Code § 12.32.

The parole and good conduct time instruction is taken from Tex. Code Crim. Proc. art. 37.07, § 4(a), (b).

Caution: This instruction does not address all possible circumstances under which parole or good conduct time may be restricted. *See, e.g.*, Tex. Code Crim. Proc. art. 37.07, § 4(a). The parties must review the law carefully in light of the facts of the case at hand.

CPJC 12.10 Instruction—First-Degree Felony—Enhanced (One Prior Felony)

You have found the defendant, [*name*], guilty of [*offense*]. The state has accused the defendant of having been convicted of a felony once before. It asks that you find this accusation true and assess punishment under the law applicable to defendants with a prior felony conviction.

Accusation

Specifically, the state accuses the defendant of being convicted on [*date*], in Cause No. [*number*] in the District Court of [*county*] County, Texas, for the felony offense of [*offense*]. The state further alleges that this conviction became a final conviction before the commission of the offense for which you have found the defendant guilty in this trial.

The defendant has pleaded that this accusation is "not true."

The range of punishments from which you must assess the defendant's punishment therefore depends on whether you find the state has proved the prior conviction accusation.

Relevant Statutes—Punishment If Accusation of Prior Conviction "Not True"

If the state does not prove the accusation of a prior conviction is true, this offense is punishable by—

1. a term of imprisonment for no less than five years and no more than ninety-nine years or for life, or

2. a term of imprisonment for no less than five years and no more than ninety-nine years or for life and a fine of no more than $10,000.

Relevant Statutes—Punishment If Accusation of Prior Conviction Proved "True"

If the state proves the accusation of a prior conviction is true, this offense is punishable by—

1. a term of imprisonment for no less than fifteen years and no more than ninety-nine years or for life, or

2. a term of imprisonment for no less than fifteen years and no more than ninety-nine years or for life and a fine of no more than $10,000.

Other Relevant Statutes

[*Offense*] is a felony offense.

Burden of Proof

The state must prove, beyond a reasonable doubt, the prior conviction accusation.

[Include the following if the offense is one under Texas Code of Criminal Procedure article 37.07, section 4(b).]

Parole and Good Conduct Time

Under the law applicable in this case, the defendant, if sentenced to a term of imprisonment, may earn time off the period of incarceration imposed through the award of good conduct time. Prison authorities may award good conduct time to a prisoner who exhibits good behavior, diligence in carrying out prison work assignments, and attempts at rehabilitation. If a prisoner engages in misconduct, prison authorities may also take away all or part of any good conduct time earned by the prisoner.

It is also possible that the length of time for which the defendant will be imprisoned might be reduced by the award of parole.

Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served plus any good conduct time earned equals one-fourth of the sentence imposed or fifteen years, whichever is less. Eligibility for parole does not guarantee that parole will be granted.

It cannot accurately be predicted how the parole law and good conduct time might be applied to this defendant if he is sentenced to a term of imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities.

You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, three elements of its accusation of a prior conviction. The elements are that—

1. the defendant was convicted on [*date*], in Cause No. [*number*] in the District Court of [*county*] County, Texas; and

2. this conviction was for [*offense*], a felony; and

3. this conviction became final before the commission of the offense for which the defendant was convicted in this trial.

You must all agree on elements 1, 2, and 3 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the prior conviction accusation is "not true." In this event, you are to determine and state in your verdict—

1. the term in prison to be imposed on the defendant for no less than five years and no more than ninety-nine years or for life, or

2. the term in prison to be imposed on the defendant for no less than five years and no more than ninety-nine years or for life and a fine of no more than $10,000.

If you all agree the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must find the prior conviction accusation is "true." In this event, you are to determine and state in your verdict—

1. the term in prison to be imposed on the defendant for no less than fifteen years and no more than ninety-nine years or for life, or

2. the term in prison to be imposed on the defendant for no less than fifteen years and no more than ninety-nine years or for life and a fine of no more than $10,000.

VERDICT—ACCUSATION OF PRIOR CONVICTION "NOT TRUE"

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], find that the accusation of a prior conviction has not been proved true. We assess the defendant's punishment at: (select one)

_____ imprisonment in the Texas Department of Criminal Justice for a term of _____ years and no fine.

_____ imprisonment in the Texas Department of Criminal Justice for a term of _____ years and a fine of $_____.

_____ imprisonment in the Texas Department of Criminal Justice for life and no fine.

_____ imprisonment in the Texas Department of Criminal Justice for life and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

VERDICT—ACCUSATION OF PRIOR CONVICTION "TRUE"

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], find that the accusation of a prior conviction has been proved true. We assess the defendant's punishment at: (select one)

_____ imprisonment in the Texas Department of Criminal Justice for a term of _____ years and no fine.

_____ imprisonment in the Texas Department of Criminal Justice for a term of _____ years and a fine of $_____.

_____ imprisonment in the Texas Department of Criminal Justice for life and no fine.

_____ imprisonment in the Texas Department of Criminal Justice for life and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

COMMENT

Punishment for a first-degree felony is set out in Tex. Penal Code § 12.32. Punishment for a first-degree felony enhanced by one prior felony conviction, other than a state jail felony punishable under Tex. Penal Code § 12.35, is set out in Tex. Penal Code § 12.42(c)(1).

The parole and good conduct time instruction is taken from Tex. Code Crim. Proc. art. 37.07, § 4(b).

Caution: This instruction does not address all possible circumstances under which parole or good conduct time may be restricted. *See, e.g.*, Tex. Code Crim. Proc. art. 37.07, § 4(a). The parties must review the law carefully in light of the facts of the case at hand.

CPJC 12.11 Instruction—Second-Degree Felony—Unenhanced

You have found the defendant, [*name*], guilty of [*offense*].

Relevant Statutes

This offense is punishable by—

1. a term of imprisonment for no less than two years and no more than twenty years, or

2. a term of imprisonment for no less than two years and no more than twenty years and a fine of no more than $10,000.

[Include the following if the offense is one under Texas Code of Criminal Procedure article 37.07, section 4(c).]

Parole and Good Conduct Time

Under the law applicable in this case, the defendant, if sentenced to a term of imprisonment, may earn time off the period of incarceration imposed through the award of good conduct time. Prison authorities may award good conduct time to a prisoner who exhibits good behavior, diligence in carrying out prison work assignments, and attempts at rehabilitation. If a prisoner engages in misconduct, prison authorities may also take away all or part of any good conduct time earned by the prisoner.

It is also possible that the length of time for which the defendant will be imprisoned might be reduced by the award of parole.

Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served plus any good conduct time earned equals one-fourth of the sentence imposed. Eligibility for parole does not guarantee that parole will be granted.

It cannot accurately be predicted how the parole law and good conduct time might be applied to this defendant if he is sentenced to a term of imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities.

You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant.

Verdict

You are therefore to determine and state in your verdict—

1. the term in prison to be imposed on the defendant for no less than two years and no more than twenty years, or

2. the term in prison to be imposed on the defendant for no less than two years and no more than twenty years and a fine of no more than $10,000.

VERDICT

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], assess his punishment at: (select one)

_____ imprisonment in the Texas Department of Criminal Justice for a term of _____ years and no fine.

_____ imprisonment in the Texas Department of Criminal Justice for a term of _____ years and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

COMMENT

Punishment for a second-degree felony is set out in Tex. Penal Code § 12.33.

The parole and good conduct time instruction is taken from Tex. Code Crim. Proc. art. 37.07, § 4(c).

Caution: This instruction does not address all possible circumstances under which parole or good conduct time may be restricted. *See, e.g.*, Tex. Code Crim. Proc. art. 37.07, § 4(a). The parties must review the law carefully in light of the facts of the case at hand.

CPJC 12.12 Instruction—Second-Degree Felony—Enhanced (One Prior Felony)

You have found the defendant, [*name*], guilty of [*offense*]. The state has accused the defendant of having been convicted of a felony once before. It asks that you find this accusation true and assess punishment under the law applicable to defendants with a prior felony conviction.

Accusation

Specifically, the state accuses the defendant of being convicted on [*date*], in Cause No. [*number*] in the District Court of [*county*] County, Texas, for the felony offense of [*offense*]. The state further alleges that this conviction became a final conviction before the commission of the offense for which you have found the defendant guilty in this trial.

The defendant has pleaded that this accusation is "not true."

The range of punishments from which you must assess the defendant's punishment therefore depends on whether you find the state has proved the prior conviction accusation.

Relevant Statutes—Punishment If Accusation of Prior Conviction "Not True"

If the state does not prove the accusation of a prior conviction is true, this offense is punishable by—

1. a term of imprisonment for no less than two years and no more than twenty years, or

2. a term of imprisonment for no less than two years and no more than twenty years and a fine of no more than $10,000.

Relevant Statutes—Punishment If Accusation of Prior Conviction Proved "True"

If the state proves the accusation of a prior conviction is true, this offense is punishable by—

1. a term of imprisonment for no less than five years and no more than ninety-nine years or for life, or

2. a term of imprisonment for no less than five years and no more than ninety-nine years or for life and a fine of no more than $10,000.

Other Relevant Statutes

[*Offense*] is a felony offense.

Burden of Proof

The state must prove, beyond a reasonable doubt, the prior conviction accusation.

[Include the following if the offense is one under Texas Code of Criminal Procedure article 37.07, section 4(c).]

Parole and Good Conduct Time

Under the law applicable in this case, the defendant, if sentenced to a term of imprisonment, may earn time off the period of incarceration imposed through the award of good conduct time. Prison authorities may award good conduct time to a prisoner who exhibits good behavior, diligence in carrying out prison work assignments, and attempts at rehabilitation. If a prisoner engages in misconduct, prison authorities may also take away all or part of any good conduct time earned by the prisoner.

It is also possible that the length of time for which the defendant will be imprisoned might be reduced by the award of parole.

Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served plus any good conduct time earned equals one-fourth of the sentence imposed. Eligibility for parole does not guarantee that parole will be granted.

It cannot accurately be predicted how the parole law and good conduct time might be applied to this defendant if he is sentenced to a term of imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities.

You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, three elements of its accusation of a prior conviction. The elements are that—

1. the defendant was convicted on [*date*], in Cause No. [*number*] in the District Court of [*county*] County, Texas; and

2. this conviction was for [*offense*], a felony; and

3. this conviction became final before the commission of the offense for which the defendant was convicted in this trial.

You must all agree on elements 1, 2, and 3 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the prior conviction accusation is "not true." In this event, you are to determine and state in your verdict—

1. the term in prison to be imposed on the defendant for no less than two years and no more than twenty years, or

2. the term in prison to be imposed on the defendant for no less than two years and no more than twenty years and a fine of no more than $10,000.

If you all agree the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must find the prior conviction accusation is "true." In this event, you are to determine and state in your verdict—

1. the term in prison to be imposed on the defendant for no less than five years and no more than ninety-nine years or for life, or

2. the term in prison to be imposed on the defendant for no less than five years and no more than ninety-nine years or for life and a fine of no more than $10,000.

VERDICT—ACCUSATION OF PRIOR CONVICTION "NOT TRUE"

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], find that the accusation of a prior conviction has not been proved true. We assess the defendant's punishment at: (select one)

_____ imprisonment in the Texas Department of Criminal Justice for a term of _____ years and no fine.

_____ imprisonment in the Texas Department of Criminal Justice for a term of _____ years and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

VERDICT—ACCUSATION OF PRIOR CONVICTION "TRUE"

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], find that the accusation of a prior conviction has been proved true. We assess the defendant's punishment at: (select one)

_____ imprisonment in the Texas Department of Criminal Justice for a term of _____ years and no fine.

_____ imprisonment in the Texas Department of Criminal Justice for a term of _____ years and a fine of $_____.

_____ imprisonment in the Texas Department of Criminal Justice for life and no fine.

_____ imprisonment in the Texas Department of Criminal Justice for life and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

COMMENT

Punishment for a second-degree felony is set out in Tex. Penal Code § 12.33. Punishment for a second-degree felony enhanced by one prior felony conviction, other than a state jail felony punishable under Tex. Penal Code § 12.35(a), is set out in Tex. Penal Code § 12.42(b).

The parole and good conduct time instruction is taken from Tex. Code Crim. Proc. art. 37.07, § 4(c).

Caution: This instruction does not address all possible circumstances under which parole or good conduct time may be restricted. *See, e.g.*, Tex. Code Crim. Proc. art. 37.07, § 4(a). The parties must review the law carefully in light of the facts of the case at hand.

CPJC 12.13 Instruction—Third-Degree Felony—Unenhanced

You have found the defendant, [*name*], guilty of [*offense*].

Relevant Statutes

This offense is punishable by—

1. a term of imprisonment for no less than two years and no more than ten years, or

2. a term of imprisonment for no less than two years and no more than ten years and a fine of no more than $10,000.

Parole and Good Conduct Time

[Include the following if the offense is one under Texas Code of Criminal Procedure article 37.07, section 4(c).]

Under the law applicable in this case, the defendant, if sentenced to a term of imprisonment, may earn time off the period of incarceration imposed through the award of good conduct time. Prison authorities may award good conduct time to a prisoner who exhibits good behavior, diligence in carrying out prison work assignments, and attempts at rehabilitation. If a prisoner engages in misconduct, prison authorities may also take away all or part of any good conduct time earned by the prisoner.

It is also possible that the length of time for which the defendant will be imprisoned might be reduced by the award of parole.

Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served plus any good conduct time earned equals one-fourth of the sentence imposed. Eligibility for parole does not guarantee that parole will be granted.

It cannot accurately be predicted how the parole law and good conduct time might be applied to this defendant if he is sentenced to a term of imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities.

You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant.

[Include the following if the offense is one under Texas Code of Criminal Procedure article 37.07, section 4(a).]

Under the law applicable in this case, the defendant, if sentenced to a term of imprisonment, may earn time off the period of incarceration imposed through the award of good conduct time. Prison authorities may award good conduct time to a prisoner who exhibits good behavior, diligence in carrying out prison work assignments, and attempts at rehabilitation. If a prisoner engages in misconduct, prison authorities may also take away all or part of any good conduct time earned by the prisoner.

It is also possible that the length of time for which the defendant will be imprisoned might be reduced by the award of parole.

Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served equals one-half of the sentence imposed or thirty years, whichever is less, without consideration of any good conduct time he may earn. If the defendant is sentenced to a term of less than four years, he must serve at least two years before he is eligible for parole. Eligibility for parole does not guarantee that parole will be granted.

It cannot accurately be predicted how the parole law and good conduct time might be applied to this defendant if he is sentenced to a term of imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities.

You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant.

Verdict

You are therefore to determine and state in your verdict—

1. the term in prison to be imposed on the defendant for no less than two years and no more than ten years, or

2. the term in prison to be imposed on the defendant for no less than two years and no more than ten years and a fine of no more than $10,000.

VERDICT

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], assess his punishment at: (select one)

_____ imprisonment in the Texas Department of Criminal Justice for a term of _____ years and no fine.

_____ imprisonment in the Texas Department of Criminal Justice for a term of _____ years and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

COMMENT

Punishment for a third-degree felony is set out in Tex. Penal Code § 12.34.

The parole and good conduct time instruction is taken from Tex. Code Crim. Proc. art. 37.07, § 4(a), (c).

Caution: This instruction does not address all possible circumstances under which parole or good conduct time may be restricted. *See, e.g.*, Tex. Code Crim. Proc. art. 37.07, § 4(a). The parties must review the law carefully in light of the facts of the case at hand.

CPJC 12.14 Instruction—Third-Degree Felony—Enhanced (One Prior Felony)

You have found the defendant, [*name*], guilty of [*offense*]. The state has accused the defendant of having been convicted of a felony once before. It asks that you find this accusation true and assess punishment under the law applicable to defendants with a prior felony conviction.

Accusation

Specifically, the state accuses the defendant of being convicted on [*date*], in Cause No. [*number*] in the District Court of [*county*] County, Texas, for the felony offense of [*offense*]. The state further alleges that this conviction became a final conviction before the commission of the offense for which you have found the defendant guilty in this trial.

The defendant has pleaded that this accusation is "not true."

The range of punishments from which you must assess the defendant's punishment therefore depends on whether you find the state has proved the prior conviction accusation.

Relevant Statutes—Punishment If Accusation of Prior Conviction "Not True"

If the state does not prove the accusation of a prior conviction is true, this offense is punishable by—

1. a term of imprisonment for no less than two years and no more than ten years, or

2. a term of imprisonment for no less than two years and no more than ten years and a fine of no more than $10,000.

Relevant Statutes—Punishment If Accusation of Prior Conviction Proved "True"

If the state proves the accusation of a prior conviction is true, this offense is punishable by—

1. a term of imprisonment for no less than two years and no more than twenty years, or

2. a term of imprisonment for no less than two years and no more than twenty years and a fine of no more than $10,000.

Other Relevant Statutes

[*Offense*] is a felony offense.

Burden of Proof

The state must prove, beyond a reasonable doubt, the prior conviction accusation.

[Include the following if the offense is one under Texas Code of Criminal Procedure article 37.07, section 4(c).]

Parole and Good Conduct Time

Under the law applicable in this case, the defendant, if sentenced to a term of imprisonment, may earn time off the period of incarceration imposed through the award of good conduct time. Prison authorities may award good conduct time to a prisoner who exhibits good behavior, diligence in carrying out prison work assignments, and attempts at rehabilitation. If a prisoner engages in misconduct, prison authorities may also take away all or part of any good conduct time earned by the prisoner.

It is also possible that the length of time for which the defendant will be imprisoned might be reduced by the award of parole.

Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served plus any good conduct time earned equals one-fourth of the sentence imposed. Eligibility for parole does not guarantee that parole will be granted.

It cannot accurately be predicted how the parole law and good conduct time might be applied to this defendant if he is sentenced to a term of imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities.

You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, three elements of its accusation of a prior conviction. The elements are that—

1. the defendant was convicted on [*date*], in Cause No. [*number*] in the District Court of [*county*] County, Texas; and

2. this conviction was for [*offense*], a felony; and

3. this conviction became final before the commission of the offense for which the defendant was convicted in this trial.

You must all agree on elements 1, 2, and 3 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the prior conviction accusation is "not true." In this event, you are to determine and state in your verdict—

1. the term in prison to be imposed on the defendant for no less than two years and no more than ten years, or

2. the term in prison to be imposed on the defendant for no less than two years and no more than ten years and a fine of no more than $10,000.

If you all agree the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must find the prior conviction accusation is "true." In this event, you are to determine and state in your verdict—

1. the term in prison to be imposed on the defendant for no less than two years and no more than twenty years, or

2. the term in prison to be imposed on the defendant for no less than two years and no more than twenty years and a fine of no more than $10,000.

VERDICT—ACCUSATION OF PRIOR CONVICTION "NOT TRUE"

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], find that the accusation of a prior conviction has not been proved true. We assess the defendant's punishment at: (select one)

_____ imprisonment in the Texas Department of Criminal Justice for a term of _____ years and no fine.

_____ imprisonment in the Texas Department of Criminal Justice for a term of _____ years and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

VERDICT—ACCUSATION OF PRIOR CONVICTION "TRUE"

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], find that the accusation of a prior conviction has been proved true. We assess the defendant's punishment at: (select one)

_____ imprisonment in the Texas Department of Criminal Justice for a term of _____ years and no fine.

_____ imprisonment in the Texas Department of Criminal Justice for a term of _____ years and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

COMMENT

Punishment for a third-degree felony is set out in Tex. Penal Code § 12.34. Punishment for a third-degree felony enhanced by one prior felony conviction, other than a state jail felony punishable under Tex. Penal Code § 12.35(a), is set out in Tex. Penal Code § 12.42(a).

The parole and good conduct time instruction is taken from Tex. Code Crim. Proc. art. 37.07, § 4(c).

Caution: This instruction does not address all possible circumstances under which parole or good conduct time may be restricted. *See, e.g.*, Tex. Code Crim. Proc. art. 37.07, § 4(a). The parties must review the law carefully in light of the facts of the case at hand.

CPJC 12.15 Instruction—Any Felony Other Than State Jail Felony—Enhanced (Two Prior Felonies)

You have found the defendant, [*name*], guilty of [*offense*]. The state has accused the defendant of having been convicted of a felony twice before. It asks that you find this accusation true and assess punishment under the law applicable to defendants with two prior felony convictions.

Accusation

Specifically, the state accuses the defendant of being convicted on [*date*], in Cause No. [*number*] in the District Court of [*county*] County, Texas, for the felony offense of [*offense*]. The state further alleges that this conviction became a final conviction before the commission of the offense of which the defendant is accused in the next paragraph.

The state further accuses the defendant of being convicted on [*date*], in Cause No. [*number*] in the District Court of [*county*] County, Texas, for the felony offense of [*offense*]. The state further alleges that this conviction became a final conviction before the commission of the offense for which you have found the defendant guilty in this trial.

The defendant has pleaded that this accusation is "not true."

The range of punishments from which you must assess the defendant's punishment therefore depends on whether you find the state has proved the prior convictions accusation.

Relevant Statutes—Punishment If Accusation of Prior Convictions "Not True"

If the state does not prove the accusation of prior convictions is true, this offense is punishable by—

[Insert range for charged offense, unenhanced.]

Relevant Statutes—Punishment If Accusation of Prior Convictions Proved "True"

If the state proves the accusation of two prior convictions is true, this offense is punishable by—

1. a term of imprisonment for no less than twenty-five years and no more than ninety-nine years or for life, or

2. a term of imprisonment for no less than twenty-five years and no more than ninety-nine years or for life and a fine of no more than $10,000.

Other Relevant Statutes

[*Offense*] is a felony offense.

Burden of Proof

The state must prove, beyond a reasonable doubt, the prior convictions accusation.

[Include the following if the offense is one under Texas Code of Criminal Procedure article 37.07, section 4(b).]

Parole and Good Conduct Time

Under the law applicable in this case, the defendant, if sentenced to a term of imprisonment, may earn time off the period of incarceration imposed through the award of good conduct time. Prison authorities may award good conduct time to a prisoner who exhibits good behavior, diligence in carrying out prison work assignments, and attempts at rehabilitation. If a prisoner engages in misconduct, prison authorities may also take away all or part of any good conduct time earned by the prisoner.

It is also possible that the length of time for which the defendant will be imprisoned might be reduced by the award of parole.

Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served plus any good conduct time earned equals one-fourth of the sentence imposed or fifteen years, whichever is less. Eligibility for parole does not guarantee that parole will be granted.

It cannot accurately be predicted how the parole law and good conduct time might be applied to this defendant if he is sentenced to a term of imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities.

You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, six elements of its accusation of prior convictions. The elements are that—

1. the defendant was convicted on [*date*], in Cause No. [*number*] in the District Court of [*county*] County, Texas; and

2. this conviction was for [*offense*], a felony; and

3. this conviction became final before the commission of the offense for which the defendant was convicted as reflected in the next three elements; and

4. the defendant was convicted on [*date*], in Cause No. [*number*] in the District Court of [*county*] County, Texas; and

5. this conviction was for [*offense*], a felony; and

6. this conviction became final before the commission of the offense for which the defendant was convicted in this trial.

You must all agree on elements 1, 2, 3, 4, 5, and 6 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, 4, 5, and 6 listed above, you must find the prior convictions accusation is "not true." In this event, you are to determine and state in your verdict—

[Insert range for charged offense, unenhanced.]

If you all agree the state has proved, beyond a reasonable doubt, each of the six elements listed above, you must find the prior convictions accusation is "true." In this event, you are to determine and state in your verdict—

1. the term in prison to be imposed on the defendant for no less than twenty-five years and no more than ninety-nine years or for life, or

2. the term in prison to be imposed on the defendant for no less than twenty-five years and no more than ninety-nine years or for life and a fine of no more than $10,000.

VERDICT—ACCUSATION OF PRIOR CONVICTIONS "NOT TRUE"

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], find that the accusation of two prior convictions has not been proved true. We assess the defendant's punishment at: (select one)

[Insert options appropriate for charged offense, unenhanced.]

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

VERDICT—ACCUSATION OF PRIOR CONVICTIONS "TRUE"

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], find that the accusation of two prior convictions has been proved true. We assess the defendant's punishment at: (select one)

_____ imprisonment in the Texas Department of Criminal Justice for a term of _____ years and no fine.

_____ imprisonment in the Texas Department of Criminal Justice for a term of _____ years and a fine of $_____.

_____ imprisonment in the Texas Department of Criminal Justice for life and no fine.

_____ imprisonment in the Texas Department of Criminal Justice for life and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

COMMENT

Punishment for a felony enhanced by two prior felony convictions, other than a state jail felony punishable under Tex. Penal Code § 12.35(a), is set out in Tex. Penal Code § 12.42(d).

The parole and good conduct time instruction is taken from Tex. Code Crim. Proc. art. 37.07, § 4(b).

Caution: This instruction does not address all possible circumstances under which parole or good conduct time may be restricted. *See, e.g.*, Tex. Code Crim. Proc. art. 37.07, § 4(a). The parties must review the law carefully in light of the facts of the case at hand.

V. Specific State Jail Felony Punishment Instructions

CPJC 12.16 General Comments on State Jail Felonies

Mandatory Community Supervision. Generally, the trial judge has discretion in a state jail case whether to suspend imposition of a term of confinement assessed by the jury and place the defendant on community supervision. Community supervision is, however, mandatory upon conviction of certain state jail felonies in the Texas Controlled Substances Act for defendants without prior felony convictions:

- possession of less than one gram of a Penalty Group 1 controlled substance;
- possession of five or fewer abuse units of a Penalty Group 1-A controlled substance;
- possession of marijuana weighing more than four ounces but not more than one pound;
- certain prohibited possessions of prescription forms;
- possession of less than one gram of a Penalty Group 2 controlled substance without a valid prescription or order;
- possession of less than five pounds but more than four ounces of a Penalty Group 2-A controlled substance without a valid prescription order; and
- possession of more than four ounces but no more than one pound of a Penalty Group 2-A controlled substance without a valid prescription order.

Tex. Code Crim. Proc. art. 43A.551(a)–(c).

The Committee concluded that if community supervision is mandatory under the Act's provisions, the jury should be informed of this.

Unavailability of Parole and Good Conduct Time. A defendant sentenced to confinement in a state jail facility is not entitled to parole or good conduct time. *Best v. State*, 118 S.W.3d 857, 866 (Tex. App.—Fort Worth 2003, no pet.) (citing Tex. Gov't Code § 508.141(a) and former Tex. Code Crim. Proc. art. 42.12, § 15(h)(1), now art. 42A.559(b)). The Texas Code of Criminal Procedure is silent regarding whether jury instructions should include this information. *Best* held that defendants have no right to such a jury instruction and a trial court did not err in refusing it. *Accord Gratten v. State*, No. 03-06-00036-CR, 2007 WL 844869, at *1 (Tex. App.—Austin Mar. 20, 2007, no pet.) (not designated for publication) ("Under the circumstances, we . . . find no error in the trial court's refusal to instruct the jury regarding the absence of parole and good conduct time in state jail cases.") (citing *Best*).

In *Gratten*, Justice Patterson's opinion noted that before the addition of Tex. Const. art. IV, § 11(a), the court of criminal appeals had held in *Luquis v. State*, 72 S.W.3d 355 (Tex. Crim. App. 2002), that the constitutional separation-of-powers provision was

violated by an instruction that a jury was to consider the possibility that a defendant sentenced to prison might be released on parole. It added that the state jail felony situation, unlike the felony sentencing context, had not been addressed by legislation. *See also Rose v. State*, 752 S.W.2d 529 (Tex. Crim. App. 1987).

Rose reasoned that jurors permitted to consider good conduct time and parole might assess a longer sentence than they actually thought appropriate in anticipation that the executive's application of good conduct time and parole law would result in the defendant's serving what the jurors believed to be the appropriate sentence. This would interfere with the executive's constitutional right to exercise the clemency power.

In 1989, article IV, section 11(a), of the Texas Constitution was amended to provide that—

> [t]he Legislature shall by law establish a Board of Pardons and Paroles and shall require it to keep record of its actions and the reasons for its actions. The Legislature shall have authority to enact parole laws *and laws that require or permit courts to inform juries about the effect of good conduct time and eligibility for parole or mandatory supervision on the period of incarceration served by a defendant convicted of a criminal offense.*

Tex. Const. art. IV, § 11(a) (emphasis added to portion added in 1989). By adding section 4 to article 37.07 of the Code of Criminal Procedure, the legislature exercised its constitutional power under this provision. *See Luquis*, 72 S.W.3d at 361. Insofar as legislation has not affected particular types of cases, *Rose* remains good law and bars instructions permitting or requiring sentencing juries to consider the availability of executive clemency.

No legislation addresses jury instructions in state jail felony cases. Nevertheless, the rationale of *Rose* suggests that separation-of-powers law does not bar telling state jail felony juries that those sentenced to confinement in a state jail do not earn good conduct time and are not eligible for parole. Such an instruction simply informs jurors that the situation before them does not involve the issue of good conduct time and parole. There is no risk that such an instruction will result in juries tailoring punishment assessments in a manner that interferes with executive clemency.

The Committee concluded that an instruction of this sort was both permissible and demanded by the need to inform sentencing juries as fully as possible.

Gratten also held that a trial court did not err in refusing to instruct a jury that "[a] person sentenced to the state jail will serve each day of his sentence in the state jail." Because a defendant sentenced to a term in a state jail may be granted "shock" community supervision, it noted, this would not be a correct statement of the applicable law. *Gratten*, 2007 WL 844869, at *1. The Committee avoided such inaccurate elaborations on the basic information that parole and good conduct time are not available.

Enhancement—Two Prior Convictions. In 2011, the Texas legislature replaced Tex. Penal Code § 12.42(a) with Tex. Penal Code § 12.425. Under Tex. Penal Code § 12.425, the state has three provisions available for enhancing state jail felonies with prior convictions.

Section 12.425(a), providing for enhancement by two prior state jail felonies, explicitly requires that the defendant must be punished for a third-degree felony. Under the old statute, Tex. Penal Code § 12.42, "the state must prove that there are two prior final convictions for state jail felonies, but does not need to prove that the prior convictions occurred sequentially, as it must under subsection (a)(2)." *Campbell v. State*, 49 S.W.3d 874, 876 (Tex. Crim. App. 2001). No case has addressed whether, under the new statute, the state must prove that the prior state jail convictions occurred sequentially.

Section 12.425(b), providing for enhancement by two prior felonies, requires that the defendant must be punished for a second-degree felony. The new statute kept the language about sequential felonies (i.e., the second enhancement offense must have occurred after the first enhancement conviction became final).

Section 12.425(c) provides that if the defendant was previously convicted of one prior felony and it is shown at trial that the defendant was adjudged guilty under section 12.35(c), then the defendant must be punished for a second-degree felony.

Parole and Good Conduct Time When Enhancement Sought. If the state alleges enhancements that if found true would require a sentence of imprisonment, the jury should be instructed on the parole and good conduct time provisions applicable to such a sentence. *Facion v. State*, No. 05-04-01536-CR, 2005 WL 1405794, at *1 (Tex. App.—Dallas June 2, 2005, no pet.) (not designated for publication) (when state jail felony conviction was enhanced by two prior felony convictions, "the jury should have been charged in accordance with section 4(c) of article 37.07 of the Texas Code of Criminal Procedure.").

CPJC 12.17 Instruction—State Jail Felony—Unenhanced

You have found the defendant, [*name*], guilty of [*offense*].

Relevant Statutes

This offense is punishable by—

1. a term of confinement in a state jail for no less than 180 days and no more than two years, or

2. a term of confinement in a state jail for no less than 180 days and no more than two years and a fine of no more than $10,000.

[Include the following if community supervision is mandatory under Texas Code of Criminal Procedure article 42A.551(a)–(c).]

Community Supervision or Probation

The term of confinement assessed by you will be suspended and the court will place the defendant on community supervision or probation.

"Community supervision" is often called "probation." The two terms mean the same thing.

During the period the defendant is on community supervision, the defendant will not be required to serve the period of confinement assessed by you. If the defendant successfully completes the period of community supervision, the court will discharge the defendant. A defendant so discharged will never have to serve the confinement assessed by you.

During the period of community supervision, conditions will be imposed on the defendant, and the defendant will be placed under a variety of programs. If the defendant is believed to have violated the conditions of community supervision, the defendant will be brought before the court. The court, after a hearing without a jury, will either continue or revoke the community supervision.

If the court revokes the community supervision, the court will dispose of the case as if there had been no community supervision. It may sentence the defendant to a term of confinement not exceeding the term assessed by this jury.

The duration of the period of community supervision will be determined by the court. It may not be for a period of longer than five years or for a period of shorter than two years.

Parole and Good Conduct Time

A defendant confined in a state jail for a specific term is not subject to release on parole. The term of confinement is not reduced by good conduct time earned during that period of confinement.

Verdict

You are therefore to determine and state in your verdict—

1. the term of confinement in a state jail to be imposed on the defendant for no less than 180 days and no more than two years, or

2. the term of confinement in a state jail to be imposed on the defendant for no less than 180 days and no more than two years and a fine of no more than $10,000.

VERDICT

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], assess his punishment at: (select one)

_____ confinement in a state jail for a term of _____ and no fine.

_____ confinement in a state jail for a term of _____ and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

COMMENT

Punishment for a state jail felony is set out in Tex. Penal Code § 12.35(a), (b).

Caution: This instruction does not address all possible circumstances under which community supervision may be unavailable or in which there may be special requirements for its imposition. *See, e.g.*, Tex. Code Crim. Proc. arts. 42A.054,

42A.056, 42A.204. The parties must review the law carefully in light of the facts of the case at hand.

CPJC 12.18 Instruction—State Jail Felony—Enhanced (One Prior Felony)

You have found the defendant, [*name*], guilty of [*offense*]. The state has accused the defendant of having been convicted of a felony once before. It asks that you find this accusation true and assess punishment under the law applicable to defendants with a prior felony conviction.

Accusation

Specifically, the state accuses the defendant of being convicted on [*date*], in Cause No. [*number*] in the District Court of [*county*] County, Texas, for the felony offense of [*offense*]. The state further alleges that this conviction became a final conviction before the commission of the offense for which you have found the defendant guilty in this trial.

The defendant has pleaded that this accusation is "not true."

The range of punishments from which you must assess the defendant's punishment therefore depends on whether you find the state has proved the prior conviction accusation.

Relevant Statutes—Punishment If Accusation of Prior Conviction "Not True"

If the state does not prove the accusation of a prior conviction is true, this offense is punishable by—

1. a term of confinement in a state jail for no less than 180 days and no more than two years, or

2. a term of confinement in a state jail for no less than 180 days and no more than two years and a fine of no more than $10,000.

Relevant Statutes—Punishment If Accusation of Prior Conviction Proved "True"

If the state proves the accusation of a prior conviction is true, this offense is punishable by—

1. a term of imprisonment for no less than two years and no more than ten years, or

2. a term of imprisonment for no less than two years and no more than ten years and a fine of no more than $10,000.

Other Relevant Statutes

[*Offense*] is a state jail felony offense.

Burden of Proof

The state must prove, beyond a reasonable doubt, the prior conviction accusation.

Parole and Good Conduct Time

Under the law applicable in this case, the defendant, if sentenced to a term of imprisonment, may earn time off the period of incarceration imposed through the award of good conduct time. Prison authorities may award good conduct time to a prisoner who exhibits good behavior, diligence in carrying out prison work assignments, and attempts at rehabilitation. If a prisoner engages in misconduct, prison authorities may also take away all or part of any good conduct time earned by the prisoner.

It is also possible that the length of time for which the defendant will be imprisoned might be reduced by the award of parole.

Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served plus any good conduct time earned equals one-fourth of the sentence imposed. Eligibility for parole does not guarantee that parole will be granted.

It cannot accurately be predicted how the parole law and good conduct time might be applied to this defendant if he is sentenced to a term of imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities.

You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant.

If the defendant is sentenced to a term of confinement in a state jail, he will not be subject to release on parole. Further, the term of confinement cannot be reduced by good conduct time earned during that period of confinement.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, three elements of its accusation of a prior conviction. The elements are that—

1. the defendant was convicted on [*date*], in Cause No. [*number*] in the District Court of [*county*] County, Texas; and

2. this conviction was for [*offense*], a felony; and

3. this conviction became final before the commission of the offense for which the defendant was convicted in this trial.

You must all agree on elements 1, 2, and 3 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the prior conviction accusation is "not true." In this event, you are to determine and state in your verdict—

1. the term of confinement in a state jail to be imposed on the defendant for no less than 180 days and no more than two years, or

2. the term of confinement in a state jail to be imposed on the defendant for no less than 180 days and no more than two years and a fine of no more than $10,000.

If you all agree the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must find the prior conviction accusation is "true." In this event, you are to determine and state in your verdict—

1. the term in prison to be imposed on the defendant for no less than two years and no more than ten years, or

2. the term in prison to be imposed on the defendant for no less than two years and no more than ten years and a fine of no more than $10,000.

VERDICT—ACCUSATION OF PRIOR CONVICTION "NOT TRUE"

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], find that the accusation of a prior conviction has not been proved true. We assess the defendant's punishment at: (select one)

_____ confinement in a state jail for a term of _____ and no fine.

_____ confinement in a state jail for a term of _____ and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

VERDICT—ACCUSATION OF PRIOR CONVICTION "TRUE"

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], find that the accusation of a prior conviction has been proved true. We assess the defendant's punishment at: (select one)

_____ imprisonment in the Texas Department of Criminal Justice for a term of _____ years and no fine.

_____ imprisonment in the Texas Department of Criminal Justice for a term of _____ years and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

COMMENT

Punishment for a state jail felony is set out in Tex. Penal Code § 12.35(a), (b). Punishment for a state jail felony enhanced by one prior conviction for a felony listed in Tex. Code Crim. Proc. art. 42A.054(a), is set out in Tex. Penal Code § 12.35(c)(2)(A).

The parole and good conduct time instruction is taken from Tex. Code Crim. Proc. art. 37.07, § 4(c).

Caution: This instruction does not address all possible circumstances under which parole or good conduct time may be restricted. *See, e.g.*, Tex. Code Crim. Proc.

art. 37.07, § 4(a). The parties must review the law carefully in light of the facts of the case at hand.

CPJC 12.19 Instruction—State Jail Felony—Enhanced (Two Prior State Jail Felonies)

You have found the defendant, [*name*], guilty of [*offense*]. The state has accused the defendant of having been convicted of a state jail felony twice before. It asks that you find this accusation true and assess punishment under the law applicable to defendants with two prior state jail felony convictions.

Accusation

Specifically, the state accuses the defendant of being convicted on [*date*], in Cause No. [*number*] in the District Court of [*county*] County, Texas, for the state jail felony offense of [*offense*].

The state further accuses the defendant of being convicted on [*date*], in Cause No. [*number*] in the District Court of [*county*] County, Texas, for the state jail felony offense of [*offense*].

The state further alleges that these convictions became final convictions before the commission of the offense for which you have found the defendant guilty in this trial.

The defendant has pleaded that this accusation is "not true."

The range of punishments from which you must assess the defendant's punishment therefore depends on whether you find the state has proved the prior convictions accusation.

Relevant Statutes—Punishment If Accusation of Prior Convictions "Not True"

If the state does not prove the accusation of prior convictions is true, this offense is punishable by—

1. a term of confinement in a state jail for no less than 180 days and no more than two years, or

2. a term of confinement in a state jail for no less than 180 days and no more than two years and a fine of no more than $10,000.

Relevant Statutes—Punishment If Accusation of Prior Convictions Proved "True"

If the state proves the accusation of two prior convictions is true, this offense is punishable by—

1. a term of imprisonment for no less than two years and no more than ten years, or

2. a term of imprisonment for no less than two years and no more than ten years and a fine of no more than $10,000.

Other Relevant Statutes

[*Offense*] is a state jail felony offense.

Burden of Proof

The state must prove, beyond a reasonable doubt, the prior convictions accusation.

Parole and Good Conduct Time

Under the law applicable in this case, the defendant, if sentenced to a term of imprisonment, may earn time off the period of incarceration imposed through the award of good conduct time. Prison authorities may award good conduct time to a prisoner who exhibits good behavior, diligence in carrying out prison work assignments, and attempts at rehabilitation. If a prisoner engages in misconduct, prison authorities may also take away all or part of any good conduct time earned by the prisoner.

It is also possible that the length of time for which the defendant will be imprisoned might be reduced by the award of parole.

Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served plus any good conduct time earned equals one-fourth of the sentence imposed. Eligibility for parole does not guarantee that parole will be granted.

It cannot accurately be predicted how the parole law and good conduct time might be applied to this defendant if he is sentenced to a term of imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities.

You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may

be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant.

If the defendant is sentenced to a term of confinement in a state jail, he will not be subject to release on parole. Further, the term of confinement cannot be reduced by good conduct time earned during that period of confinement.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, six elements of its accusation of prior convictions. The elements are that—

1. the defendant was convicted on [*date*], in Cause No. [*number*] in the District Court of [*county*] County, Texas; and

2. this conviction was for [*offense*], a state jail felony; and

3. this conviction became final before the commission of the offense for which the defendant was convicted as reflected in the next three elements; and

4. the defendant was convicted on [*date*], in Cause No. [*number*] in the District Court of [*county*] County, Texas; and

5. this conviction was for [*offense*], a state jail felony; and

6. this conviction became final before the commission of the offense for which the defendant was convicted in this trial.

You must all agree on elements 1, 2, 3, 4, 5, and 6 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, 4, 5, and 6 listed above, you must find the prior convictions accusation is "not true." In this event, you are to determine and state in your verdict—

1. the term of confinement in a state jail to be imposed on the defendant for no less than 180 days and no more than two years, or

2. the term of confinement in a state jail to be imposed on the defendant for no less than 180 days and no more than two years and a fine of no more than $10,000.

If you all agree the state has proved, beyond a reasonable doubt, each of the six elements listed above, you must find the prior convictions accusation is "true." In this event, you are to determine and state in your verdict—

1. the term in prison to be imposed on the defendant for no less than two years and no more than ten years, or

2. the term in prison to be imposed on the defendant for no less than two years and no more than ten years and a fine of no more than $10,000.

VERDICT—ACCUSATION OF PRIOR CONVICTIONS "NOT TRUE"

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], find that the accusation of two prior convictions has not been proved true. We assess the defendant's punishment at: (select one)

_____ confinement in a state jail for a term of _____ and no fine.

_____ confinement in a state jail for a term of _____ and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

VERDICT—ACCUSATION OF PRIOR CONVICTIONS "TRUE"

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], find that the accusation of two prior convictions has been proved true. We assess the defendant's punishment at: (select one)

_____ imprisonment in the Texas Department of Criminal Justice for a term of _____ years and no fine.

_____ imprisonment in the Texas Department of Criminal Justice for a term of _____ years and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

COMMENT

Punishment for a state jail felony is set out in Tex. Penal Code § 12.35(a), (b). Punishment for a state jail felony enhanced by two prior state jail felony convictions is set out in Tex. Penal Code § 12.425(a).

The parole and good conduct time instruction is taken from Tex. Code Crim. Proc. art. 37.07, § 4(c). This instruction is to be given "if *a* prior conviction has been alleged for enhancement as provided by Section 12.42(a), Penal Code" (emphasis added). Because both parts of section 12.42(a) require accusation and proof of *two* prior convictions, this is apparently an error in the phraseology of article 37.07, § 4(c), and article 37.07, § 4(c), applies although more than one prior conviction is alleged for enhancement in these cases.

Caution: This instruction does not address all possible circumstances under which parole or good conduct time may be restricted. *See, e.g.*, Tex. Code Crim. Proc. art. 37.07, § 4(a). The parties must review the law carefully in light of the facts of the case at hand.

CPJC 12.20 Instruction—State Jail Felony—Enhanced (Two Prior Felonies)

You have found the defendant, [*name*], guilty of [*offense*]. The state has accused the defendant of having been convicted of a felony twice before. It asks that you find this accusation true and assess punishment under the law applicable to defendants with two prior felony convictions.

Accusation

Specifically, the state accuses the defendant of being convicted on [*date*], in Cause No. [*number*] in the District Court of [*county*] County, Texas, for the felony offense of [*offense*]. The state further alleges that this conviction became a final conviction before the commission of the offense of which the defendant is accused in the next paragraph.

The state further accuses the defendant of being convicted on [*date*], in Cause No. [*number*] in the District Court of [*county*] County, Texas, for the felony offense of [*offense*]. The state further alleges that this conviction became a final conviction before the commission of the offense for which you have found the defendant guilty in this trial.

The defendant has pleaded that this accusation is "not true."

The range of punishments from which you must assess the defendant's punishment therefore depends on whether you find the state has proved the prior convictions accusation.

Relevant Statutes—Punishment If Accusation of Prior Convictions "Not True"

If the state does not prove the accusation of prior convictions is true, this offense is punishable by—

1. a term of confinement in a state jail for no less than 180 days and no more than two years, or

2. a term of confinement in a state jail for no less than 180 days and no more than two years and a fine of no more than $10,000.

Relevant Statutes—Punishment If Accusation of Prior Convictions Proved "True"

If the state proves the accusation of two prior convictions is true, this offense is punishable by—

1. a term of imprisonment for no less than two years and no more than twenty years, or

2. a term of imprisonment for no less than two years and no more than twenty years and a fine of no more than $10,000.

Other Relevant Statutes

[*Offense*] is a felony offense.

Burden of Proof

The state must prove, beyond a reasonable doubt, the prior convictions accusation.

Parole and Good Conduct Time

Under the law applicable in this case, the defendant, if sentenced to a term of imprisonment, may earn time off the period of incarceration imposed through the award of good conduct time. Prison authorities may award good conduct time to a prisoner who exhibits good behavior, diligence in carrying out prison work assignments, and attempts at rehabilitation. If a prisoner engages in misconduct, prison authorities may also take away all or part of any good conduct time earned by the prisoner.

It is also possible that the length of time for which the defendant will be imprisoned might be reduced by the award of parole.

Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served plus any good conduct time earned equals one-fourth of the sentence imposed. Eligibility for parole does not guarantee that parole will be granted.

It cannot accurately be predicted how the parole law and good conduct time might be applied to this defendant if he is sentenced to a term of imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities.

You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant.

If the defendant is sentenced to a term of confinement in a state jail, he will not be subject to release on parole. Further, the term of confinement cannot be reduced by good conduct time earned during that period of confinement.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, six elements of its accusation of prior convictions. The elements are that—

1. the defendant was convicted on [*date*], in Cause No. [*number*] in the District Court of [*county*] County, Texas; and

2. this conviction was for [*offense*], a felony; and

3. this conviction became final before the commission of the offense for which the defendant was convicted as reflected in the next three elements; and

4. the defendant was convicted on [*date*], in Cause No. [*number*] in the District Court of [*county*] County, Texas; and

5. this conviction was for [*offense*], a felony; and

6. this conviction became final before the commission of the offense for which the defendant was convicted in this trial.

You must all agree on elements 1, 2, 3, 4, 5, and 6 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, 4, 5, and 6 listed above, you must find the prior convictions accusation is "not true." In this event, you are to determine and state in your verdict—

1. the term of confinement in a state jail to be imposed on the defendant for no less than 180 days and no more than two years, or

2. the term of confinement in a state jail to be imposed on the defendant for no less than 180 days and no more than two years and a fine of no more than $10,000.

If you all agree the state has proved, beyond a reasonable doubt, each of the six elements listed above, you must find the prior convictions accusation is "true." In this event, you are to determine and state in your verdict—

1. the term in prison to be imposed on the defendant for no less than two years and no more than twenty years, or

2. the term in prison to be imposed on the defendant for no less than two years and no more than twenty years and a fine of no more than $10,000.

VERDICT—ACCUSATION OF PRIOR CONVICTIONS "NOT TRUE"

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], find that the accusation of two prior convictions has not been proved true. We assess the defendant's punishment at: (select one)

_____ confinement in a state jail for a term of _____ and no fine.

_____ confinement in a state jail for a term of _____ and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

VERDICT—ACCUSATION OF PRIOR CONVICTIONS "TRUE"

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], find that the accusation of two prior convictions has been proved true. We assess the defendant's punishment at: (select one)

_____ imprisonment in the Texas Department of Criminal Justice for a term of _____ years and no fine.

_____ imprisonment in the Texas Department of Criminal Justice for a term of _____ years and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

COMMENT

Punishment for a state jail felony is set out in Tex. Penal Code § 12.35(a), (b). Punishment for a state jail felony enhanced by two prior state jail felony convictions punishable under Tex. Penal Code § 12.35(a) is set out in Tex. Penal Code § 12.425(a). Punishment for a state jail felony enhanced by two prior felony convictions, other than state jail felony convictions punishable under section 12.35(a), is set out in Tex. Penal Code § 12.425(b). Punishment for a state jail felony enhanced under both Tex. Penal Code § 12.35(c) and a prior felony other than a state jail felony conviction punishable under Tex. Penal Code § 12.35(a) is set out in Tex. Penal Code § 12.425(c).

The parole and good conduct time instruction is taken from Tex. Code Crim. Proc. art. 37.07, § 4(c). This instruction is to be given "if *a* prior conviction has been alleged for enhancement as provided by Section 12.42(a), Penal Code" (emphasis added). Because both parts of section 12.42(a) require accusation and proof of *two* prior convictions, this is apparently an error in the phraseology of article 37.07, § 4(c), and article 37.07, § 4(c), applies although more than one prior conviction is alleged for enhancement in these cases.

Caution: This instruction does not address all possible circumstances under which parole or good conduct time may be restricted. *See, e.g.*, Tex. Code Crim. Proc. art. 37.07, § 4(a). The parties must review the law carefully in light of the facts of the case at hand.

VI. Specific Misdemeanor Punishment Instructions

CPJC 12.21 General Comments—Instructions on Good Conduct Time

The sheriff is authorized by statute to "grant commutation of time for good conduct, industry, and obedience," although the deduction may not exceed one day for each day served. Tex. Code Crim. Proc. art. 42.032, § 2. This provision may amount to executive clemency protected from judicial interference by the state constitutional separation-of-powers provision. *See In re Bourg*, No. 01-08-00618-CV, 2008 WL 3522241, at *3 (Tex. App.—Houston [1st Dist.] Aug. 12, 2008, no pet.) (not designated for publication) (summarizing case law under Code provision).

One case has held that the potential award of good conduct time credit is an improper matter for argument by the state. *Blessing v. State*, 927 S.W.2d 266, 269 (Tex. App.—El Paso 1996, no pet.) (prosecutor improperly told jury that "the current practice in the Ector County Jail is that for every day you serve on a sentence, you get credit for two days," and urged them to consider this in assessing sentence).

The Committee recommends that the issue of good conduct time not be addressed in the jury instructions. Separation-of-powers law may require that juries not be invited to consider it. In any case, informing juries sufficiently to permit reasoned application of the power to award good conduct time would be impractical.

CPJC 12.22 Instruction—Class A Misdemeanor—Unenhanced

You have found the defendant, [*name*], guilty of [*offense*].

Relevant Statutes

This offense is punishable by—

1. a fine of no more than $4,000, or

2. a term of confinement in the county jail for no more than one year, or

3. both a fine of no more than $4,000 and a term of confinement in the county jail for no more than one year.

Verdict

You are therefore to determine and state in your verdict—

1. any fine to be imposed on the defendant of no more than $4,000, or

2. a term of confinement in the county jail to be imposed on the defendant for no more than one year, or

3. both a fine to be imposed on the defendant of no more than $4,000 and a term of confinement in the county jail to be imposed on the defendant for no more than one year.

VERDICT

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], assess his punishment at: (select one)

_____ a fine of $_____ and no confinement in jail.

_____ confinement in the county jail for a term of _____ and no fine.

_____ confinement in the county jail for a term of _____ and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

COMMENT

Punishment for a class A misdemeanor is set out in Tex. Penal Code § 12.21.

CPJC 12.23 Instruction—Class A Misdemeanor—Enhanced (One Prior Conviction)

You have found the defendant, [*name*], guilty of [*offense*]. The state has accused the defendant of having been convicted of a crime once before. It asks that you find this accusation true and assess punishment under the law applicable to defendants with a prior conviction.

Accusation

Specifically, the state accuses the defendant of being convicted on [*date*], in Cause No. [*number*] in the [County/District] Court of [*county*] County, Texas, for the [class A misdemeanor/felony] offense of [*offense*]. The state further alleges that this conviction became a final conviction before the commission of the offense for which you have found the defendant guilty in this trial.

The defendant has pleaded that this accusation is "not true."

The range of punishments from which you must assess the defendant's punishment therefore depends on whether you find the state has proved the prior conviction accusation.

Relevant Statutes—Punishment If Accusation of Prior Conviction "Not True"

If the state does not prove the accusation of a prior conviction is true, this offense is punishable by—

1. a fine of no more than $4,000, or

2. a term of confinement in the county jail for no more than one year, or

3. both a fine of no more than $4,000 and a term of confinement in the county jail for no more than one year.

Relevant Statutes—Punishment If Accusation of Prior Conviction Proved "True"

If the state proves the accusation of a prior conviction is true, this offense is punishable by—

1. a fine of no more than $4,000, or

2. a term of confinement in the county jail for no less than ninety days and no more than one year, or

3. both a fine of no more than $4,000 and a term of confinement in the county jail for no less than ninety days and no more than one year.

Burden of Proof

The state must prove, beyond a reasonable doubt, the prior conviction accusation.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, three elements of its accusation of a prior conviction. The elements are that—

1. the defendant was convicted on [*date*], in Cause No. [*number*] in the [County/District] Court of [*county*] County, Texas; and

2. this conviction was for [*offense*], a [class A misdemeanor/felony]; and

3. this conviction became final before the commission of the offense for which the defendant was convicted in this trial.

You must all agree on elements 1, 2, and 3 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the prior conviction accusation is "not true." In this event, you are to determine and state in your verdict—

1. any fine to be imposed on the defendant of no more than $4,000, or

2. a term of confinement in the county jail to be imposed on the defendant for no more than one year, or

3. both a fine to be imposed on the defendant of no more than $4,000 and a term of confinement in the county jail to be imposed on the defendant for no more than one year.

If you all agree the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must find the prior conviction accusation is "true." In this event, you are to determine and state in your verdict—

1. any fine to be imposed on the defendant of no more than $4,000, or

2. a term of confinement in the county jail to be imposed on the defendant for no less than ninety days and no more than one year, or

3. both a fine to be imposed on the defendant of no more than $4,000 and a term of confinement in the county jail to be imposed on the defendant for no less than ninety days and no more than one year.

VERDICT—ACCUSATION OF PRIOR CONVICTION "NOT TRUE"

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], find that the accusation of a prior conviction has not been proved true. We assess the defendant's punishment at: (select one)

_____ a fine of $_____ and no confinement in jail.

_____ confinement in the county jail for a term of _____ and no fine.

_____ confinement in the county jail for a term of _____ and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

VERDICT—ACCUSATION OF PRIOR CONVICTION "TRUE"

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], find that the accusation of a prior conviction has been proved true. We assess the defendant's punishment at: (select one)

_____ a fine of $_____ and no confinement in jail.

_____ confinement in the county jail for a term of _____ and no fine.

_____ confinement in the county jail for a term of _____ and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

COMMENT

Punishment for a class A misdemeanor is set out in Tex. Penal Code § 12.21. Punishment for a class A misdemeanor enhanced by one prior conviction for either a class A misdemeanor or a felony is set out in Tex. Penal Code § 12.43(a).

CPJC 12.24 Instruction—Class B Misdemeanor—Unenhanced

You have found the defendant, [*name*], guilty of [*offense*].

Relevant Statutes

This offense is punishable by—

1. a fine of no more than $2,000, or

2. a term of confinement in the county jail for no more than 180 days, or

3. both a fine of no more than $2,000 and a term of confinement in the county jail for no more than 180 days.

Verdict

You are therefore to determine and state in your verdict—

1. any fine to be imposed on the defendant of no more than $2,000, or

2. a term of confinement in the county jail to be imposed on the defendant for no more than 180 days, or

3. both a fine to be imposed on the defendant of no more than $2,000 and a term of confinement in the county jail to be imposed on the defendant for no more than 180 days.

VERDICT

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], assess his punishment at: (select one)

_____ a fine of $_____ and no confinement in jail.

_____ confinement in the county jail for a term of _____ days and no fine.

_____ confinement in the county jail for a term of _____ days and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

COMMENT

Punishment for a class B misdemeanor is set out in Tex. Penal Code § 12.22.

CPJC 12.25 Instruction—Class B Misdemeanor—Enhanced (One Prior Conviction)

You have found the defendant, [*name*], guilty of [*offense*]. The state has accused the defendant of having been convicted of a crime once before. It asks that you find this accusation true and assess punishment under the law applicable to defendants with a prior conviction.

Accusation

Specifically, the state accuses the defendant of being convicted on [*date*], in Cause No. [*number*] in the [County/District] Court of [*county*] County, Texas, for the [class A misdemeanor/class B misdemeanor/felony] offense of [*offense*]. The state further alleges that this conviction became a final conviction before the commission of the offense for which you have found the defendant guilty in this trial.

The defendant has pleaded that this accusation is "not true."

The range of punishments from which you must assess the defendant's punishment therefore depends on whether you find the state has proved the prior conviction accusation.

Relevant Statutes—Punishment If Accusation of Prior Conviction "Not True"

If the state does not prove the accusation of a prior conviction is true, this offense is punishable by—

1. a fine of no more than $2,000, or

2. a term of confinement in the county jail for no more than 180 days, or

3. both a fine of no more than $2,000 and a term of confinement in the county jail for no more than 180 days.

Relevant Statutes—Punishment If Accusation of Prior Conviction Proved "True"

If the state proves the accusation of a prior conviction is true, this offense is punishable by—

1. a fine of no more than $2,000, or

2. a term of confinement in the county jail for no less than 30 days and no more than 180 days, or

3. both a fine of no more than $2,000 and a term of confinement in the county jail for no less than 30 days and no more than 180 days.

Burden of Proof

The state must prove, beyond a reasonable doubt, the prior conviction accusation.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, three elements of its accusation of a prior conviction. The elements are that—

1. the defendant was convicted on [*date*], in Cause No. [*number*] in the [County/District] Court of [*county*] County, Texas; and

2. this conviction was for [*offense*], a [class A misdemeanor/class B misdemeanor/felony]; and

3. this conviction became final before the commission of the offense for which the defendant was convicted in this trial.

You must all agree on elements 1, 2, and 3 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the prior conviction accusation is "not true." In this event, you are to determine and state in your verdict—

1. any fine to be imposed on the defendant of no more than $2,000, or

2. a term of confinement in the county jail to be imposed on the defendant for no more than 180 days, or

3. both a fine to be imposed on the defendant of no more than $2,000 and a term of confinement in the county jail to be imposed on the defendant for no more than 180 days.

If you all agree the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must find the prior conviction accusation is "true." In this event, you are to determine and state in your verdict—

1. any fine to be imposed on the defendant of no more than $2,000, or

2. a term of confinement in the county jail to be imposed on the defendant for no less than 30 days and no more than 180 days, or

3. both a fine to be imposed on the defendant of no more than $2,000 and a term of confinement in the county jail to be imposed on the defendant for no less than 30 days and no more than 180 days.

VERDICT—ACCUSATION OF PRIOR CONVICTION "NOT TRUE"

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], find that the accusation of a prior conviction has not been proved true. We assess the defendant's punishment at: (select one)

_____ a fine of $_____ and no confinement in jail.

_____ confinement in the county jail for a term of _____ days and no fine.

_____ confinement in the county jail for a term of _____ days and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

VERDICT—ACCUSATION OF PRIOR CONVICTION "TRUE"

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], find that the accusation of a prior conviction has been proved true. We assess the defendant's punishment at: (select one)

_____ a fine of $ _____ and no confinement in jail.

_____ confinement in the county jail for a term of _____ days and no fine.

_____ confinement in the county jail for a term of _____ days and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

COMMENT

Punishment for a class B misdemeanor is set out in Tex. Penal Code § 12.22. Punishment for a class B misdemeanor enhanced by one prior conviction for either a class A or class B misdemeanor or a felony is set out in Tex. Penal Code § 12.43(b).

VII. Intoxication Offenses

CPJC 12.26 General Comments on Intoxication Offenses

Approach to Instructions Specific to Intoxication Offenses. The basic intoxication offenses in chapter 49 of the Texas Penal Code present some special problems in applying the Committee's approach to punishment stage instructions. Consequently, the Committee undertook to draft punishment stage instructions for several of these offenses.

The most basic offense, of course, is driving while intoxicated under Tex. Penal Code § 49.04. Very similar in structure are the offenses of flying while intoxicated, under Tex. Penal Code § 49.05; boating while intoxicated, under Tex. Penal Code § 49.06; and assembling or operating an amusement ride while intoxicated, under Tex. Penal Code § 49.065. These are all class B misdemeanors with special provisions for minimum period of confinement. All can be enhanced to class A misdemeanors with an increased minimum period of confinement under Tex. Penal Code § 49.09(a).

For felony DWI status under Tex. Penal Code § 49.09(b), the prior intoxication-related offenses are elements of the offense of felony DWI and must be submitted to the jury during the guilt-innocence phase. *Gibson v. State*, 995 S.W.2d 693, 696 (Tex. Crim. App. 1999). At the time of publication, it was unsettled whether this would also hold true for class A DWI-second offense. The court of criminal appeals granted review on this issue in *Oliva v. State*, PD-0398-17 (submitted Nov. 1, 2017). Because *Oliva* was still pending at the time this volume went to press, the Committee set out punishment instructions for both possibilities. CPJC 12.34 through CPJC 12.37 treat the prior intoxication conviction as a punishment phase issue. CPJC 12.33 can be used where the prior conviction has already been determined at the guilt phase. Practitioners requiring guilt-phase instructions that make the prior intoxication conviction an element of the offense rather than a punishment enhancement can fashion such instructions based on CPJC 40.16, Felony Driving While Intoxicated, in *Texas Criminal Pattern Jury Charges—Intoxication, Controlled Substance & Public Order Offenses*.

Driving while intoxicated and assembling or operating an amusement ride while intoxicated provide for an increased minimum period of confinement on proof at the penalty stage of possession of an open container of alcohol. Tex. Penal Code §§ 49.04(c), 49.065(c).

Fine-Only Punishment. The Committee encountered an initial question regarding the options open to a sentencing jury in a prosecution of many of the chapter 49 offenses.

Driving while intoxicated, flying while intoxicated, boating while intoxicated, and assembling or operating an amusement ride while intoxicated each have a minimum

term of confinement of seventy-two hours. Tex. Penal Code §§ 49.04(b), 49.05(b), 49.06(b), 49.065(b). Driving while intoxicated with an open container and assembling or operating an amusement ride with an open container have a minimum term of confinement of six days. Tex. Penal Code §§ 49.04(c), 49.065(c). These offenses are all class B misdemeanors. Tex. Penal Code §§ 49.04(b), 49.05(b), 49.06(b), 49.065(b).

There appears to be a conflict with the mandatory confinement provisions in these sections of the Penal Code and the punishment options for class B misdemeanors. Class B misdemeanors "shall be punished by: (1) a fine not to exceed $2,000; (2) confinement in jail for a term not to exceed 180 days; or (3) both such fine and confinement." Tex. Penal Code § 12.22. Some Texas jurisdictions, giving effect to section 12.22, give juries the option of assessing only fines.

The Committee concluded that chapter 49 requires assessment of some period of confinement. Some case law supports this. *State v. Magee*, 29 S.W.3d 639, 639–40 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd) (trial court erred in sentencing defendant convicted of driving while intoxicated to fine only). *Accord Harvey v. State*, No. 01-04-00525-CR, 2005 WL 2615280, at *5 (Tex. App.—Houston [1st Dist.] Oct. 13, 2005, no pet.) (not designated for publication); *State v. Turner*, No. 05-03-01263-CR, 2004 WL 308507, at *1 (Tex. App.—Dallas Feb. 19, 2004, no pet.) (not designated for publication).

The instructions for these offenses, then, do not permit a sentencing jury to assess a fine only.

Open Container Provision. The open container accusation applies to only the first-offender offenses of class B misdemeanor driving while intoxicated and assembling or operating an amusement ride while intoxicated. Tex. Penal Code §§ 49.04(c), 49.065(c). The effect of finding the open container accusation true is that the minimum confinement is increased from three days to six days. Tex. Penal Code §§ 49.04(c), 49.065(c). Because prosecutors often charge alternative paragraphs, the Committee addressed the situation of an information alleging driving while intoxicated or assembling or operating an amusement ride while intoxicated with a prior conviction paragraph and with an open container paragraph. The jury instructions tell the jury that on finding the prior conviction true, it need not determine whether the open container accusation is true.

Special Definition of "Final" Conviction. Several parts in chapter 49 of the Texas Penal Code make special provision for enhancing offenses by proof of prior convictions. Section 49.09(a) provides for enhancing basic class B misdemeanor offenses to class A misdemeanors by proving one prior conviction. Section 49.09(b) provides for enhancing these offenses to felony status. Neither statutory provision explicitly requires the prior convictions to be final.

Tex. Penal Code § 49.09(d), however, refers to certain circumstances in which a conviction "is a final conviction [for purposes of § 49.09]," which strongly implies a

requirement of finality. This is consistent with traditional Texas case law, discussed earlier in this chapter, which holds that the term *conviction* means *final conviction.*

The Committee concluded that Texas law requires convictions used to enhance intoxication offenses to be final.

The Committee also concluded that the same approach should be taken here as is proper in other enhancement situations. The instructions should tell the jury that the conviction must be final. They should not elaborate on that requirement, or define finality, unless the evidence presents an issue concerning finality.

If the facts raise an issue of finality, the definition of that term should take notice of section 49.09(d). Under that provision, a conviction for driving while intoxicated that occurs on or after September 1, 1994, is a final conviction, whether the sentence for the conviction is imposed or probated. Tex. Penal Code § 49.09(d). Probated convictions can be used for the purpose of enhancement as long as those convictions are for offenses committed on or after January 1, 1984. *See Ex parte Serrato,* 3 S.W.3d 41 (Tex. Crim. App. 1999).

The definition used might be something along the following lines:

Final Conviction

A final conviction is the entry of a judgment reflecting the defendant's conviction of an offense and the imposition or suspension of a sentence for that offense.

[Include the following if the evidence indicates an appeal may have been taken.]

If an appeal was taken by the defendant, the conviction is final only if after that appeal the conviction was affirmed and a mandate affirming the conviction was issued by the appellate court.

If the enhancement offense at issue was committed before January 1, 1984, the definition of *final* must be modified by removing the phrase "or suspension." It might also be supplemented with an explanation that the state can prove finality by evidence that community supervision or probation was revoked and sentence ultimately imposed.

Suspension of Driver's License. A driver's license is automatically suspended on conviction of driving while intoxicated, intoxication assault (if the defendant used a motor vehicle in the commission of the offense), or intoxication manslaughter. Tex. Transp. Code § 521.341(3), (4).

Suspension is not permitted if the jury has "recommended that the license not be revoked." Tex. Transp. Code § 521.344(d)(1). Jury recommendation that the license not be suspended is set out in Tex. Code Crim. Proc. art. 42A.407(a).

Jury submission does not require that the defendant establish on the record that the defendant holds a driver's license. *Hernandez v. State*, 842 S.W.2d 294 (Tex. Crim. App. 1992).

The instruction and verdict form should include the provisions in the instruction at CPJC 12.38 in this chapter if—

1. the defendant has been convicted of—
   a. driving while intoxicated (not enhanced to a class A misdemeanor or a third-degree felony), or
   b. intoxication assault (if the defendant used a motor vehicle in the commission of the offense), or
   c. intoxication manslaughter; and
2. the conviction is not for an offense relating to the operation of a motor vehicle while intoxicated that was committed within five years of the commission of a prior offense relating to the operation of a motor vehicle while intoxicated; and
3. the jury is instructed that it may recommend community supervision.

CPJC 12.27 Instruction—Misdemeanor [Driving/Flying/Boating/ Assembling or Operating Amusement Ride] While Intoxicated—Unenhanced

You have found the defendant, [*name*], guilty of [driving/flying/boating/ assembling or operating an amusement ride] while intoxicated.

Relevant Statutes

This offense is punishable by—

1. a term of confinement in the county jail for no less than seventy-two hours and no more than 180 days, or

2. a term of confinement in the county jail for no less than seventy-two hours and no more than 180 days and a fine of no more than $2,000.

VERDICT

We, the jury, having found the defendant, [*name*], guilty of the misdemeanor offense of [driving/flying/boating/assembling or operating an amusement ride] while intoxicated, assess his punishment at: (select one)

_____ confinement in the county jail for a term of _____ and no fine.

_____ confinement in the county jail for a term of _____ and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

COMMENT

Punishment for driving while intoxicated is set out in Tex. Penal Code § 49.04(a), (b). Punishment for flying while intoxicated is set out in Tex. Penal Code § 49.05(b). Punishment for boating while intoxicated is set out in Tex. Penal Code § 49.06(b). Punishment for assembling or operating an amusement ride while intoxicated is set out in Tex. Penal Code § 49.065(b).

CPJC 12.28 Instruction—Misdemeanor Driving While Intoxicated—Enhanced—Alcohol Concentration at or above 0.15

You have found the defendant, [*name*], guilty of driving while intoxicated with a [blood/breath/urine] alcohol concentration level of 0.15 or more.

Relevant Statutes

This offense is punishable by—

1. a term of confinement in the county jail for no less than seventy-two hours and no more than one year, or

2. a term of confinement in the county jail for no less than seventy-two hours and no more than one year and a fine of no more than $4,000.

VERDICT

We, the jury, having found the defendant, [*name*], guilty of the misdemeanor offense of driving while intoxicated with a [blood/breath/urine] alcohol concentration level of 0.15 or more, assess his punishment at: (select one)

_____ confinement in the county jail for a term of _____ and no fine.

_____ confinement in the county jail for a term of _____ and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

COMMENT

Punishment for driving while intoxicated with an alcohol concentration level of 0.15 or above is set out in Tex. Penal Code § 49.04(d). There is no such enhancement for flying, boating, or assembling or operating an amusement ride with an alcohol concentration level of 0.15 or above.

CPJC 12.29 Instruction—Misdemeanor [Driving/Assembling or Operating Amusement Ride] While Intoxicated—Unenhanced—Open Container Accusation (Plea of Not True)

You have found the defendant, [*name*], guilty of [driving/assembling or operating an amusement ride] while intoxicated. The state has accused the defendant of being in possession of an open container of alcohol. It asks that you find this accusation true and assess punishment under the law applicable to defendants found to be in possession of such an open container.

Accusation

Specifically, the state accuses the defendant of having an open container of alcohol in his immediate possession at the time the defendant committed the offense of [driving/assembling or operating an amusement ride] while intoxicated.

The defendant has pleaded that this accusation is "not true."

The range of punishments from which you must assess the defendant's punishment therefore depends on whether you find the state has proved the open container accusation.

Relevant Statutes—Punishment If Accusation of Open Container "Not True"

If the state does not prove the accusation of an open container is true, this offense is punishable by—

1. a term of confinement in the county jail for no less than seventy-two hours and no more than 180 days, or

2. a term of confinement in the county jail for no less than seventy-two hours and no more than 180 days and a fine of no more than $2,000.

Relevant Statutes—Punishment If Accusation of Open Container Proved "True"

If the state proves the accusation of an open container is true, this offense is punishable by—

1. a term of confinement in the county jail for no less than 6 days and no more than 180 days, or

2. a term of confinement in the county jail for no less than 6 days and no more than 180 days and a fine of no more than $2,000.

Definitions

Open Container

"Open container" means a bottle, can, or other receptacle that contains any amount of alcoholic beverage and that is open, that has been opened, that has a broken seal, or the contents of which are partially removed.

Alcoholic Beverage

"Alcoholic beverage" means alcohol, or any beverage containing more than one-half of one percent of alcohol by volume, which is capable of use for beverage purposes, either alone or when diluted.

Burden of Proof

The state must prove, beyond a reasonable doubt, the open container accusation.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, two elements of its accusation of an open container. The elements are that—

1. the defendant had an open container of an alcoholic beverage in his immediate possession, and

2. the defendant did this at the time of [driving/assembling or operating an amusement ride] while intoxicated.

You must all agree on elements 1 and 2 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of elements 1 and 2 listed above, you must find the open container accusation is "not true." In this event, you are to determine and state in your verdict—

1. the term of confinement in the county jail to be imposed on the defendant for no less than seventy-two hours and no more than 180 days, or

2. the term of confinement in the county jail to be imposed on the defendant for no less than seventy-two hours and no more than 180 days and a fine of no more than $2,000.

If you all agree the state has proved, beyond a reasonable doubt, both of the two elements listed above, you must find the open container accusation is "true." In this event, you are to determine and state in your verdict—

1. the term of confinement in the county jail to be imposed on the defendant for no less than 6 days and no more than 180 days, or

2. the term of confinement in the county jail to be imposed on the defendant for no less than 6 days and no more than 180 days and a fine of no more than $2,000.

VERDICT—ACCUSATION OF OPEN CONTAINER "NOT TRUE"

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], find that the accusation of an open container has not been proved true. We assess the defendant's punishment at: (select one)

_____ confinement in the county jail for a term of _____ and no fine.

_____ confinement in the county jail for a term of _____ and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

VERDICT—ACCUSATION OF OPEN CONTAINER "TRUE"

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], find that the accusation of an open container has been proved true. We assess the defendant's punishment at: (select one)

_____ confinement in the county jail for a term of _____ days and no fine.

_____ confinement in the county jail for a term of _____ days and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

COMMENT

Punishment for driving while intoxicated with a proved accusation of possession of an open container is set out in Tex. Penal Code § 49.04(c). Punishment for assembling or operating an amusement ride while intoxicated with a proved accusation of possession of an open container is set out in Tex. Penal Code § 49.065(c).

The definition of "open container" is from Tex. Penal Code § 49.031(a)(1). The definition of "alcoholic beverage" is from Tex. Alco. Bev. Code § 1.04(1), incorporated into the Penal Code at Tex. Penal Code § 1.07(a)(4).

CPJC 12.30 Instruction—Misdemeanor Driving While Intoxicated—Enhanced—Alcohol Concentration at or above 0.15—Open Container Accusation (Plea of Not True)

You have found the defendant, [*name*], guilty of driving while intoxicated with a [blood/breath/urine] alcohol concentration level of 0.15 or more. The state has accused the defendant of being in possession of an open container of alcohol. It asks that you find this accusation true and assess punishment under the law applicable to defendants found to be in possession of such an open container.

Accusation

Specifically, the state accuses the defendant of having an open container of alcohol in his immediate possession at the time the defendant committed the offense of driving while intoxicated with a [blood/breath/urine] alcohol concentration level of 0.15 or more.

The defendant has pleaded that this accusation is "not true."

The range of punishments from which you must assess the defendant's punishment therefore depends on whether you find the state has proved the open container accusation.

Relevant Statutes—Punishment If Accusation of Open Container "Not True"

If the state does not prove the accusation of an open container is true, this offense is punishable by—

1. a term of confinement in the county jail for no less than seventy-two hours and no more than one year, or

2. a term of confinement in the county jail for no less than seventy-two hours and no more than one year and a fine of no more than $4,000.

Relevant Statutes—Punishment If Accusation of Open Container Proved "True"

If the state proves the accusation of an open container is true, this offense is punishable by—

1. a term of confinement in the county jail for no less than six days and no more than one year, or

2. a term of confinement in the county jail for no less than six days and no more than one year and a fine of no more than $4,000.

Definitions

Open Container

"Open container" means a bottle, can, or other receptacle that contains any amount of alcoholic beverage and that is open, that has been opened, that has a broken seal, or the contents of which are partially removed.

Alcoholic Beverage

"Alcoholic beverage" means alcohol, or any beverage containing more than one-half of one percent of alcohol by volume, which is capable of use for beverage purposes, either alone or when diluted.

Burden of Proof

The state must prove, beyond a reasonable doubt, the open container accusation.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, two elements of its accusation of an open container. The elements are that—

1. the defendant had an open container of an alcoholic beverage in his immediate possession, and

2. the defendant did this at the time of driving while intoxicated with a [blood/breath/urine] alcohol concentration level of 0.15 or more.

You must all agree on elements 1 and 2 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of elements 1 and 2 listed above, you must find the open container accusation is "not true." In this event, you are to determine and state in your verdict—

1. the term of confinement in the county jail to be imposed on the defendant for no less than seventy-two hours and no more than one year, or

2. the term of confinement in the county jail to be imposed on the defendant for no less than seventy-two hours and no more than one year and a fine of no more than $4,000.

If you all agree the state has proved, beyond a reasonable doubt, both of the two elements listed above, you must find the open container accusation is "true." In this event, you are to determine and state in your verdict—

1. the term of confinement in the county jail to be imposed on the defendant for no less than six days and no more than one year, or

2. the term of confinement in the county jail to be imposed on the defendant for no less than six days and no more than one year and a fine of no more than $4,000.

VERDICT—ACCUSATION OF OPEN CONTAINER "NOT TRUE"

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], find that the accusation of an open container has not been proved true. We assess the defendant's punishment at: (select one)

_____ confinement in the county jail for a term of _____ and no fine.

_____ confinement in the county jail for a term of _____ and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

VERDICT—ACCUSATION OF OPEN CONTAINER "TRUE"

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], find that the accusation of an open container has been proved true. We assess the defendant's punishment at: (select one)

_____ confinement in the county jail for a term of _____ days and no fine.

_____ confinement in the county jail for a term of _____ days and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

COMMENT

Punishment for driving while intoxicated with an alcohol concentration level of 0.15 or above is set out in Tex. Penal Code § 49.04(d). Punishment for driving while intoxicated with a proved accusation of possession of an open container is set out in Tex. Penal Code § 49.04(c).

The definition of "open container" is from Tex. Penal Code § 49.031(a)(1). The definition of "alcoholic beverage" is from Tex. Alco. Bev. Code § 1.04(1), incorporated into the Penal Code at Tex. Penal Code § 1.07(a)(4).

CPJC 12.31 Instruction—Misdemeanor [Driving/Assembling or Operating Amusement Ride] While Intoxicated—Unenhanced—Open Container Accusation (Plea of True)

You have found the defendant, [*name*], guilty of [driving/assembling or operating an amusement ride] while intoxicated. The state has accused the defendant of being in possession of an open container of alcohol. It asks that you find this accusation true and assess punishment under the law applicable to defendants found to be in possession of such an open container.

Accusation

Specifically, the state accuses the defendant of having an open container of alcohol in his immediate possession at the time the defendant committed the offense of [driving/assembling or operating an amusement ride] while intoxicated.

The defendant has pleaded that this accusation is "true."

Relevant Statutes—Punishment If Accusation of Open Container Proved "True"

If the state proves the accusation of an open container is true, this offense is punishable by—

1. a term of confinement in the county jail for no less than 6 days and no more than 180 days, or

2. a term of confinement in the county jail for no less than 6 days and no more than 180 days and a fine of no more than $2,000.

Definitions

Open Container

"Open container" means a bottle, can, or other receptacle that contains any amount of alcoholic beverage and that is open, that has been opened, that has a broken seal, or the contents of which are partially removed.

Alcoholic Beverage

"Alcoholic beverage" means alcohol, or any beverage containing more than one-half of one percent of alcohol by volume, which is capable of use for beverage purposes, either alone or when diluted.

Burden of Proof

The state must prove, beyond a reasonable doubt, the open container accusation.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, two elements of its accusation of an open container. The elements are that—

1. the defendant had an open container of an alcoholic beverage in his immediate possession, and

2. the defendant did this at the time of [driving/assembling or operating an amusement ride] while intoxicated.

The defendant has pleaded "true" to the open container accusation and admits both elements listed above. You must find that the state has proved, beyond a reasonable doubt, the open container accusation is "true." You are to determine and state in your verdict—

1. the term of confinement in the county jail to be imposed on the defendant for no less than 6 days and no more than 180 days, or

2. the term of confinement in the county jail to be imposed on the defendant for no less than 6 days and no more than 180 days and a fine of no more than $2,000.

VERDICT

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], find that the accusation of an open container has been proved true. We assess the defendant's punishment at: (select one)

_____ confinement in the county jail for a term of _____ days and no fine.

_____ confinement in the county jail for a term of _____ days and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

COMMENT

Punishment for driving while intoxicated with a proved accusation of possession of an open container is set out in Tex. Penal Code § 49.04(c). Punishment for assembling or operating an amusement ride while intoxicated with a proved accusation of possession of an open container is set out in Tex. Penal Code § 49.065(c).

The definition of "open container" is from Tex. Penal Code § 49.031(a)(1). The definition of "alcoholic beverage" is from Tex. Alco. Bev. Code § 1.04(1), incorporated into the Penal Code at Tex. Penal Code § 1.07(a)(4).

CPJC 12.32 Instruction—Misdemeanor Driving While Intoxicated—Enhanced—Alcohol Concentration at or above 0.15—Open Container Accusation (Plea of True)

You have found the defendant, [*name*], guilty of driving while intoxicated with a [blood/breath/urine] alcohol concentration level of 0.15 or more. The state has accused the defendant of being in possession of an open container of alcohol. It asks that you find this accusation true and assess punishment under the law applicable to defendants found to be in possession of such an open container.

Accusation

Specifically, the state accuses the defendant of having an open container of alcohol in his immediate possession at the time the defendant committed the offense of driving while intoxicated with a [blood/breath/urine] alcohol concentration level of 0.15 or more.

The defendant has pleaded that this accusation is "true."

Relevant Statutes—Punishment If Accusation of Open Container Proved "True"

If the state proves the accusation of an open container is true, this offense is punishable by—

1. a term of confinement in the county jail for no less than six days and no more than one year, or

2. a term of confinement in the county jail for no less than six days and no more than one year and a fine of no more than $4,000.

Definitions

Open Container

"Open container" means a bottle, can, or other receptacle that contains any amount of alcoholic beverage and that is open, that has been opened, that has a broken seal, or the contents of which are partially removed.

Alcoholic Beverage

"Alcoholic beverage" means alcohol, or any beverage containing more than one-half of one percent of alcohol by volume, which is capable of use for beverage purposes, either alone or when diluted.

Burden of Proof

The state must prove, beyond a reasonable doubt, the open container accusation.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, two elements of its accusation of an open container. The elements are that—

1. the defendant had an open container of an alcoholic beverage in his immediate possession, and

2. the defendant did this at the time of driving while intoxicated with a [blood/breath/urine] alcohol concentration level of 0.15 or more.

The defendant has pleaded "true" to the open container accusation and admits both elements listed above. You must find that the state has proved, beyond a reasonable doubt, the open container accusation is "true." You are to determine and state in your verdict—

1. the term of confinement in the county jail to be imposed on the defendant for no less than six days and no more than one year, or

2. the term of confinement in the county jail to be imposed on the defendant for no less than six days and no more than one year and a fine of no more than $4,000.

VERDICT

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], find that the accusation of an open container has been proved true. We assess the defendant's punishment at: (select one)

_____ confinement in the county jail for a term of _____ and no fine.

_____ confinement in the county jail for a term of _____ and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

COMMENT

Punishment for driving while intoxicated with an alcohol concentration level of 0.15 or above is set out in Tex. Penal Code § 49.04(d). Punishment for driving while intoxicated with a proved accusation of possession of an open container is set out in Tex. Penal Code § 49.04(c).

The definition of "open container" is from Tex. Penal Code § 49.031(a)(1). The definition of "alcoholic beverage" is from Tex. Alco. Bev. Code § 1.04(1), incorporated into the Penal Code at Tex. Penal Code § 1.07(a)(4).

CPJC 12.33 Instruction—Misdemeanor [Driving/Flying/Boating/ Assembling or Operating Amusement Ride] While Intoxicated—Offense Enhancement (One Prior DWI Conviction)

[As of the publication date of this volume, it was unsettled whether the prior offense for DWI-second was a guilt or punishment issue. See CPJC 12.26, General Comments on Intoxication Offenses.]

You have found the defendant, [*name*], guilty of [*offense, e.g.*, the enhanced offense of driving while intoxicated].

Relevant Statutes

This offense is punishable by—

1. a term of confinement in the county jail for no less than thirty days and no more than one year, or

2. a term of confinement in the county jail for no less than thirty days and no more than one year and a fine of no more than $4,000.

Application of Law to Facts

You are therefore to determine and state in your verdict—

1. the term of confinement in the county jail to be imposed on the defendant for no less than thirty days and no more than one year, or

2. the term of confinement in the county jail to be imposed on the defendant for no less than thirty days and no more than one year and a fine to be imposed on the defendant of no more than $4,000.

VERDICT

We, the jury, having found the defendant, [*name*], guilty of [*offense, e.g.*, the enhanced offense of driving while intoxicated], assess the defendant's punishment at: (select one)

_____ confinement in the county jail for a term of _____ days and no fine.

_____ confinement in the county jail for a term of _____ days and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

CPJC 12.34 Instruction—Misdemeanor [Driving/Flying/Boating/ Assembling or Operating Amusement Ride] While Intoxicated—Punishment Enhancement (Plea of Not True)

[As of the publication date of this volume, it was unsettled whether the prior offense for DWI-second was a guilt or punishment issue. See CPJC 12.26, General Comments on Intoxication Offenses.]

You have found the defendant, [*name*], guilty of [driving/flying/boating/ assembling or operating an amusement ride] while intoxicated. The state has accused the defendant of having been convicted of [*offense*] once before. It asks that you find this accusation true and assess punishment under the law applicable to defendants with such a prior conviction.

Accusation

Specifically, the state accuses the defendant of being convicted on [*date*], in Cause No. [*number*] in the [County/District] Court of [*county*] County, Texas, for the offense of [*offense*]. The state further alleges that this conviction became a final conviction before the commission of the offense for which you have found the defendant guilty in this trial.

The defendant has pleaded that this accusation is "not true."

The range of punishments from which you must assess the defendant's punishment therefore depends on whether you find the state has proved the prior conviction accusation.

Relevant Statutes—Punishment If Accusation of Prior Conviction "Not True"

If the state does not prove the accusation of a prior conviction is true, this offense is punishable by—

1. a term of confinement in the county jail for no less than seventy-two hours and no more than 180 days, or

2. a term of confinement in the county jail for no less than seventy-two hours and no more than 180 days and a fine of no more than $2,000.

Relevant Statutes—Punishment If Accusation of Prior Conviction Proved "True"

If the state proves the accusation of a prior conviction is true, this offense is punishable by—

1. a term of confinement in the county jail for no less than thirty days and no more than one year, or

2. a term of confinement in the county jail for no less than thirty days and no more than one year and a fine of no more than $4,000.

Burden of Proof

The state must prove, beyond a reasonable doubt, the prior conviction accusation.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, three elements of its accusation of a prior conviction. The elements are that—

1. the defendant was convicted on [*date*], in Cause No. [*number*] in the [County/District] Court of [*county*] County, [*state*]; and

2. this conviction was for [driving while intoxicated/flying while intoxicated/driving while intoxicated with a child passenger/intoxication assault with a motor vehicle/intoxication manslaughter with a motor vehicle/boating while intoxicated/operating or assembling an amusement ride while intoxicated/an offense under article 6701*l*-1, Revised Civil Statutes, as that law existed before September 1, 1994/an offense under article 6701*l*-2, Revised Civil Statutes, as that law existed before January 1, 1984/criminally negligent homicide under section 19.05(a)(2), Penal Code, as that law existed before September 1, 1994, if the vehicle operated was a motor vehicle/an offense of the laws of another state that prohibit the operation of a motor vehicle while intoxicated]; and

3. this conviction became final before the commission of the offense for which the defendant was convicted in this trial.

You must all agree on elements 1, 2, and 3 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the prior conviction

accusation is "not true." In this event, you are to determine and state in your verdict—

1. the term of confinement in the county jail to be imposed on the defendant for no less than seventy-two hours and no more than 180 days, or

2. the term of confinement in the county jail to be imposed on the defendant for no less than seventy-two hours and no more than 180 days and a fine of no more than $2,000.

If you all agree the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must find the prior conviction accusation is "true." In that event, you are to determine and state in your verdict—

1. the term of confinement in the county jail to be imposed on the defendant for no less than thirty days and no more than one year, or

2. the term of confinement in the county jail to be imposed on the defendant for no less than thirty days and no more than one year and a fine of no more than $4,000.

VERDICT—ACCUSATION OF PRIOR CONVICTION "NOT TRUE"

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], find that the accusation of a prior conviction has not been proved true. We assess the defendant's punishment at: (select one)

_____ confinement in the county jail for a term of _____ and no fine.

_____ confinement in the county jail for a term of _____ and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

VERDICT—ACCUSATION OF PRIOR CONVICTION "TRUE"

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], find that the accusation of a prior conviction has been proved true. We assess the defendant's punishment at: (select one)

_____ confinement in the county jail for a term of _____ and no fine.

_____ confinement in the county jail for a term of _____ and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

COMMENT

Punishment for driving while intoxicated is set out in Tex. Penal Code § 49.04(a), (b). Punishment for flying while intoxicated is set out in Tex. Penal Code § 49.05(b). Punishment for boating while intoxicated is set out in Tex. Penal Code § 49.06(b). Punishment for assembling or operating an amusement ride while intoxicated is set out in Tex. Penal Code § 49.065(b). Provision for enhancement of driving, flying, boating, or assembling or operating an amusement ride while intoxicated by one prior conviction is set out in Tex. Penal Code § 49.09(a).

CPJC 12.35 Instruction—Misdemeanor [Driving/Flying/Boating/ Assembling or Operating Amusement Ride] While Intoxicated—Punishment Enhancement (Plea of True)

[As of the publication date of this volume, it was unsettled whether the prior offense for DWI-second was a guilt or punishment issue. See CPJC 12.26, General Comments on Intoxication Offenses.]

You have found the defendant, [*name*], guilty of [driving/flying/boating/ assembling or operating an amusement ride] while intoxicated. The state has accused the defendant of having been convicted of [*offense*] once before. It asks that you find this accusation true and assess punishment under the law applicable to defendants with such a prior conviction.

Accusation

Specifically, the state accuses the defendant of being convicted on [*date*], in Cause No. [*number*] in the [County/District] Court of [*county*] County, Texas, for the offense of [*offense*]. The state further alleges that this conviction became a final conviction before the commission of the offense for which you have found the defendant guilty in this trial.

The defendant has pleaded that this accusation is "true."

Relevant Statutes—Punishment If Accusation of Prior Conviction Proved "True"

If the state proves the accusation of a prior conviction is true, this offense is punishable by—

1. a term of confinement in the county jail for no less than thirty days and no more than one year, or

2. a term of confinement in the county jail for no less than thirty days and no more than one year and a fine of no more than $4,000.

Burden of Proof

The state must prove, beyond a reasonable doubt, the prior conviction accusation.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, three elements of its accusation of a prior conviction. The elements are that—

1. the defendant was convicted on [*date*], in Cause No. [*number*] in the [County/District] Court of [*county*] County, [*state*]; and

2. this conviction was for [driving while intoxicated/flying while intoxicated/driving while intoxicated with a child passenger/intoxication assault with a motor vehicle/intoxication manslaughter with a motor vehicle/boating while intoxicated/operating or assembling an amusement ride while intoxicated/an offense under article 6701*l*-1, Revised Civil Statutes, as that law existed before September 1, 1994/an offense under article 6701*l*-2, Revised Civil Statutes, as that law existed before January 1, 1984/criminally negligent homicide under section 19.05(a)(2), Penal Code, as that law existed before September 1, 1994, if the vehicle operated was a motor vehicle/an offense of the laws of another state that prohibit the operation of a motor vehicle while intoxicated]; and

3. this conviction became final before the commission of the offense for which the defendant was convicted in this trial.

The defendant has pleaded "true" to the prior conviction accusation and admits all three elements listed above. You must find that the state has proved, beyond a reasonable doubt, the prior conviction accusation is "true." You are to determine and state in your verdict—

1. the term of confinement in the county jail to be imposed on the defendant for no less than thirty days and no more than one year, or

2. the term of confinement in the county jail to be imposed on the defendant for no less than thirty days and no more than one year and a fine of no more than $4,000.

VERDICT

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], find that the accusation of a prior conviction has been proved true. We assess the defendant's punishment at: (select one)

_____ confinement in the county jail for a term of _____ and no fine.

_____ confinement in the county jail for a term of _____ and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

COMMENT

Punishment for driving while intoxicated is set out in Tex. Penal Code § 49.04(a), (b). Punishment for flying while intoxicated is set out in Tex. Penal Code § 49.05(b). Punishment for boating while intoxicated is set out in Tex. Penal Code § 49.06(b). Punishment for assembling or operating an amusement ride while intoxicated is set out in Tex. Penal Code § 49.065(b). Provision for enhancement of driving, flying, boating, or assembling or operating an amusement ride while intoxicated by one prior conviction is set out in Tex. Penal Code § 49.09(a).

CPJC 12.36 Instruction—Misdemeanor [Driving/Assembling or Operating Amusement Ride] While Intoxicated—Punishment Enhancement (Plea of Not True)—Open Container Accusation (Plea of Not True)

[As of the publication date of this volume, it was unsettled whether the prior offense for DWI-second was a guilt or punishment issue. See CPJC 12.26, General Comments on Intoxication Offenses.]

You have found the defendant, [*name*], guilty of [driving/assembling or operating an amusement ride] while intoxicated. The state has accused the defendant of having been convicted of [*offense*] once before and of being in possession of an open container of alcohol. It asks that you find these accusations true and assess punishment under the law applicable to defendants with such a prior conviction and found to be in possession of such an open container.

Accusation

Specifically, the state accuses the defendant of being convicted on [*date*], in Cause No. [*number*] in the [County/District] Court of [*county*] County, Texas, for the offense of [*offense*]. The state further alleges that this conviction became a final conviction before the commission of the offense for which you have found the defendant guilty in this trial.

The defendant has pleaded that this accusation is "not true."

The state further accuses the defendant of having an open container of alcohol in his immediate possession at the time the defendant committed the offense of [driving/assembling or operating an amusement ride] while intoxicated.

The defendant has pleaded that this accusation is "not true."

The range of punishments from which you must assess the defendant's punishment therefore depends on whether you find the state has proved the prior conviction accusation, the open container accusation, or both.

Relevant Statutes—Punishment If Accusation of Prior Conviction Proved "True"

If the state proves the accusation of a prior conviction is true, this offense is punishable by—

1. a term of confinement in the county jail for no less than thirty days and no more than one year, or

2. a term of confinement in the county jail for no less than thirty days and no more than one year and a fine of no more than $4,000.

If you find the prior conviction accusation is true, you need not determine if the open container accusation is true, and you must decide the defendant's punishment for [driving/assembling or operating an amusement ride] while intoxicated under element 1 or 2.

Relevant Statutes—Punishment If Accusation of Prior Conviction "Not True" and Accusation of Open Container Proved "True"

If the state does not prove the accusation of a prior conviction is true, you must next decide whether the state has proved the open container accusation.

If the state proves the accusation of an open container is true, this offense is punishable by—

3. a term of confinement in the county jail for no less than 6 days and no more than 180 days, or

4. a term of confinement in the county jail for no less than 6 days and no more than 180 days and a fine of no more than $2,000.

If you find the prior conviction accusation is not true and you find the open container accusation is true, you must decide the defendant's punishment for [driving/assembling or operating an amusement ride] while intoxicated under element 3 or 4.

Relevant Statutes—Punishment If Both Accusation of Prior Conviction and Accusation of Open Container "Not True"

If the state does not prove either the accusation of a prior conviction or the accusation of an open container is true, this offense is punishable by—

5. a term of confinement in the county jail for no less than seventy-two hours and no more than 180 days, or

6. a term of confinement in the county jail for no less than seventy-two hours and no more than 180 days and a fine of no more than $2,000.

If you find both the prior conviction accusation and the open container accusation are not true, you must decide the defendant's punishment for [driving/assembling or operating an amusement ride] while intoxicated under element 5 or 6.

Definitions

Open Container

"Open container" means a bottle, can, or other receptacle that contains any amount of alcoholic beverage and that is open, that has been opened, that has a broken seal, or the contents of which are partially removed.

Alcoholic Beverage

"Alcoholic beverage" means alcohol, or any beverage containing more than one-half of one percent of alcohol by volume, which is capable of use for beverage purposes, either alone or when diluted.

Burden of Proof

The state must prove, beyond a reasonable doubt, the prior conviction and open container accusations.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, three elements of its accusation of a prior conviction. The elements are that—

1. the defendant was convicted on [*date*], in Cause No. [*number*] in the [County/District] Court of [*county*] County, [*state*]; and

2. this conviction was for [driving while intoxicated/flying while intoxicated/driving while intoxicated with a child passenger/intoxication assault with a motor vehicle/intoxication manslaughter with a motor vehicle/boating while intoxicated/operating or assembling an amusement ride while intoxicated/an offense under article 6701*l*-1, Revised Civil Statutes, as that law existed before September 1, 1994/an offense under article 6701*l*-2, Revised Civil Statutes, as that law existed before January 1, 1984/criminally negligent homicide under section 19.05(a)(2), Penal Code, as that law existed before September 1, 1994, if the vehicle operated was a motor vehicle/an offense of the laws of another state that prohibit the operation of a motor vehicle while intoxicated]; and

3. this conviction became final before the commission of the offense for which the defendant was convicted in this trial.

You must all agree on elements 1, 2, and 3 listed above.

If you all agree the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must find the prior conviction accusation is "true," and you do not need to determine whether the defendant had an open container of alcohol. In this event, you are to determine and state in your verdict—

1. the term of confinement in the county jail to be imposed on the defendant for no less than thirty days and no more than one year, or

2. the term of confinement in the county jail to be imposed on the defendant for no less than thirty days and no more than one year and a fine of no more than $4,000.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the prior conviction accusation is "not true." You must next determine whether the state has proved, beyond a reasonable doubt, two elements of its accusation of an open container. The elements are that—

4. the defendant had an open container of an alcoholic beverage in his immediate possession, and

5. the defendant did this at the time of [driving/assembling or operating an amusement ride] while intoxicated.

You must all agree on elements 4 and 5 listed above.

If you all agree the state has proved, beyond a reasonable doubt, both of the two elements listed above, you must find the open container accusation is "true." In this event, you are to determine and state in your verdict—

1. the term of confinement in the county jail to be imposed on the defendant for no less than 6 days and no more than 180 days, or

2. the term of confinement in the county jail to be imposed on the defendant for no less than 6 days and no more than 180 days and a fine of no more than $2,000.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of elements 4 and 5 listed above, you must find the open container accusation is "not true." In this event, you are to determine and state in your verdict—

1. the term of confinement in the county jail to be imposed on the defendant for no less than seventy-two hours and no more than 180 days, or

2. the term of confinement in the county jail to be imposed on the defendant for no less than seventy-two hours and no more than 180 days and a fine of no more than $2,000.

VERDICT—ACCUSATION OF PRIOR CONVICTION "TRUE"

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], find that the accusation of a prior conviction has been proved true. We assess the defendant's punishment at: (select one)

_____ confinement in the county jail for a term of _____ and no fine.

_____ confinement in the county jail for a term of _____ and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

VERDICT—ACCUSATION OF PRIOR CONVICTION "NOT TRUE" AND ACCUSATION OF OPEN CONTAINER "TRUE"

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], find that the accusation of a prior conviction has not been proved true and that the accusation of an open container has been proved true. We assess the defendant's punishment at: (select one)

_____ confinement in the county jail for a term of _____ days and no fine.

_____ confinement in the county jail for a term of _____ days and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

VERDICT—ACCUSATION OF PRIOR CONVICTION AND OF OPEN CONTAINER "NOT TRUE"

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], but finding that both the accusation of a prior conviction and of an open container have not been proved true, assess his punishment at: (select one)

_____ confinement in the county jail for a term of _____ and no fine.

_____ confinement in the county jail for a term of _____ and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

COMMENT

Punishment for driving while intoxicated with a proved accusation of possession of an open container is set out in Tex. Penal Code § 49.04(c). Punishment for assembling or operating an amusement ride while intoxicated with a proved accusation of possession of an open container is set out in Tex. Penal Code § 49.065(c). Provision for enhancement of driving or assembling or operating an amusement ride while intoxicated is set out in Tex. Penal Code § 49.09(a).

The definition of "open container" is from Tex. Penal Code § 49.031(a)(1). The definition of "alcoholic beverage" is from Tex. Alco. Bev. Code § 1.04(1), incorporated into the Penal Code at Tex. Penal Code § 1.07(a)(4).

CPJC 12.37 Instruction—Misdemeanor [Driving/Assembling or Operating Amusement Ride] While Intoxicated—Punishment Enhancement (Plea of Not True)—Open Container Accusation (Plea of True)

[As of the publication date of this volume, it was unsettled whether the prior offense for DWI-second was a guilt or punishment issue. See CPJC 12.26, General Comments on Intoxication Offenses.]

You have found the defendant, [*name*], guilty of [driving/assembling or operating an amusement ride] while intoxicated. The state has accused the defendant of having been convicted of [*offense*] once before and of being in possession of an open container of alcohol. It asks that you find these accusations true and assess punishment under the law applicable to defendants with such a prior conviction and found to be in possession of such an open container.

Accusation

Specifically, the state accuses the defendant of being convicted on [*date*], in Cause No. [*number*] in the [County/District] Court of [*county*] County, Texas, for the offense of [*offense*]. The state further alleges that this conviction became a final conviction before the commission of the offense for which you have found the defendant guilty in this trial.

The defendant has pleaded that this accusation is "not true."

The state further accuses the defendant of having an open container of alcohol in his immediate possession at the time the defendant committed the offense of [driving/assembling or operating an amusement ride] while intoxicated.

The defendant has pleaded that this accusation is "true."

The range of punishments from which you must assess the defendant's punishment therefore depends on whether you find the state has proved the prior conviction accusation.

Relevant Statutes—Punishment If Accusation of Prior Conviction Proved "True"

If the state proves the accusation of a prior conviction is true, this offense is punishable by—

1. a term of confinement in the county jail for no less than thirty days and no more than one year, or

2. a term of confinement in the county jail for no less than thirty days and no more than one year and a fine of no more than $4,000.

If you find the prior conviction accusation is true, you must decide the defendant's punishment for [driving/operating an amusement ride] while intoxicated under element 1 or 2.

Relevant Statutes—Punishment If Accusation of Prior Conviction "Not True"

If the state does not prove the accusation of a prior conviction is true, you must next decide whether the state has proved the open container accusation.

If the state proves the accusation of an open container is true, this offense is punishable by—

1. a term of confinement in the county jail for no less than 6 days and no more than 180 days, or

2. a term of confinement in the county jail for no less than 6 days and no more than 180 days and a fine of no more than $2,000.

The defendant has pleaded "true" to the open container accusation. If you find the prior conviction accusation is not true, you must find that the state has proved, beyond a reasonable doubt, the open container accusation is "true."

Definitions

Open Container

"Open container" means a bottle, can, or other receptacle that contains any amount of alcoholic beverage and that is open, that has been opened, that has a broken seal, or the contents of which are partially removed.

Alcoholic Beverage

"Alcoholic beverage" means alcohol, or any beverage containing more than one-half of one percent of alcohol by volume, which is capable of use for beverage purposes, either alone or when diluted.

Burden of Proof

The state must prove, beyond a reasonable doubt, the prior conviction and open container accusations.

Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, three elements of its accusation of a prior conviction. The elements are that—

1. the defendant was convicted on [*date*], in Cause No. [*number*] in the [County/District] Court of [*county*] County, [*state*]; and

2. this conviction was for [driving while intoxicated/flying while intoxicated/driving while intoxicated with a child passenger/intoxication assault with a motor vehicle/intoxication manslaughter with a motor vehicle/ boating while intoxicated/operating or assembling an amusement ride while intoxicated/an offense under article 6701*l*-1, Revised Civil Statutes, as that law existed before September 1, 1994/an offense under article 6701*l*-2, Revised Civil Statutes, as that law existed before January 1, 1984/criminally negligent homicide under section 19.05(a)(2), Penal Code, as that law existed before September 1, 1994, if the vehicle operated was a motor vehicle/an offense of the laws of another state that prohibit the operation of a motor vehicle while intoxicated]; and

3. this conviction became final before the commission of the offense for which the defendant was convicted in this trial.

You must all agree on elements 1, 2, and 3 listed above.

If you all agree the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must find the prior conviction accusation is "true," and you do not need to determine whether the defendant had an open container of alcohol. In this event, you are to determine and state in your verdict—

1. the term of confinement in the county jail to be imposed on the defendant for no less than thirty days and no more than one year, or

2. the term of confinement in the county jail to be imposed on the defendant for no less than thirty days and no more than one year and a fine of no more than $4,000.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the prior conviction

accusation is "not true." You must next determine whether the state has proved, beyond a reasonable doubt, two elements of its accusation of an open container. The elements are that—

1. the defendant had an open container of an alcoholic beverage in his immediate possession, and

2. the defendant did this at the time of [driving/assembling or operating an amusement ride] while intoxicated.

The defendant has pleaded "true" to the open container accusation and admits both elements listed above. You must find that the state has proved, beyond a reasonable doubt, the open container accusation is "true." You are to determine and state in your verdict—

1. the term of confinement in the county jail to be imposed on the defendant for no less than 6 days and no more than 180 days, or

2. the term of confinement in the county jail to be imposed on the defendant for no less than 6 days and no more than 180 days and a fine of no more than $2,000.

VERDICT—ACCUSATION OF PRIOR CONVICTION "TRUE"

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], find that the accusation of a prior conviction has been proved true. We assess the defendant's punishment at: (select one)

_____ confinement in the county jail for a term of _____ and no fine.

_____ confinement in the county jail for a term of _____ and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

VERDICT—ACCUSATION OF PRIOR CONVICTION "NOT TRUE" AND ACCUSATION OF OPEN CONTAINER "TRUE"

We, the jury, having found the defendant, [*name*], guilty of the offense of [*offense*], find that the accusation of a prior conviction has not been proved true and the accusation of an open container has been proved true. We assess the defendant's punishment at: (select one)

_____ confinement in the county jail for a term of _____ days and no fine.

_____ confinement in the county jail for a term of _____ days and a fine of $_____.

_____
Foreperson of the Jury

_____
Printed Name of Foreperson

COMMENT

Punishment for driving while intoxicated with a proved accusation of possession of an open container is set out in Tex. Penal Code § 49.04(c). Punishment for assembling or operating an amusement ride while intoxicated with a proved accusation of possession of an open container is set out in Tex. Penal Code § 49.065(c). Provision for enhancement of driving or assembling or operating an amusement ride while intoxicated is set out in Tex. Penal Code § 49.09(a).

The definition of "open container" is from Tex. Penal Code § 49.031(a)(1). The definition of "alcoholic beverage" is from Tex. Alco. Bev. Code § 1.04(1), incorporated into the Penal Code at Tex. Penal Code § 1.07(a)(4).

CPJC 12.38 Instruction—Suspension of Driver's License

Suspension of Driver's License

Because you have convicted the defendant of [*offense*], the defendant's driver's license will automatically be suspended unless you recommend that the license not be suspended.

If you recommend that the defendant be placed on community supervision, you may recommend that the license not be suspended. If you recommend that the license not be suspended, it will not be suspended.

Therefore, if you recommend that the defendant be placed on community supervision, consider also whether you wish to recommend that the defendant's driver's license not be suspended. If you decide to make such a recommendation, indicate this on your verdict in the place provided. If you decide not to make such a recommendation, indicate that.

VERDICT

[Include the following after the portion permitting the jury to recommend community supervision.]

With regard to suspension of the defendant's driver's license:

_____ we recommend that the license not be suspended.

_____ we recommend that the license be suspended.

COMMENT

For guidelines on this instruction, see the comment entitled "Suspension of Driver's License" at CPJC 12.26.

Suspension of a driver's license after conviction of an intoxication-related offense is set out in Tex. Transp. Code §§ 521.341, 521.344. A sentencing jury's authority to recommend that the license not be suspended is set out in Tex. Code Crim. Proc. art. 42A.407(a).

APPENDIX

Following are the tables of contents of the most recent editions of the *Texas Criminal Pattern Jury Charges* series. The practitioner may also be interested in the civil *Texas Pattern Jury Charges* series. Please visit **http://texasbarbooks.net/texas-pattern-jury-charges/** for more information.

Contents of *TEXAS CRIMINAL PATTERN JURY CHARGES—CRIMINAL DEFENSES* (2015 Ed.)

Contents of
***TEXAS CRIMINAL PATTERN JURY CHARGES—INTOXICATION, CONTROLLED SUBSTANCE & PUBLIC ORDER OFFENSES* (2016 Ed.)**

[Chapters 42 through 49 are reserved for expansion.]

Contents of
***TEXAS CRIMINAL PATTERN JURY CHARGES—CRIMES AGAINST PERSONS & PROPERTY* (2016 Ed.)**

PART II. AGGRAVATED ASSAULT

PART III. INJURY TO CHILD, ELDERLY INDIVIDUAL, OR DISABLED INDIVIDUAL

PART IV. DEADLY CONDUCT

STATUTES AND RULES CITED

[Decimal references are to CPJC numbers.
"Quick Guide" references are to the guide preceding chapter 1.]

Texas Constitution

Texas Alcoholic Beverage Code

Texas Code of Criminal Procedure

Texas Government Code

Texas Health & Safety Code

Texas Penal Code

Texas Transportation Code

Texas Administrative Code

Texas Rules of Appellate Procedure

Texas Rules of Evidence

Miscellaneous

CASES CITED

[Decimal references are to CPJC numbers.
"Quick Guide" references are to the guide preceding chapter 1.]

SUBJECT INDEX

[Decimal references are to CPJC numbers.]

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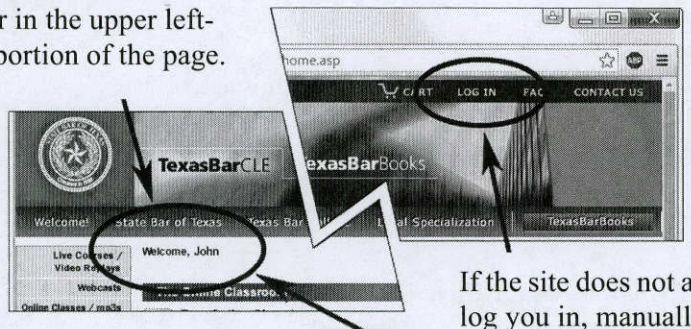

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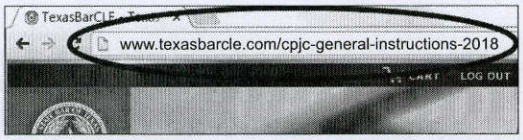

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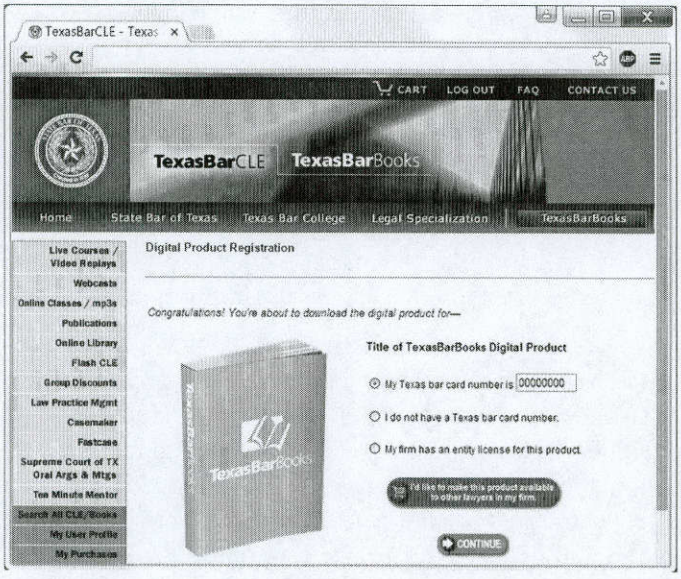

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GENERAL INSTRUCTIONS

The Pattern Jury Charges Committee—Criminal began its work in 2005 with the goal of developing model instructions that juries could easily understand, formatted to make each section clearly identifiable. The Committee reorganized and expanded the series beginning in 2015 and continues to update and add important new material to each book. This first volume of the series contains model jury instructions for the general charge, ancillary issues, evidentiary issues, and punishments.

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