Texas Criminal Pattern Jury Charges

Defenses

2013

TEXAS CRIMINAL PATTERN JURY CHARGES

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

Austin 2013

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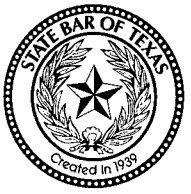

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PREFACE

The Pattern Jury Charges Committee—Criminal is pleased to present the second volume of the *Texas Criminal Pattern Jury Charges* series. This volume contains model jury instructions on criminal defenses. The Committee tried to provide jury instructions that will improve jurors' comprehension of legal defenses so that they will be able to more easily understand how the law should be applied to the facts presented at trial. We believe that this volume will be a valuable resource for the bench and bar.

As with the first volume, the Committee has provided a significant amount of material on the underlying law to aid practitioners in using the charges, to ensure that attorneys have all the information needed to use the charges with confidence.

The Committee gratefully acknowledges the instrumental role of Eduardo Rodriguez, who while president of the State Bar of Texas created this Committee and initiated this process. It is also grateful for the help and support of State Bar presidents Martha Dickie, Gib Walton, Harper Estes, Roland K. Johnson, and Terry Tottenham.

The Committee would also like especially to thank Judge Cathy Cochran, its liaison to the Texas Court of Criminal Appeals. Her participation and support have been both invaluable and a pleasure.

This work could not have been completed without the initiative, perseverance, and hard work of many Committee members both past and present. 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 for their patient support in bringing this volume to fruition.

—Alan Levy, *Chair*
—George Dix, *Vice-Chair*

The Committee owes a special debt of gratitude to George Dix for his exhaustive and valuable contributions to this project.

—Alan Levy

PREFACE TO THE 2013 EDITION

The State Bar of Texas is very proud to publish this new edition of *Texas Criminal Pattern Jury Charges—Defenses*.

This, the second volume of the *Texas Criminal Pattern Jury Charges* series, contains model jury instructions on criminal defenses. The Committee has updated the form instructions and commentary to reflect changes in the law and to incorporate suggestions made by judges and attorneys since the original publication.

The Committee has furnished jury instructions that it believes will improve jurors' comprehension of legal defenses. Each volume in this series provides a significant amount of material on the underlying law to aid practitioners in using the charges, to ensure that attorneys have the information they need to use the charges with confidence.

The Committee gratefully acknowledges the instrumental role of Eduardo Rodriguez, who while president of the State Bar created this Committee and initiated this process. It is also grateful for the help and continued support of State Bar leadership as we have moved forward.

This work could not have been completed without the initiative, perseverance, and hard work of many Committee members, both past and present. The Committee would also like especially to thank Judge Cathy Cochran, its liaison to the Texas Court of Criminal Appeals, for her participation and support. 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 for their diligent work in bringing this volume to fruition.

—Alan Levy, *Chair*
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—Alan Levy

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 general instructions for the guilt/innocence stage of the trial and instructions covering a range of defensive matters. 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 in cases raising defensive issues 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 "[aggravated kidnapping/murder]," the user must choose between the terms or phrases within the brackets. The choices are separated by forward slash marks. Alternative phrases may also be indicated by the use of brackets. For example, in the phrase "use [or attempted use] of unlawful force," the user must decide whether to include the bracketed phrase. In a bracketed statement such as "[*name*]," the user is to substitute the name of the person rather than retain the bracketed material verbatim. Material such as "[*include if applicable*: . . .]" and "[*insert specific*

offense]" provide 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. Downloading and Installing the Digital Product

The complimentary downloadable version of *Texas Criminal Pattern Jury Charges—Defenses* contains the entire text of the printed book. To download the digital product—

1. go to **http://www.texasbarcle.com/pjc-defenses-2013/**,
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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.

§ B1.1 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.

§ B1.2 Jury Instructions in Criminal Cases—Terminology and Structure

§ B1.2.1 Terminology—"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."

§ B1.2.2 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).

§ B1.2.3 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.").

§ B1.2.4 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.

§ B1.3 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.

§ B1.3.1 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.

§ B1.3.2 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 . . . .").

§ B1.3.3 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).

§ B1.3.4 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.

§ B1.4 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).

§ B1.5 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.

§ B1.5.1 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).

§ B1.5.2 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 v. State*, 652 S.W.2d 370 (Tex. Crim. App. 1983), 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.").

§ B1.5.3 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.

§ B1.5.4 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.

§ B1.5.5 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.

§ B1.6 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."

§ B1.6.1 "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).

§ B1.6.2 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.

§ B1.7 Culpable Mental States

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

§ B1.7.1 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.

§ B1.7.2 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 v. State*, 781 S.W.2d 600 (Tex. Crim. App. 1989), 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.

§ B1.7.3 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?

§ B1.7.4 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.

§ B1.7.5 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 v. State*, 704 S.W.2d 36 (Tex. Crim. App. 1985), 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.

§ B1.8 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).

§ B1.8.1 "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.

§ B1.8.2 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 defendant'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.

§ B1.8.3 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).

§ B1.8.4 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.

§ B1.8.5 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.

§ B1.8.6 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).

§ B1.8.7 Defendant's Conduct "Contributing to" Result

In *Robbins v. State*, 717 S.W.2d 348 (Tex. Crim. App. 1986), 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 intoxica-

tion "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*.

§ B1.8.8 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 v. State*, 717 S.W.2d 348 (Tex. Crim. App. 1986), 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 v. State*, 93 S.W.3d 16 (Tex. Crim. App. 2001)—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.

§ B1.9 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.

§ B1.9.1 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 v. State*, 235 S.W.3d 711, 714 (Tex. Crim. App. 2007) (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, impair-

ment, 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 serous 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.

§ B1.9.2 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").

§ B1.9.3 Committee's Approach

The Committee attempted to apply the approach of *Stuhler v. State*, 218 S.W.3d 706 (Tex. Crim. App. 2007), and *Pizzo v. State*, 235 S.W.3d 711 (Tex. Crim. App. 2007), 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 v. State*, 23 S.W.3d 30 (Tex. Crim. App. 2000), and *Harrod v. State*, 203 S.W.3d 622 (Tex. App.—Dallas 2006, no pet.), 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.

§ B1.10 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.

§ B2.1 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.

[Insert provisions specific to the case here.]

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.

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

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[ed] 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).

§ B3.1 Categorizing Defenses

This volume addresses jury instructions concerning the legal doctrines criminal defendants can rely on to avoid conviction despite the state's satisfactory proof of the elements of the offense. These are traditionally and somewhat uncritically spoken of as "defenses."

The Committee considered the extent to which its task might be facilitated by careful categorization of these doctrines.

Traditionally, criminal law drew a conceptual distinction between "excuses" and "justifications." *See* Wayne LaFave, *Substantive Criminal Law* § 9.01(a) (5th ed. 2010), relying heavily on Paul H. Robinson, *Criminal Law Defenses* (1984). Doctrines of justification involve a conclusion that the act committed by the defendant was "justified" and thus not wrongful conduct at all. Doctrines of excuse, in contrast, assume that the conduct was wrongful but establish (if applicable) that the defendant has an excuse for engaging in the wrongful conduct and thus is not blameworthy. George E. Dix & M. Michael Sharlot, *Criminal Law: Cases and Materials* 754–55 (6th ed. 2008). At common law, the distinction between excuse and justification had important consequences. This is seldom if ever the case under modern law generally. *See* LaFave at § 9.01(a).

There is considerable dispute about how to best or most accurately categorize defenses under modern criminal law in light of the relevance to many defenses of the accused's belief. For example, a killing may be found noncriminal because the killer accurately knew he had to take the life of the victim to prevent the victim from wrongfully taking his. The doctrine leading to this result is clearly a justification. But a killing may also be found noncriminal because the killer wrongfully believed he had to take the life of the victim to prevent the victim from wrongfully taking his. Whether the doctrine leading to this result is a justification or rather an excuse (based on the killer's mistaken perception) is less clear.

The American Law Institute's Model Penal Code contributed to the confusion by devoting an article (article 3) to "General Principles of Justification." This included "choice of evils," self-defense, defense of others and of property, and some others. Another article (article 4) was clearly designed to deal with what traditionally would be called excuses. It was, however, called "Responsibility" and included only insanity and infancy. Other matters that would be regarded as excuses were included in article 2, titled "General Principles of Liability." *See* Markus D. Dubber, *Criminal Law: Model Penal Code* 249–50 (2002). These matters included ignorance, mistake, intoxication, duress, and entrapment.

The Texas Penal Code compounds the confusion or at least the already tenuous relationship of legal doctrine to the traditional distinction between justifications and excuses.

In chapter 9, the Code purports to provide for what it calls "justifications." These include necessity, public duty, self-defense, defense of others, defense of property, law enforcement, and "special relationships." Chapter 8 seems designed to provide for what traditionally would be called excuses. Rather than use this term, however, the Code labels these as "general defenses to criminal responsibility." Chapter 8 includes not only insanity—which in traditional terms clearly is an excuse rather than a justification—but also mistake of fact and law, duress, and entrapment.

For purposes of drafting jury instructions, it is doubtful that it is important whether the legal doctrine relied on by a defendant is one of excuse, justification, or some combination of these. What is important is separating the defense from the elements of the charged offense, identifying the facts that the defense puts into contest, and placing the burden of proof on those elements.

With regard to burdens of proof, the Model Penal Code was uncertain. By a rather complicated provision, it left to the courts to decide whether particular matters of excuse or justification were so peculiarly within the knowledge of criminal defendants that the defendant could fairly be required to adduce supporting evidence. Model Penal Code § 1.12(3) (Proposed Official Draft 1962).

The Texas Penal Code more specifically and extensively addresses the burdens of production and proof on defensive matters. This is covered in Code chapter 2. Chapter 2 distinguishes among (1) elements of the offense, (2) exceptions, (3) defenses, (4) affirmative defenses, and (5) grounds of defense in a penal law not plainly labeled in accordance with chapter 2 of the Penal Code.

Under chapter 2, the allocation of the burden of proof is not determined by the label attached to a doctrine. All "justifications" are treated as "defenses." *See* Tex. Penal Code § 9.02. This determines that the burden of proof is on the state. But not all "general defenses to criminal responsibility" in chapter 8 are defenses in this sense. For example, insanity and duress are affirmative defenses.

Chapter 2 also refers to "[a] ground of defense in a penal law that is not plainly labeled in accordance with this chapter." Tex. Penal Code § 2.03(e). Such a ground of defense "has the procedural and evidentiary consequences of a defense." Tex. Penal Code § 2.03(e).

The case law introduces other terms. In *Giesberg v. State*, 984 S.W.2d 245 (Tex. Crim. App. 1998), the court of criminal appeals referred to "defensive issues" and "defensive theories," apparently as distinguished from "statutory defense[s]."

Case law earlier referred to the so-called "diminished capacity" rule or doctrine as a "failure-of-proof defense." *Penry v. State*, 903 S.W.2d 715, 769 (Tex. Crim. App. 1995) (quoting Robinson, § 64(a) at 276). *Accord Jackson v. State*, 160 S.W.3d 568, 573 (Tex. Crim. App. 2005) ("[T]he diminished-capacity doctrine at issue in this case is simply a failure-of-proof defense in which the defendant claims that the State failed to prove that the defendant had the required state of mind at the time of the offense.").

LaFave has explained the term *failure-of-proof defense* as follows:

> A failure of proof defense is one in which the defendant has introduced evidence at his criminal trial showing that some essential element of the crime charged has not been proved beyond a reasonable doubt. As Robinson explains, such a defense is "in essence no more than the negation of an element required by the definition of the offense," and the "characterization of a given failure of proof as a defense rather than as a defect in proving the offense depends, for the most part, upon common language usage."

LaFave at § 9.1(a)(1) (quoting Robinson § 21).

The Committee concluded that to achieve its purposes it need not worry about distinctions between or among justifications, excuses, defenses to criminal responsibility, and the like. Rather, it focused on distinguishing (1) failure-of-proof defenses, (2) defenses generally, and (3) affirmative defenses. Both defenses generally and affirmative defenses (but not failure-of-proof defenses) put into contest matters not addressed in the definition of the charged offense. Only affirmative defenses place the burden of proof on the defendant.

§ B3.2 Burdens of Proof and Production under Texas Penal Code Chapter 2

Chapter 2 of the Texas Penal Code, titled "Burden of Proof," addresses both burdens of persuasion and burdens of production. It distinguishes between "defenses" (matters "labeled by the phrase 'It is a defense to prosecution . . .'") and "affirmative defenses" (matters "labeled by the phrase 'It is an affirmative defense to prosecution . . .'"). Tex. Penal Code §§ 2.03(a) (defense), 2.04(a) (affirmative defense). "A ground of defense in a penal law that is not plainly labeled in accordance with [this scheme]" is to be treated as a defense. Tex. Penal Code § 2.03(e).

§ B3.2.1 Burden of Production

A criminal defendant has under chapter 2 what could be called a "burden of production" regarding both defenses and affirmative defenses. This simply means that the defendant has a right to a jury instruction on a defense or affirmative defense only if certain evidence has been produced before the jury. *Shaw v. State*, 243 S.W.3d 647, 657–58 (Tex. Crim. App. 2007).

Under chapter 2, "[t]he issue of the existence" of a defense or affirmative defense is submitted to the jury only if "evidence is admitted supporting" the defense or affirmative defense. Tex. Penal Code §§ 2.03(c) (defense), 2.04(c) (affirmative defense).

Shaw explained further—

> [A] defense is supported (or raised) by the evidence if there is some evidence, from any source, on each element of the defense that, if believed by the jury, would support a rational inference that that element is true. In determining whether a defense is thus supported, a court must rely on its own judgment, formed in the light of its own common sense and experience, as to the limits of rational inference from the facts proven. If a defense is supported by the evidence, then the defendant is entitled to an instruction on that defense, even if the evidence supporting the defense is weak or contradicted, and even if the trial court is of the opinion that the evidence is not credible. But the evidence must be such that it will support a rational jury finding as to each element of the defense.

Shaw, 243 S.W.3d at 657–58 (footnotes omitted).

Nothing in *Shaw* or other authority indicates that the evidence must have been introduced by the party seeking the instruction. Consequently, the burden is less one of *producing* evidence than one of *identifying* to the trial court evidence before the jury supporting the defense or ground of defense.

§ B3.2.2 Burden of Persuasion

Allocation of the burdens of persuasion under chapter 2 is more complicated. It is also perhaps somewhat counterintuitive.

With regard to affirmative defenses, the burden of proof or persuasion is on the defendant. In these situations, the burden is by the preponderance of the evidence. Tex. Penal Code § 2.04(d).

With regard to defenses generally, "a reasonable doubt on the issue requires that the defendant be acquitted." Tex. Penal Code § 2.03(d). Thus the burden is on the state to prove that the law providing a defense does not govern.

§ B3.3 Explaining to Jury State's Burden of Proof on Defenses

Unfortunately, the statutory provisions defining both affirmative defenses and defenses generally often appear to have been drafted in terms that assume the party raising the matter has the burden of proving them.

This highlights the most difficult task in drafting jury instructions regarding defenses. With regard to defenses generally, the terms of the Penal Code must be translated into what the state must prove in order to clarify for juries the substance of the state's burden of proof.

Traditionally, Texas jury instructions have ignored this difficulty. Juries have been instructed in the statutory terms clearly assuming the burden of persuasion to be on the defendant. They have then essentially been told to acquit if they find the facts as

required by the defense, phrased in terms of the burden of persuasion's being on the defendant, or if they have a reasonable doubt "thereof." In *Crippen v. State*, 189 S.W. 496, 498 (Tex. Crim. App. 1916), for example, the application portion of the self-defense instruction was—

> If you believe that the defendant committed the assault as a means of defense, believing at the time he did so (if he did do so) that he was in danger of losing his life or of serious bodily injury at the hands of said J. R. Spillers, then you will acquit the defendant, and say by your verdict, "Not guilty," or if you have a reasonable doubt thereof, you will acquit him.

"This did not shift the burden of proof to appellant, nor ignore the doctrine of reasonable doubt as applied to a defense . . . ." *Crippen*, 189 S.W. at 498.

This form of instruction continues to be widely used and accepted by the appellate courts. *Luck v. State*, 588 S.W.2d 371, 375 (Tex. Crim. App. 1979) (instruction not error where it "required the jury to acquit appellant if they believed that he was acting in self-defense or the jury had a reasonable doubt thereof"); *Wilkerson v. State*, 920 S.W.2d 404, 406 (Tex. App.—Houston [1st Dist.] 1996, no pet.) ("If the issue of the existence of self-defense is submitted to the jury, the court shall charge the jury that if it believes that the defendant was acting in self-defense or has a reasonable doubt thereof, it must acquit the defendant.").

The Committee concluded that this approach did not adequately identify the burden of proof on the state. More important, it did not specify what this burden of proof meant, that is, what in these cases the state must prove.

Therefore, when a matter of defense places a burden on the state, the Committee attempted to draft an instruction that makes clear what the state has to prove to prevail. Sometimes this required taking some liberty with the statutory language, but the Committee believed this is necessary in formulating instructions that clearly communicate the burden of proof.

§ B3.4 Nonstatutory Defensive Positions and Jury Instructions

The Texas Code of Criminal Procedure prohibits a trial judge, in the process of instructing the jury, from "expressing any opinion as to the weight of the evidence." Tex. Code Crim. Proc. art. 36.14. The court of criminal appeals has indicated that this bars trial judges from instructing juries concerning defensive arguments as to why the state has failed to meet its burden of proof if those arguments have not been explicitly authorized by a statutory provision.

The leading decision, of course, is *Giesberg v. State*, 984 S.W.2d 245, 250 (Tex. Crim. App. 1998) ("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."). *Giesberg* holds that a

defendant is not entitled to an instruction on alibi. Further, it clearly announces the court's view that a trial judge errs in giving such an instruction because that instruction violates the state's right under article 36.14 to have the trial judge avoid any comment on the evidence. *Giesberg*, 984 S.W.2d at 250.

In *Walters v. State*, 247 S.W.3d 204 (Tex. Crim. App. 2007), in an opinion joined by all eight judges participating in the case, the court reaffirmed the approach taken in *Giesberg*. In a section of the opinion titled "B. The law: Jury instructions on defensive issues," the court explained that, under *Giesberg*, "we have held that a defendant is not entitled to a defensive charge on accident, good faith, alternative cause, independent impulse, or suicide under the 1974 Penal Code." *Walters*, 247 S.W.3d at 210 (footnotes omitted).

Generally, then, under *Giesberg* and *Walters*, an instruction on a failure-of-proof defense is permissible only if that defense is specifically embodied in a statute. The only general statute embodying such a defense appears to be section 8.02 of the Penal Code, recognizing mistake of fact.

A major remaining question is whether article 36.14, as construed in *Giesberg* and *Walters*, has the flexibility to at least permit jury instructions on nonstatutory failure-of-proof defenses or defensive theories where the courts conclude the nature or complexities of the situation present an unusually high risk of jury confusion.

§ B3.5 Instructions on Inconsistent Defenses

The court of criminal appeals appears to disavow a general rule that a right to an instruction on a defensive matter would be barred by that matter's being inconsistent with the position taken on other defensive matters on which the jury will be instructed.

In *Bowen v. State*, 162 S.W.3d 226 (Tex. Crim. App. 2005), the court explained:

> We have recognized the independence of separate defenses by holding that a defendant is entitled to the submission of every defensive issue raised by the evidence, even if the defense may be inconsistent with other defenses. We reaffirm this principle by holding self-defense's statutorily imposed restrictions do not foreclose necessity's availability.

Bowen, 162 S.W.3d at 229–30 (footnote omitted).

Apparently, then, the fact that a defendant's request for a jury instruction on a defensive matter is inconsistent with that defendant's position on other parts of the jury instructions does not defeat the defendant's right to the instruction. If the evidence raises several possible defenses, the trial court cannot require the defense to in some sense "elect" only one position on which the court will instruct the jury.

§ B3.6 "Confession and Avoidance": Need to Admit Offense

The "confession and avoidance doctrine" applies to at least some defenses under Texas law, as the court of criminal appeals reaffirmed in *Juarez v. State*, 308 S.W.3d 398 (Tex. Crim. App. 2010), despite the lack of any specific statutory basis for it.

Under this doctrine, a defendant is entitled to a jury instruction on a defense to which the doctrine applies only if the defendant—in some sense—admits to the act and culpable mental state constituting the charged offense. In *Juarez* itself the court applied confession and avoidance to the necessity defense.

Juarez left undecided whether, as applied to necessity, confession and avoidance required that the defendant personally—perhaps by in-court testimony—admit the act and culpable mental state. It left open that the doctrine might be satisfied if "a defendant's defensive evidence . . . admit[s] to the conduct." *Juarez*, 308 S.W.3d at 406. Another part of the discussion in *Juarez* suggested that confession and avoidance might be satisfied negatively, that is, by a demonstration that the defendant did not "flatly deny the charged conduct—the act or omission and the applicable culpable mental state." *Juarez*, 308 S.W.3d at 406.

Juarez involved a prosecution for aggravated assault on a peace officer by biting the officer. The defendant had in conclusory terms and in response to leading questions denied that he bit the officer intentionally, knowingly, or recklessly. Nevertheless, the court found the defendant entitled to an instruction on necessity:

> Juarez's mental state—that the biting was done either intentionally, knowingly, or recklessly—could have reasonably been inferred from his testimony about the circumstances surrounding his conduct. Thus, the confession and avoidance doctrine was satisfied because Juarez had admitted to both the act and the requisite mental state.

Juarez, 308 S.W.3d at 405 (footnotes omitted). A summary denial of the required culpable mental state apparently does not preclude an instruction if the defendant's testimony nevertheless would permit a reasonable inference that he in fact had the required culpable mental state.

What *Juarez* means for confession and avoidance as it applies to defenses other than necessity is not clear. In *Juarez*, the court acknowledged that in the sixty years following introduction of the doctrine into Texas criminal law jurisprudence in 1952, "our application of the confession and avoidance doctrine . . . has been somewhat inconsistent." *Juarez*, 308 S.W.3d at 403. *Juarez*, of course, did not resolve what inconsistency there is in the case law.

Application of confession and avoidance to specific defenses is addressed in the context of those defenses in this volume.

§ B3.7 Failure to Instruct on Defense Cannot Be "Fundamental" Error

Under article 36.19 of the Texas Code of Criminal Procedure, as construed in *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1984), error in the jury instructions is sometimes "fundamental." This means reversal of a conviction is required even if the defendant failed to preserve the error in the trial court by objection or request for special instructions. In fact, reversal is required even if the defendant, after reviewing the proposed instructions, affirmatively announced that the defense had no objection. *Bluitt v. State*, 137 S.W.3d 51 (Tex. Crim. App. 2004).

A trial judge has the obligation to instruct the jury, without a request from either party, regarding only "the law applicable to the case." Tex. Code Crim. Proc. art. 36.14. At least some defensive matters are not "law applicable to the case." Therefore a trial court's failure to instruct on these defensive matters cannot give rise to fundamental error under *Almanza*. *Posey v. State*, 966 S.W.2d 57, 61 (Tex. Crim. App. 1998) (any unpreserved error in failing to instruct on mistake of fact cannot be fundamental error under *Almanza*). *See also Bennett v. State*, 235 S.W.3d 241, 243 (Tex. Crim. App. 2007) (defense of third person was defensive matter and trial court's failure to instruct on it could not be fundamental error under *Posey*); *Delgado v. State*, 235 S.W.3d 244, 249–50 (Tex. Crim. App. 2007) (instruction on state's burden of proof on extraneous offenses was not required by *Almanza*).

Fundamental error under *Almanza* nevertheless has some impact in the context of defensive matters. If, without a defense request, a trial judge gives an instruction on a defensive matter, error in the substance of that instruction can be fundamental. *Barrera v. State*, 982 S.W.2d 415, 416–17 (Tex. Crim. App. 1998).

§ B3.8 Defendant's Right to Have No Instruction on Defense

A defendant may have the right to have the trial court not instruct the jury on what may seem to be a defensive matter. In that case, the giving of an instruction may be error. The court of criminal appeals explained:

> A defendant cannot waive submission of an element of the prosecution's case to the finder of fact. But submission of a defensive issue is a strategic decision to be made by the defendant and his attorney. Not only is a defendant *permitted* to forego submission of a defensive issue, but he is also entitled to *insist* that a defensive issue not be submitted.

Williams v. State, 273 S.W.3d 200, 221 (Tex. Crim. App. 2008) (citing *Posey v. State*, 966 S.W.2d 57 (Tex. Crim. App. 1998), and *Delgado v. State,* 235 S.W.3d 244 (Tex. Crim. App. 2007).).

Some of what are generally regarded as defensive matters may, at least as applied to some situations, favor the state. A proper instruction on voluntary intoxication, for example, is really an instruction that there is no defense of this sort.

A mistake-of-fact instruction might be construed as telling the jury to give less significance to evidence of an unreasonable mistake of fact than the defendant would like. Failure of the instructions to address the matter may permit the defendant to explicitly or implicitly argue to the jury a more favorable version of the legal standard than the law provides. A mistake-of-fact instruction, then, may at least sometimes favor the state.

Consequently, and despite the *Williams* discussion, the state may sometimes have a right to a jury charge on some defensive matters over the defendant's objection. Clearly, whether a voluntary intoxication instruction is given cannot depend on the defendant's preference. Perhaps the same is the case regarding mistake of fact.

§ B3.9 Relationship of Necessity to Other Defensive Positions

The case law leaves open some question whether a defendant is entitled to an instruction on the defense of necessity if the evidence also raises a different—and likely more qualified—defensive doctrine.

In *Bowen v. State*, 162 S.W.3d 226 (Tex. Crim. App. 2005), the trial judge had instructed the jury on self-defense. The question before the court of criminal appeals was whether the defendant was also entitled to an instruction on necessity. Presiding Judge Keller reasoned that the nature of the two defenses meant that necessity was not available:

> By its nature, the "necessity" defense is a catch-all provision designed to afford a defense in situations where a defense is clearly warranted but is not afforded by any other statutory provision. I would hold that a necessity defense is not raised if the evidence presented merely raises an issue under another statutory defense. Otherwise, entitlement to an instruction for certain defenses such as self-defense and defense of a third person would *always* also entail entitlement to an instruction on the defense of necessity. Submitting wholly redundant defenses would not aid the truth-finding function of the trial and risks confusing the jury.

Bowen, 162 S.W.3d at 230 (Keller, P.J., dissenting). The majority rejected this reasoning, apparently on the following grounds:

> We have recognized the independence of separate defenses by holding that a defendant is entitled to the submission of every defensive issue raised by the evidence, even if the defense may be inconsistent with other defenses. We reaffirm this principle by holding self-defense's statutorily imposed restrictions do not foreclose necessity's availability.

Bowen, 162 S.W.3d at 229–30 (footnote omitted).

Bowen may not govern in situations where the other defense is limited in a manner more directly inconsistent with necessity. One court has held, for example, that *Bowen* does not govern where the defendant has received an instruction on deadly force in self-defense and that instruction includes a requirement of retreat in certain circumstances. *Perry v. State*, No. 06-07-00113-CR, 2008 WL 3287038 (Tex. App.—Texarkana Aug. 12, 2008, no pet.) (not designated for publication) (inclusion of justification of necessity, on facts that implicate application of self-defense using deadly force, would undermine legislature's purpose in imposing duty to retreat). *Contra Fox v. State*, No. 13-03-230-CR, 2006 WL 2521622 (Tex. App.—Corpus Christi Aug. 31, 2006, pet. ref'd) (not designated for publication).

An approach considerably different than that in *Bowen* was suggested by *Shaw v. State*, 243 S.W.3d 647 (Tex. Crim. App. 2007), involving the so-called "Good Samaritan" defense to injury of a child. The statute, now section 22.04(k) of the Penal Code, provides: "It is a defense to prosecution under this section that the act or omission [causing injury or serious bodily injury to a child] consisted of . . . emergency medical care administered in good faith and with reasonable care by a person not licensed in the healing arts." Tex. Penal Code § 22.04(k). In *Shaw*, the court commented that this provision "operates as a kind of particularized example of the justification of necessity, applicable specifically in prosecutions for injury to a child." *Shaw*, 243 S.W.3d at 659.

If *Shaw*'s characterization is correct, it would seem that a defendant is never entitled on the basis of the same facts to have the jury instructed on both the general necessity justification and the specific section 22.04(k) defense.

This reasoning was also the thrust of *Gilbert v. State*, No. PD-1645-08, 2010 WL 454966 (Tex. Crim. App. Feb. 10, 2010) (not designated for publication). At Gilbert's aggravated-robbery trial, he testified he participated in the robbery because his companion Hall threatened to kill him and others if he did not take part. The trial judge instructed the jury on duress but refused to instruct on necessity. Finding no error, the majority concluded that necessity was not raised by the evidence:

> Th[e] evidence of Hall's alleged threats . . . in order to coerce appellant into participating in the commission of the offenses raises the defense of duress—appellant acted because he was compelled by the threats from Hall and the threats of harm were imminent, at least as to the restaurant workers. The justification of necessity, however, is not based on external pressure; the statute does not require coercive behavior by a third party. Rather, the language of the statute indicates that "necessity" turns on a personal choice made by the actor based on the relative desirability of acting or not acting: "the desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be

> prevented . . . ." Necessity is raised if the choice to act is an internal decision, not coerced by another. . . . Taking appellant's version as true, he was clearly coerced and he sufficiently admitted the conduct charged, but all of his admitted acts were compelled by another. We hold that the evidence did not raise the justification of necessity . . . .

Gilbert, 2010 WL 454966, at *5. If evidence suggesting that duress applies renders necessity inapplicable, evidence suggesting that self-defense applies might also seem to render necessity inapplicable. There may be some tension between *Bowen* and *Gilbert* and perhaps between *Shaw* and *Gilbert*.

Under *Gilbert*, a defendant is entitled to instructions on both necessity and another overlapping defense only if the other and overlapping defense makes the accused's responsibility "turn[] on a personal choice made by the [accused] based on the relative desirability of acting or not acting." *Gilbert*, 2010 WL 454966, at *5. The defendant is not entitled to both instructions if the other and overlapping defense makes the accused's responsibility turn on whether the accused was "compelled." Self-defense, as raised in *Bowen*, would seem to contend that the accused was confronted with coercion rather than an opportunity for personal choice based on the relative desirability of the presented options.

Gilbert was designated "do not publish." Under Texas Rule of Appellate Procedure 77.3, the opinion has "no precedential value and must not be cited as authority by counsel or by a court." Tex. R. App. P. 77.3. Nevertheless, in *Juarez v. State*—a published opinion of the court—the court explained that it was "necessary" to explain why *Gilbert* did not render the issue in *Juarez* moot. It then distinguished *Gilbert* and commented that "even if Juarez had admitted to the conduct, *Gilbert* does not bar the application of the necessity defense under the facts of this case." *Juarez v. State*, 308 S.W.3d 398, 406 (Tex. Crim. App. 2010). Despite rule 77.3, *Juarez* treated *Gilbert* as worth discussing and as requiring distinction.

Gilbert, then, may have more significance than its "do not publish" designation suggests.

§ B4.1 Statutory References

The defense of lack of voluntary act is provided for in Tex. Penal Code § 6.01(a).

§ B4.2 General Comments

Fashioning an appropriate jury instruction concerning the so-called voluntary act requirement of Texas criminal law proved a considerable task for the Committee. This was in part because of uncertainty about precisely what is demanded by the requirement.

Texas Penal Code section 6.01(a) mandates that any act relied on as the basis for criminal liability be voluntary. The Code, however, contains no definition of the term *voluntary*.

Conceptually, this requirement of a voluntary act is distinct from the requirement of a culpable mental state and from other defenses, such as insanity.

§ B4.2.1 Background of Section 6.01(a)

In enacting Texas Penal Code section 6.01(a), the legislature rejected the State Bar Committee's 1970 proposed language that would have provided: "A voluntary act is a bodily movement performed consciously as a result of effort or determination." *See* State Bar Committee on Revision of the Penal Code, *Texas Penal Code: A Proposed Revision* § 6.01(b) (Final Draft Oct. 1970).

The legislature also failed to use language from the Model Penal Code that would have explicitly provided that the following are not voluntary acts:

1. a reflex or convulsion;
2. a bodily movement during unconsciousness or sleep;
3. conduct during hypnosis or resulting from hypnotic suggestion; or
4. a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.

See Alford v. State, 866 S.W.2d 619, 623 (Tex. Crim. App. 1993) (discussing legislative history of section 6.01).

§ B4.2.2 Procedural Nature of Voluntariness Requirement

Voluntariness need not be pleaded in the charging instrument. *Bermudez v. State*, 533 S.W.2d 806, 807 (Tex. Crim. App. 1976).

Voluntariness is an issue—and an instruction is required—only if it is raised by the evidence. *Alford v. State*, 866 S.W.2d 619, 624 (Tex. Crim. App. 1993). Although this issue was not addressed in *Alford*, such a result would seem to be dictated by chapter 2 of the Texas Penal Code. Involuntariness of the act on which the state relies would seem to be "[a] ground of defense in a penal law that is not plainly labeled in accor-

dance with [chapter 2 of the Penal Code]." Tex. Penal Code § 2.03(e). Under section 2.03(e), therefore, it "has the procedural and evidentiary consequences of a defense."

The issue is to be submitted to the jury only if "evidence is admitted supporting the defense." Tex. Penal Code § 2.03(c). If it is submitted, the burden of proof is on the state by proof beyond a reasonable doubt. *See* Tex. Penal Code § 2.03(d).

§ B4.2.3 Terminology—Act, Conduct, Etc.

Texas Penal Code section 6.01(a) requires that a defendant have voluntarily engaged "in conduct, including an act, an omission, or possession." Tex. Penal Code § 6.01(a). Section 1.07(a)(10) defines conduct as "an act or omission and its accompanying mental state." Tex. Penal Code § 1.07(a)(10).

Section 6.01(a) uses the term *conduct* to make clear that the requirement of voluntariness applies to omissions and possession as well as to physical acts.

In most situations, however, the state's theory of the case will rely on an act and involve no question of omission liability or of liability for possession not fitting neatly into the category of either act or omission. There is no need in these cases to confuse matters by shifting language between conduct and acts. Clearly, when as in these cases the state relies on some physical act of the defendant's, there is no need to use the term *conduct* in the instructions. Thus the instruction uses only *act.*

Obviously, if liability is sought based on an omission, the instruction will need to be modified.

§ B4.2.4 Meaning of "Voluntary"—In General

In several discussions the court of criminal appeals has addressed the meaning of *voluntary* in connection with that term's inclusion in Texas Penal Code section 6.01(a).

In *Alford v. State*, 866 S.W.2d 619 (Tex. Crim. App. 1993), the court noted, "Webster's definition of the term 'voluntary' includes at least eight variations, some of which are considerably broader than others and many of which equate intentional conduct with voluntary conduct." *Alford*, 866 S.W.2d at 623. Although acknowledging that most of these variations include "a concept of free will," *Alford* concluded that the term as used in section 6.01(a) did not incorporate such a concept. *Alford*, 866 S.W.2d at 623–24.

Rogers v. State, 105 S.W.3d 630 (Tex. Crim. App. 2003), held that a request for an instruction on "accident" is not a request for an instruction on section 6.01(a)'s voluntary act requirement. In the course of its discussion, *Rogers* observed:

> "Voluntariness," within the meaning of Section 6.01(a), refers only to one's own physical body movements. If those physical movements are the nonvolitional result of someone else's act, are set in motion by some independent non-human force, are caused by a physical reflex or convulsion, or are the product of unconsciousness, hypnosis or other nonvolitional impetus, that movement is not voluntary.

Rogers, 105 S.W.3d at 638 (footnotes omitted).

The court of criminal appeals has not addressed whether voluntariness may or should ever be defined in the jury instructions. *Alford*, of course, argues for such a definition. It indicates that the term has multiple (and inconsistent) meanings in ordinary usage. Further, it suggests that the term as used in this part of the law has a meaning somewhat narrower than many of the "plain meanings." *Alford*, 866 S.W.2d at 623–24.

§ B4.2.5 Meaning of "Voluntary"—"Accident" Distinguished

In 1982, the court observed:

> There is no law and defense of accident in the present penal code, and the bench and bar would be well advised to avoid the term "accident" in connection with offenses defined by the present penal code. The function of the former defense of accident is performed now by the requirement of V.T.C.A., Penal Code, Section 6.01(a), that, "A person commits an offense only if he voluntarily engages in conduct . . . ."

Williams v. State, 630 S.W.2d 640, 644 (Tex. Crim. App. 1982) (citation omitted).

Perhaps because of the court's suggestion that section 6.01(a) serves the function of former accident law, considerable confusion has persisted about whether some of the substance and terminology of old accident law can and should be used in applying section 6.01(a) voluntary act law.

§ B4.2.6 Current Practice

Current practice is to instruct juries in little more than the language of the Texas Penal Code. The instruction used in *Simpkins v. State*, 590 S.W.2d 129 (Tex. Crim. App. 1979), *disapproved on other grounds in Lugo v. State*, 667 S.W.2d 144, 147 (Tex. Crim. App. 1984), is still typical of those instructions that make a meaningful effort to apply the law to the facts:

> You are instructed that a person commits an offense only if he voluntarily engages in conduct, including an act, an omission, or possession. Conduct is not rendered involuntary merely because the person did not intend the results of his conduct. Therefore, if you believe from the evidence beyond a reasonable doubt that on the occasion in question the defendant, David

> Michael Simpkins, did cause the death of JOHN MILTON by shooting him with a gun, as alleged in the indictment, but you further believe from the evidence, or have a reasonable doubt thereof, that the shooting was the result of an accidental discharge of the gun while Alvin Giddings and the defendant were struggling or scuffling for the possession of the gun and was not the voluntary act or conduct of the defendant, you will acquit the defendant and say by your verdict not guilty.

Simpkins, 590 S.W.2d at 135.

§ B4.2.7 Situations Not Putting Voluntariness into Issue

Several types of situations do not, under the case law, generate an issue of voluntariness under Texas Penal Code section 6.01(a).

First, a claim that the defendant did not have the required culpable mental state regarding conduct constituting an element of the offense does not generate a voluntariness issue. This is despite the fact that voluntariness replaces the pre-1974 defense of accident, which did in some situations address that matter. *Cf. Brown v. State*, 955 S.W.2d 276 (Tex. Crim. App. 1997) (despite jury instruction in murder case requiring proof that defendant intentionally or knowingly caused death of victim, defendant was entitled to instruction that pulling of trigger must have been a voluntary act).

Second, no voluntariness issue is generated by a claim that the defendant's decision to intentionally engage in the conduct was influenced by pressure that arguably meant the defendant did not exercise free will. Proof of duress does not show that the conduct constituting the crime was not voluntary in the sense of section 6.01(a). *Alford v. State*, 866 S.W.2d 619, 623–24 (Tex. Crim. App. 1993). *See also Brown v. State*, 89 S.W.3d 630, 633 (Tex. Crim. App. 2002) (taking marijuana into correctional facility was voluntary despite evidence that defendant was in custody and under restraint and thus, in one sense, was compelled to enter into facility).

§ B4.2.8 Situations Putting Voluntariness into Issue—In General

Case discussions have tended to discuss voluntariness in terms of what evidence would show that a physical movement is *not* voluntary.

The *Rogers* discussion, for example, stated that physical movements are not voluntary "[i]f those physical movements are the nonvolitional result of someone else's act, are set in motion by some independent non-human force, are caused by a physical reflex or convulsion, or are the product of unconsciousness, hypnosis or other nonvolitional impetus." *Rogers v. State*, 105 S.W.3d 630, 638 (Tex. Crim. App. 2003).

A major question in voluntariness law is whether the above or some similar list is exclusive.

§ B4.2.9 Situations Putting Voluntariness into Issue—Impaired Consciousness

Rogers v. State, 105 S.W.3d 630, 638–39 (Tex. Crim. App. 2003), noted that a defendant's physical movement such as pulling the trigger on a gun is not voluntary if that movement is "the product of unconsciousness." *Mendenhall v. State*, 77 S.W.3d 815, 816 (Tex. Crim. App. 2002), indicated that a jury issue on voluntariness was generated by evidence that "the [charged] assault occurred during a brief episode in which [the defendant] was unconscious or semi-conscious due to hypoglycemia (i.e., low blood sugar)." The court explained that—

> [p]ersons who were unconscious or semi-conscious at the time of the alleged offense may argue . . . that they did not engage in a voluntary act, *see* Tex. Pen. Code § 6.01(a). See *Alford v. State*, 866 S.W.2d 619, 625 (Tex. Crim. App. 1993) (Clinton, J., concurring) ("voluntary" act means conscious act).

Mendenhall, 77 S.W.3d at 818 (footnote omitted). *See also Arcement v. State*, No. 06-08-00130-CR, 2009 WL 383398, at *6 (Tex. App.—Texarkana Feb. 18, 2009, no pet.) (not designated for publication) (defendant who testified that acts constituting child molestation occurred while he was asleep would probably have been entitled to instruction on voluntary act if he had requested it).

Logically, it would seem that in many cases a requirement of consciousness at least overlaps with the requirement of a culpable mental state. The almost classic scenario arises when the defendant is charged with intentionally or knowingly causing the death of the victim by shooting him with a gun. The defendant testifies he did not intentionally pull the trigger on the gun; perhaps he adds that he bumped a wall, causing his finger on the trigger to move and the gun to discharge. Is it possible a jury might find the state has proved that the defendant intended to kill the victim but did not consciously pull the trigger to accomplish this?

Brown v. State, 955 S.W.2d 276, 279–80 (Tex. Crim. App. 1997), appears to conclusively reject the proposition that a proper instruction on the required culpable mental state renders unnecessary an instruction on the voluntary act requirement.

If Texas Penal Code section 6.01(a) requires an act to be conscious, how conscious must the defendant have been? *Mendenhall* suggests that a jury issue can be raised by evidence that the defendant was semiconscious at the time of the conduct constituting the offense. Conceptually, it would seem that the instructions should assist the jury in determining how conscious the state must prove the defendant was. On the other hand, there is no standard readily ascertainable from either the statute or the case law for making this decision.

Apparently no cases have addressed contentions that defendants are entitled to have jury instructions state explicitly that a voluntary act must be performed while conscious.

§ B4.2.10 Situations Putting Voluntariness into Issue—Movement Caused by Independent Force

"If [one's] physical movement [is] the nonvolitional result of someone else's act [or is] set in motion by some independent non-human force . . . that movement is not voluntary." *Rogers v. State*, 105 S.W.3d 630, 638 (Tex. Crim. App. 2003) (footnotes omitted).

When the defendant was charged with intentionally or knowingly causing the death of another by shooting that person with a gun, for example, a jury issue on voluntariness was raised by evidence that he did not intentionally pull the trigger but that the gun discharged accidentally when the defendant was bumped by another person. *Brown v. State*, 955 S.W.2d 276 (Tex. Crim. App. 1997).

§ B4.2.11 Situations Putting Voluntariness into Issue—Unexplained Denial That Act Was Volitional

Is a jury instruction required by evidence that does not indicate some independent cause of the physical movement but only that the movement occurred? The question is presented if a defendant testifies, "I did not intend to pull the trigger. The gun just went off." The case law suggests an instruction is not required. An instruction may even be inappropriate.

Evidence in one case indicated that after shooting the victim the defendant said, "Oh, my God, I done killed her. . . . It was an accident." *Joiner v. State*, 727 S.W.2d 534, 537 (Tex. Crim. App. 1987). No instruction on voluntary act was required.

In *George v. State*, 681 S.W.2d 43 (Tex. Crim. App. 1984), the defendant was charged with aggravated assault by intentionally, knowingly, and recklessly causing serious bodily injury to another by shooting him with a handgun. A gun the defendant was holding to the head of the victim discharged, injuring the victim. At trial, the defendant testified he did not intend to discharge the gun: "[T]he hammer slipped off my thumb," and the gun "went off." *George*, 681 S.W.2d at 43. This was held not to require a jury instruction on voluntariness. *George*, 681 S.W.2d at 47. *See also Adanandus v. State*, 866 S.W.2d 210, 229–30 (Tex. Crim. App. 1993) (testimony that gun went off as defendant was stumbling backward did not require instruction on voluntary act, as "there is no evidence that the gun fired on its own volition").

One court of appeals has read these cases as quite dramatically limiting the situations in which an instruction is required.

> [W]hen a defendant's conduct includes a bodily movement sufficient to discharge a bullet, unless there is more, such as precipitation by another individual, "a jury need not be charged on the matter of whether the accused voluntarily engaged in the conduct with which he is charged." [*Brown v. State*, 955 S.W.2d 276, 279 (Tex. Crim. App. 1997)] (citing *George v. State*, 681 S.W.2d 43, 47 (Tex. Crim. App. 1984)).
>
> Appellant's bare assertion that the firing of the pistol was accidental does not raise the issue of voluntariness. An accused's testimony that a weapon "accidentally went off" or that he "didn't intend to shoot but that it was an accident," does not raise the issue of the voluntariness of his conduct. *Gerber v. State*, 845 S.W.2d 460, 467 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd); *see also Joiner v. State*, 727 S.W.2d 534, 536 (Tex. Crim. App. 1987) (holding that request for instruction on voluntariness was properly denied because bare assertions of lack of intent and accidental discharge do not raise issue of absence of voluntary conduct).
>
> To be entitled to an instruction on involuntary conduct there must be "evidence of an independent event, such as the conduct of a third party, which could have precipitated the discharge of the bullet." *Brown v. State*, 906 S.W.2d 565, 568 (Tex. App.—Houston [14th Dist.] 1995), *aff'd*, 955 S.W.2d 276 (Tex. Crim. App. 1997).

Rodgers v. State, No. 01-03-00850-CR, 2004 WL 2363830, at *2 (Tex. App.—Houston [1st Dist.] Oct. 1, 2004, no pet.) (not designated for publication).

This seems inconsistent with general principles of jury submission. A defendant's failure to provide an explanation for his claim that the act was not volitional may, of course, cause a jury to discredit it. But that failure—as a logical matter—should not deprive the defendant of the right to go to the jury with proper instructions on the applicable law.

§ B4.2.12 Distinguishing Lack of Intent to Cause Result of Conduct from Lack of Culpable Mental State

Traditionally, jury instructions on the voluntary act requirement have, in the abstract portion, told the jury the basic law from Texas Penal Code section 6.01(a) and then added, "Conduct is not rendered involuntary merely because the person did not intend the results of his conduct."

In 1979, this language was held in *Simpkins v. State*, 590 S.W.2d 129, 135 (Tex. Crim. App. 1979), to "correctly state[] the law as found in V.T.C.A. Penal Code, Secs. 6.01(a) and 6.02(a). *See Dockery v. State* [542 S.W.2d 644, 650 (Tex. Crim. App. 1975) (opinion on motion for rehearing)]." *Simpkins* was followed in *Sims v. State*, No. 01-

06-00060-CR, 2007 WL 1559828 (Tex. App.—Houston [1st Dist.] May 31, 2007) (not designated for publication), *aff'd*, 273 S.W.3d 291 (Tex. Crim. App. 2008).

Sims explained that the language was not error because "it is not error for the jury to be instructed that there is a difference between involuntary conduct and unintentional conduct such that the absence of one does not dictate the absence of the other." *Sims*, 2007 WL 1559828, at *3. Thus the legitimate purpose of the language seems to be to explicitly tell juries that the requirement of a voluntary act is distinct from the requirements of culpable mental states and that proof of the second does not necessarily mean proof of the first.

The requirement of a voluntary act is, however, independent of any and all culpable mental state requirements, not simply those requiring the defendant to intend the result of his conduct. Instructions based on the *Simpkins* language suggest the voluntary act requirement is independent only of culpable mental state requirements concerning result elements.

This state of the law contains some potential for confusion. Culpable mental state requirements and the voluntary act demand are, theoretically, independent. In fact, if the only voluntariness issue is impaired consciousness, they may not, as a practical matter, be independent. In most situations, it is unlikely that a jury would find the state has proved the required culpable mental state but not that the act was committed consciously.

Under current practice, this confusion is arguably obscured by failing to mention the required culpable mental state in the application portion.

The Committee believed the danger of confusion is sufficient that some cautionary mention of the matter is appropriate. It suggests substituting the traditional caution approved in *Simpkins*, 590 S.W.2d at 135 ("Conduct is not rendered involuntary merely because the person did not intend the results of his conduct."), with a paragraph stressing that this issue is distinct from any culpable mental issue presented by the instructions on the elements of the offense.

§ B4.2.13 Course of Conduct Including Voluntary and Involuntary Acts

In some situations, the course of conduct by the defendant contains several physical acts, and the defense evidence puts into issue only the voluntariness of one or some of them.

In one early case, the court of criminal appeals explained:

> [O]ne voluntarily engages in conduct when the conduct *includes*, *inter alia*, a voluntary act and its accompanying mental state, if any. That such conduct

also includes an involuntary act does not necessarily render engaging in that conduct involuntary.[5]

5. The point is illustrated in the Practice Commentary with an example of an intoxicated driver charged with involuntary manslaughter—he "may not successfully defend with the argument he fell asleep before the collision . . ." Note, however, that he may claim his conduct constituted criminally negligent homicide. *Ormsby v. State*, 600 S.W.2d 782 (Tex. Cr. App. 1979).

George v. State, 681 S.W.2d 43, 45 & n.5 (Tex. Crim. App. 1984).

This analysis might be construed as meaning that a defendant cannot prevail by challenging the state's proof of the voluntariness of the act constituting the crime if the act was part of a course of conduct that also included an admittedly voluntary act.

The discussion in *George* may, however, obscure the need to identify and specify the act on which criminal liability is sought. A driver who, while asleep, "drives" (in some sense of the term) his automobile into a victim and causes the victim's death cannot be held criminally liable for a crime committed by the act of driving the vehicle into the victim. That driver may, however, be convicted of a crime committed before he fell asleep by driving with awareness (or under circumstances making his lack of awareness criminal negligence) that he might fall asleep and cause someone's death. *George* simply makes clear that the fact that the course of conduct included an involuntary act does not mean liability cannot be based on a voluntary act performed during that same course of conduct.

In most of these situations, the most appropriate result may be to permit the jury to consider guilt of the charged offense or of a lesser included offense based on the earlier and admittedly voluntary act of the defendant. If this is done, the instructions might best make clear that the alternative theory of the charged offense or the lesser included offense (for example, driving while sleepy but before falling asleep) is based on a different physical act than is the state's primary theory of the charged offense (for example, steering the car into the victim).

§ B4.3 Instruction—Lack of Voluntary Act

If you all agree the state has proved, beyond a reasonable doubt, each of the [*number*] elements listed above, you must next consider whether the state has proved the necessary voluntary act.

Voluntary Conduct

You have heard evidence that, when the defendant [*insert specific conduct constituting offense, e.g.*, pulled the trigger on the gun], his act was not voluntary.

Relevant Statutes

A person commits an offense only if the person voluntarily engages in an act constituting an offense. An act is a bodily movement.

An act is voluntary if it is performed consciously as a result of effort or determination.

An act is not voluntary if it is the nonvolitional result of another person's act or it is set in motion by some independent nonhuman force.

The requirement that the act constituting the offense be voluntary is separate and distinct from the requirement that the defendant have acted with one or more culpable mental states. You have found that the state has proved the defendant acted with the required culpable mental state[s]. Now you must address the different question of whether the defendant's act has been proved voluntary.

Burden of Proof

The defendant is not required to prove that his act constituting the offense was involuntary. Rather, the state must prove, beyond a reasonable doubt, that the act was voluntary.

Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the state has proved that the defendant's act constituting the offense was voluntary.

To decide the issue of voluntariness, you must determine whether the state has proved, beyond a reasonable doubt, that the defendant's act [*insert specific act, e.g.*, of pulling the trigger on the gun] was voluntary.

You must all agree that the state has proved the act was voluntary.

If you find that the state has failed to prove, beyond a reasonable doubt, that the act was voluntary, you must find the defendant "not guilty."

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of [*insert specific offense*], and you believe, beyond a reasonable doubt, that the defendant acted voluntarily, you must find the defendant "guilty."

[See chapter 2 for verdict instruction.]

COMMENT

Specific Aspects of Voluntariness Requirement. The Committee considered instructions that would focus on specific aspects of the voluntariness requirement as that requirement has been developed under the appellate case law.

One instruction would apply if the evidence raising voluntariness suggested specifically that the defendant's physical act was caused by an independent force, such as action by another person. The preliminary units of such an instruction might be as follows:

Voluntary Conduct

You have heard evidence that, when the defendant [*insert specific conduct constituting offense, e.g.*, pulled the trigger on the gun], his act was not voluntary because [*insert specific act, e.g.*, his act in pulling the trigger was caused by being bumped by [*name*] or another person].

Relevant Statutes

A person commits an offense only if the person voluntarily engages in an act constituting an offense. An act is a bodily movement.

An act is voluntary if it is performed consciously as a result of effort or determination.

An act is not voluntary if it is the nonvolitional result of another person's act or it is set in motion by some independent nonhuman force.

The requirement that the act constituting the offense be voluntary is separate and distinct from the requirement that the defendant have

acted with one or more culpable mental states. You have found that the state has proved the defendant acted with the required culpable mental state[s]. Now you must address the different question of whether the defendant's act has been proved voluntary.

A second instruction would apply if the evidence suggested unconsciousness:

Voluntary Conduct

You have heard evidence that, when the defendant [*insert specific conduct constituting offense, e.g.*, pulled the trigger on the gun], he was not conscious.

Relevant Statutes

A person commits an offense only if the person voluntarily engages in an act constituting an offense. An act is a bodily movement.

An act is voluntary only if it is performed consciously as a result of effort or determination.

An act is not voluntary if it is performed while the person is asleep or unconscious.

The requirement that the act constituting the offense be voluntary is separate and distinct from the requirement that the defendant have acted with one or more culpable mental states. You have found that the state has proved the defendant acted with the required culpable mental state[s]. Now you must address the different question of whether the defendant's act has been proved voluntary.

Both instructions would, of course, require application of law to facts units along the lines of that unit of the instruction above.

A majority of the Committee, however, decided that the law regarding the content of the voluntariness requirement and the propriety of instructions going beyond the statutory language was sufficiently uncertain that the Committee would not recommend such instructions.

§ B5.1 Statutory References

The defense of mistake of fact is provided for in Tex. Penal Code § 8.02(a).

The definition of "reasonable belief" is based on Tex. Penal Code § 1.07(a)(42).

§ B5.2 Basic Framework for Mistake of Fact under Texas Law

The Committee found mistake of fact deceptively difficult to address. The basic law is set out in Texas Penal Code section 8.02(a):

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

Tex. Penal Code § 8.02(a). This defense is a failure-of-proof defense. A jury instruction is required despite *Giesberg v. State*, 984 S.W.2d 245 (Tex. Crim. App. 1998), however, because mistake of fact is a failure-of-proof defense specifically provided for by statute.

Some members of the Committee believed that a literal application of the statutory provision is logically inconsistent with the subjective culpable mental states required by many crimes. Thus jury instructions including both mistake of fact as defined by statute and the culpable mental states as defined by statute would be internally inconsistent. Such instructions might also be unconstitutional, at least as applied to some situations.

The essence of the problem, these members of the Committee believed, is that section 8.02(a) appears to direct that an honest but objectively unreasonable mistake of fact be given no effect by juries. This seems to be required even if, as a matter of logical analysis of the evidence, that mistake makes clear that the state has failed to prove the culpable mental state the instructions tell the jury must be proved.

§ B5.3 Pre-1974 Texas Mistake-of-Fact Law

Before enactment of the 1974 Penal Code, former article 41 stated:

> If a person laboring under a mistake as to a particular fact shall do an act which would otherwise be criminal he is guilty of no offense, but the mistake of fact which will excuse must be such that the person so acting under a mistake would have been excusable had his conjecture as to the fact been correct, and it must also be such mistake as does not arise from a want of proper care on the part of the person so acting.

Tex. Penal Code art. 41 (1925), *repealed by* Acts 1973, 63d Leg., R.S., ch. 399, § 1 (S.B. 34), eff. Jan. 1, 1974. Article 41 demanded that a mistake of fact not arise from a want of proper care. This is, of course, the equivalent of a requirement that the mistake be a reasonable one.

This provision—and its requirement of reasonableness—was often enforced. *See Brown v. State*, 28 S.W.2d 143, 144 (Tex. Crim. App. 1930) ("[T]he charge sought by appellant was defective in failing to embrace an instruction to the effect that the mistake of fact under which appellant was laboring must not be the result of want of proper care on the part of appellant.").

The court of criminal appeals, however, held that the statutory bar to defensive reliance on a mistake of fact arising from a "want of proper care" did not apply to "those crimes where the unlawful intent is an essential element without which the offense does not arise." *Green v. State*, 221 S.W.2d 612, 616 (Tex. Crim. App. 1949) (opinion on motion for rehearing).

Green was a prosecution for theft of hogs in which the defendant introduced evidence that he mistakenly believed he owned the hogs at issue. The trial court was found to have erred in giving a mistake instruction permitting acquittal on this ground only if the mistake did not arise from a want of proper care. Case law going back to *Bray v. State*, 41 Tex. 203 (1874), the court of criminal appeals reasoned, established that a claim of right, even if based on want of proper care, is inconsistent with the requirements of theft. Consequently—

> [A]ppellant has brought himself within the rule of law [stated in the case law] and . . . he was entitled to have the jury instructed in accordance therewith, to the effect that if he acted under a mistaken claim of right, in good faith believing that the hogs belonged to him, he would not be guilty—and this, without reference to whether that belief "did not arise from want of proper care" on his part.

Green, 221 S.W.2d at 616. Generalizing, the court continued:

> In order that no confusion may arise, it should be again pointed out that the rule of law here announced and the interpretation placed upon Art. 41,

> P.C., apply only to those crimes where the unlawful intent is an essential element without which the offense does not arise.

Green, 221 S.W.2d at 616.

In 2007, the court of criminal appeals—discussing transferred intent and mistake of fact—summarized *Green* in a manner confirming its treatment of the then-statutory requirement of want of due care. *Thompson v. State*, 236 S.W.3d 787, 794–95 (Tex. Crim. App. 2007).

Green, then, arguably recognized in pre-1974 Texas law a nonstatutory failure-of-proof defense of mistake of fact that did not embody the statutory requirement that a mistake have been reasonable. Since former article 41 provided for this two-part approach, current Penal Code section 8.02(a) might have been intended to preserve that approach. *Green*'s insistence on a jury instruction concerning the failure-of-proof defense was consistent with jury instruction law in effect at that time. *Giesberg v. State*, 984 S.W.2d 245 (Tex. Crim. App. 1998), changed the law on jury instructions concerning nonstatutory failure-of-proof defenses. It did not affect the substantive mistake-of-law doctrine recognized and reaffirmed in *Green*.

Some Committee members did not believe that the *Green* case presents a problem for current interpretation of section 8.02. As the court of criminal appeals later explained in *Thompson*, the statute applicable in 1948, article 41, did not apply to *Green* because, pursuant to article 41, mistake did not have to negate the culpable mental state required for the offense. Since article 41 did not apply, neither did its provision that the mistake not arise from a want of proper care. Since the statutory law was amended in 1973, the new reasonable mistake-of-fact provision does require that the mistake negate the culpable mental state required for the offense (and does require that the mistake be a reasonable one). When the legislature was considering the 1970 amendments, the State Bar committee proposed a "claim of right" defense to theft that would have codified the *Green* case. Under proposed section 31.10, a mistake of fact about ownership would have to have been only honest, not reasonable. The legislature rejected this proposal and adopted current section 8.02 in 1973.

In *Louis v. State*, 393 S.W.3d 246 (Tex. Crim. App. 2012), the court of criminal appeals discussed *Thompson* and provided additional guidance on instructions for transferred intent and mistake of fact. *See Thompson*, 236 S.W.3d 787. The court of criminal appeals held that the trial court harmfully erred in denying a mistake-of-fact instruction in a capital murder case that also alleged lesser included offenses. The trial court had submitted instructions on transferred intent, but those instructions did not apply to the capital murder allegations because capital murder is a result-of-conduct offense and intent cannot be transferred from a lesser included offense to a capital offense. Nevertheless, the transferred-intent instructions were applicable to lesser included offenses (for example, causing bodily injury to a child and causing serious bodily injury to a child), and, thus, a mistake-of-fact instruction should also have been

given. "Because the transferred-intent instruction was applied to all of the offenses in the jury charge and authorized conviction of each specific offense, if causation were transferred pursuant to § 6.04, the mistake-of-fact instruction was needed to permit the jury to negate the transferred intent if the jury believed that appellant had a reasonable mistaken belief about the type of injury he was inflicting." *Louis*, 393 S.W.3d at 253-4.

§ B5.4 Other Jurisdictions and Potential Constitutional Problem

Whether the "rule" that a mistake of fact can obviate a required culpable mental state is limited to objectively reasonable mistakes has long troubled the criminal law. The common-law position is often stated as providing that an unreasonable mistake can be used by a defendant to negate a "specific" but not a "general" intent required by a charged crime.

The Model Penal Code proposed that any such limitation be abandoned. Under section 2.04(1)(a), any mistake that "negatives" any culpable mental state required by the offense is a "defense." Model Penal Code § 2.04(1)(a) (Proposed Official Draft 1962). Many jurisdictions have followed this approach. A number of jurisdictions, including Texas, have not and instead provide by statute for a mistake-of-fact defense limited to reasonable mistakes.

Some members of the Committee believed that the approach taken in Texas Penal Code section 8.02(a) and a number of other state statutes violates federal and perhaps state constitutional requirements. Due process requires proof of all elements beyond a reasonable doubt. A statutory provision that prevents defendants from challenging such proof on the basis of honest but unreasonably held mistake, they contended, interferes with the constitutionally required burden of proof. *Cf. Ruffin v. State*, 270 S.W.3d 586, 594 (Tex. Crim. App. 2008) ("The defendant's right to present a defense generally includes the due-process right to the admission of competent, reliable, exculpatory evidence to rebut any of [the culpable mental state] elements.").

Further, the right to jury trial under the Sixth and Fourteenth Amendments and perhaps under state constitutional law includes a right to have the jury informed of the state's burden of proof in a reasonably clear and internally consistent manner. This right is violated, some Committee members concluded, if a jury is told both to require proof of a subjective culpable mental state but also to ignore evidence of an honest but unreasonable mistake of fact that shows that culpable mental state was lacking.

The U.S. Supreme Court has never addressed the federal constitutional issue. In *Cheek v. United States*, 498 U.S. 192 (1991), the Court held—apparently as a matter of federal nonconstitutional law—that a federal trial judge erred in instructing a jury that the defendant's mistake could be considered in deciding whether the government had proved the required "willfulness" only if that mistake was objectively reasonable. Forbidding the jury to consider evidence of an unreasonable mistake that if considered might negate the required willfulness "would raise a serious problem under the Sixth Amendment jury trial provision." *Cheek*, 498 U.S. at 203.

Some lower courts have reasoned that, whatever *Cheek* means, it is limited to situations in which defendants rely on mistake about "law" rather than "fact." *Lemon v. State*, 837 S.W.2d 163, 166 (Tex. App.—El Paso 1992), *rev'd on other grounds*, 861 S.W.2d 249 (Tex. Crim. App. 1993) ("[I]n *Cheek* it was argued that he had a reason-

able good faith misunderstanding of the law—not fact."); *Sanford v. State*, 499 N.W.2d 496, 500 (Minn. Ct. App. 1993) ("*Cheek* was a mistake of law, rather than mistake of fact, case."). How this might limit *Cheek* is unclear. Given the more limited defense of mistake of law, it seems likely that any constitutional bar to limiting a mistake-of-law defense would apply even more rigorously to states' ability to limit defenses of mistake of fact.

In other cases, the Supreme Court has left unclear the extent to which states may limit a jury's consideration of evidence logically indicating the defendant did not have the culpable mental state required by the charged offense. In *Clark v. Arizona*, 548 U.S. 735 (2006), for example, the Court held that Arizona could limit the extent to which juries could consider evidence of mental impairment in considering whether the prosecution proved the required culpable mental state. With apparent care, however, it did not reach whether the federal constitution would permit a state to bar consideration of *all* such evidence.

Without an opinion from the majority of the Court, the Supreme Court upheld a conviction for intentional or knowing murder although the jury was instructed that it could not consider the defendant's voluntary intoxication in deciding whether the prosecution had proved intent to kill or knowledge that death would result. *Montana v. Egelhoff*, 518 U.S. 37 (1996). Some members of the Court reasoned that the federal constitutional limits on states' ability to limit consideration of such evidence depended on whether the limit was imposed as part of the definition of the required culpable mental states or, rather, as a limit on the admissibility of evidence.

No court appears to have held that any of the numerous state mistake-of-fact reasonableness requirements are actually unconstitutional. The New Jersey Supreme Court struggled with the problem and "solved" it by an analysis that basically redefined the requirement of reasonableness out of existence. *State v. Sexton*, 733 A.2d 1125 (N.J. 1999). No other court has discussed this approach.

Apparently the only Texas case to consider a possible constitutional defect in Texas law governing mistake of fact is *Shands v. State*, No. A14-90-00844-CR, 1992 WL 99607 (Tex. App.—Houston [14th Dist.] May 14, 1992, pet. ref'd) (not designated for publication). The court described the contention before it as follows:

> The jury was instructed to consider whether appellant, "through mistake formed a reasonable belief about a matter of fact, namely, his authority to amend the contract in question." Appellant contends that the trial court erred in limiting his mistake-of-fact defense to only mistakes formed through a reasonable belief. Appellant argues that the state and federal constitutions guarantee a mistake-of-fact defense, regardless of the reasonableness of the mistake, so long as the mistake negates the kind of culpable mental state required for the crime.

Shands, 1992 WL 99607, at *7. The court concluded that the authorities relied on by Shands were not necessarily controlling. Then, with no discussion of whether Shands's logic was persuasive, it rejected his contention:

> The instruction in the instant case tracked the language of section 8.02. Moreover, the definition of "reasonable belief" in the charge incorporated a subjective element by requiring that the jury consider the facts from appellant's point of view in determining whether his mistaken belief was in good faith. The trial court's instruction was not error.

Shands, 1992 WL 99607, at *7.

The court of criminal appeals did address the application of section 8.02 in *Mays v. State*, 318 S.W.3d 368 (Tex. Crim. App. 2010). Mays unsuccessfully sought a mistake-of-fact instruction on the ground that his mental impairment caused him to mistakenly believe officers seeking to arrest him were "rogue cops" intent on doing him illegal harm, and thus he did not have the awareness they were "acting in the lawful discharge of an official duty." *Mays*, 318 S.W.3d at 382. Mays maintained that this culpable mental state was required by the charged capital murder. Refusal of the instruction was held proper on several alternative grounds. One of these grounds was that any belief Mays had that in fact negated a required culpable mental state was not a reasonable one. "The law examines 'reasonableness' from the perspective of an ordinary and prudent person," the court explained, "not from that of a paranoid psychotic who is, by psychiatric definition, 'unreasonable' in his imagined suspicions, delusions, and fears." *Mays*, 318 S.W.3d at 383.

Mays, then, discussed and applied the statutory requirement of reasonableness with no indication that it might be constitutionally suspect. This discussion and application, however, came only with alternative rationales for the holding: the defense evidence did not tend to show Mays believed the officers were rogue cops, and the charged offense did not require a belief by him that the officers were acting in the lawful discharge of an official duty.

Some Committee members believed that section 8.02 would be held constitutional by the U.S. Supreme Court. First, they noted that the Court in *Cheek* was confined to interpreting the word *willfully* in the federal tax code. This code is so confusing that a defendant who makes an honest but unreasonable mistake about tax law is not guilty. To assure this result, Congress used the word *willfully* as a word of heightened mens rea. *Cheek* is strictly a statutory holding, not a constitutional one. Once the Court interprets *willfully* as requiring an honest (even if unreasonable) belief about the law, there may be a constitutional question should the judge attempt to exclude evidence that the defendant honestly but unreasonably interpreted the tax code. However, *Cheek* does not opine as to the constitutionality of a statute requiring that all mistakes of fact (even mistakes about intentional and knowing crimes) be reasonable, as there is no such statute in the federal code.

These Committee members further believed that the *Eglehoff* and *Clark* cases support the constitutionality of section 8.02. Though there was a 4-1-4 split in *Eglehoff*, all nine Supreme Court Justices agreed that Montana could, consistent with the federal Due Process Clause, bar evidence of voluntary intoxication (even when it directly refuted the mens rea of intent in a murder charge). The four in the plurality believed there was no fundamental right to negate mens rea with evidence of intoxication. The disagreement was merely in the means for the state to reach this acceptable goal. The four dissenters agreed that the state could bar such evidence, but it had to use its substantive criminal code, not an evidentiary device. The fifth vote by Justice Ginsburg held that the Montana legislature did redefine its criminal code to include killing intentionally or drunkenly. More recently, in *Clark*, six Justices agreed that Arizona could bar evidence of mental disease even if such evidence directly negated the mens rea necessary for murder. No fundamental right of the defendant bars the state from channeling such evidence into an insanity defense and placing the burden of proof by clear and convincing evidence on the defendant. Likewise, it seemed to these Committee members that there is no due-process right rooted in history or fundamental fairness to have an honest mistake-of-fact defense (rather than a reasonable one).

§ B5.5 Possible Alternative Approach—Two Mistake-of-Fact Defenses

The Committee considered a proposal that Texas law may now distinguish two related defensive positions, both of which might be labeled mistake of fact. Only one, however, would implicate Texas Penal Code section 8.02(a). The first is a defendant's reliance on evidence of mistake to negate a culpable mental state explicitly required by the definition of the charged offense. This is what case law sometimes calls a failure-of-proof defense and would not implicate section 8.02(a). The other is a statutory defense of mistake of fact based on and defined by section 8.02(a).

§ B5.5.1 Mistake of Fact as Failure-of-Proof Defense: Negating Culpable Mental State Required by Elements of Charged Offense

A defendant who relies on evidence of a mistake that logically tends to show the defendant did not have a required culpable mental state, under the proposed approach, is entitled to introduce that evidence. He is also entitled to argue to the jury that the evidence raises at least a reasonable doubt about whether he acted with the required culpable mental state. Whether any mistake shown by the evidence was reasonable or not would be irrelevant, except insofar as unreasonableness might affect the jury's willingness to believe the defendant actually harbored the mistaken belief.

This defense would not implicate Texas Penal Code section 8.02(a). As a failure-of-proof contention that triggers no explicit statutory provision, under *Giesberg v. State*, 984 S.W.2d 245 (Tex. Crim. App. 1998), a jury instruction on it would be a prohibited comment on the evidence.

Application of this approach would be illustrated by a prosecution for unauthorized use of a vehicle under Penal Code section 31.07. This crime requires proof that the defendant at least knew the owner had not consented. *See McQueen v. State*, 781 S.W.2d 600 (Tex. Crim. App. 1989).

A defendant tried for unauthorized use would be entitled to introduce evidence that he mistakenly believed he had permission from the owner to operate the vehicle. He could also argue to the jury that this evidence at least raised a reasonable doubt whether he acted with knowledge that the owner had not consented. Even obvious unreasonableness of any mistake the evidence showed would be irrelevant to the defendant's ability—as a "matter of law"—to pursue this defensive approach. (Such unreasonableness might, of course, impair his ability to prevail, that is, to persuade the jury that he in fact actually made the unreasonable mistake.) The defendant would not, however, get any jury instruction on the defensive theory. Specifically, he would get no instruction telling the jurors that if they credited his evidence, they would or should

consider this evidence on whether the state had proved, beyond a reasonable doubt, that the defendant knew the owner had not effectively consented.

§ B5.5.2 Mistake of Fact as "Statutory" Defense

A defendant unable to rely on the approach in section B5.5.1 above because his mistake, even if proved, would not negate a required culpable mental state would nevertheless—under the proposed approach—sometimes be able to rely on Texas Penal Code section 8.02. If the defendant raised this, he would be entitled to a jury instruction. That instruction would tell the jury the mistake must have been a reasonable one.

Whether a defendant is able to invoke this statutory defense depends on the construction of the charged offense. Essentially, the courts would have to determine on a crime-by-crime basis whether particular crimes contain implicit mental state requirements that are put into play if—but only if—defendants raise the statutory mistake-of-fact defense.

This approach would arguably be consistent with pre-1974 Texas law. *Green v. State*, 221 S.W.2d 612 (Tex. Crim. App. 1949), appeared to recognize a nonstatutory defense consisting of any mistake of fact—reasonable or not—that logically suggested a required culpable mental state was lacking.

§ B5.5.3 Committee's Position

Committee members were divided concerning whether a "failure-of-proof" defense in addition to a statutory mistake-of-fact defense is available. Some members of the Committee believed that there is a real likelihood the court of criminal appeals would adopt this approach. They believed it has support in Texas law and provides a reasonable way to reconcile the Penal Code provision with logical and possible constitutional requirements.

Some Committee members believed that nothing in Texas case law supports the proposition that there might be two mistake-of-fact defenses, one based on Texas Penal Code section 8.02 and a second based on a "failure-of-proof" defense. The words of section 8.02 provide that this defense does apply when a mistake negates the culpability of the defendant (what some Committee members called "failure of proof"). The court of criminal appeals implicitly rejected this two-defense proposal in *McQueen v. State*, 781 S.W.2d 600 (Tex. Crim. App. 1989), the case some Committee members cited for support of the two-defense approach.

McQueen held that section 8.02 does apply where the defendant made a mistake that negates mens rea. The defendant was charged under section 31.07, unauthorized use of a motor vehicle. Because that offense requires that the state prove that the defendant was aware that he did not have the consent of the owner, he was entitled to a

reasonable mistake-of-fact instruction if he erroneously and reasonably believed that he had the motorcycle owner's consent. *McQueen*, 781 S.W.2d at 602 n.1. This defendant was tried before a judge, so no jury instructions were given. Moreover, there was no evidence that he believed he had the consent of the owner. Nonetheless, the court specifically noted that had a jury been present and an instruction been necessary, the trial court should have offered a section 8.02 instruction.

More recently, in *Mays v. State*, 318 S.W.3d 368 (Tex. Crim. App. 2010), the court again held that a defendant's mistake that negated a required culpability for an offense must be treated under section 8.02. In *Mays*, the defendant argued that his belief that the people he shot were rogue police officers negated the required culpability for capital murder (that the defendant know he is killing a police officer in the lawful discharge of the officer's official duties) and thus should have triggered an instruction under section 8.02. Instead, the court held that the defendant's mistake was so unreasonable (it was due to his paranoia and psychotic thinking) that it didn't even raise a question for the jury. *See Mays*, 318 S.W.3d at 383. The court again reiterated that a mistake that negates mens rea must be considered under section 8.02; there was no mention of mistake of fact as an alternative failure-of-proof defense that would have allowed evidence of mistake to rebut existence of mens rea if the mistake were unreasonable.

§ B5.6 Reasonableness of Mistake as Matter for Court Rather Than Jury

The court of criminal appeals appears to have held—as a general rule—that when the reasonableness of a defendant's mistake about fact is at issue, that is always a jury question.

A trial judge may not refuse to instruct the jury on mistake of fact simply because the judge believes no reasonable jury could or would find that if the defendant entertained the mistake he claims to have entertained, that mistaken belief was unreasonable. This, of course, somewhat mitigates what some Committee members regarded as the offensiveness of the reasonableness requirement.

The controlling case is *Granger v. State*, 3 S.W.3d 36 (Tex. Crim. App. 1999), holding that the trial judge erred in failing to give a mistake-of-fact instruction. The court reasoned in part:

> The State argues, and the Court of Appeals held, that the reasonableness of an accused's mistaken belief may be evaluated by the trial judge in determining whether the statutory defense is raised. But the appellate court's holding is contrary to this Court's previous decision in *Hayes v. State*, 728 S.W.2d 804, 808 (Tex. Crim. App. 1987) (opinion on rehearing). . . .
>
> . . . .
>
> . . . [A] holding in accordance with the State's position would tend to undermine the general rule that the jury should be responsible for gauging the credibility and veracity of the defensive evidence. Trial court judges charged with evaluating the "reasonableness" of an accused's beliefs, no matter how well intentioned, would inevitably be placed in a position in which they were required to make their own decisions about the weight and believability of the defensive evidence.

Granger, 3 S.W.3d at 39–40 (citations omitted). One of the two members of the court not joining the opinion confirmed the significance of the court's opinion:

> I think that there could be extreme situations in which a defendant's mistaken belief was unreasonable as a matter of law. But such situations would appear to be so rare that trial judges should routinely leave that determination to the jury. This case does not present one of those extreme situations.

Granger, 3 S.W.3d at 41 (Keller, J., concurring in the judgment with note).

One court of appeals has explained *Granger* as follows:

> When an accused creates an issue of mistaken belief as to a culpable mental element of the offense, he is entitled to a defensive instruction on mistake of fact. The court of criminal appeals has made clear that whether a defen-

> dant's belief was reasonable is a fact issue for the jury to decide, not a preliminary consideration for the trial court.

Ingram v. State, 261 S.W.3d 749, 752 (Tex. App.—Tyler 2008, no pet.) (citing *Granger*, 3 S.W.3d at 39, 41).

Application of *Granger* is illustrated by *Sands v. State*, 64 S.W.3d 488 (Tex. App.—Texarkana 2001, no pet.), a prosecution for possession of methamphetamine. The state contended the methamphetamine was contained in a syringe. Sands testified that he received the syringe from one Julie Mason and believed it contained only vitamin B_{12}. The trial court refused a mistake-of-fact instruction, and on appeal the state defended this by emphasizing, "[T]here was no evidence concerning what Mason told Sands about the syringe and no evidence showing conduct by Mason on which Sands could have relied to form his mistaken belief." *Sands*, 64 S.W.3d at 493. Under *Granger*, however, these considerations did not support failure to submit mistake of fact to the jury. "[T]hese are matters that go to prove the reasonableness of Sands's belief. Reasonableness is a question for the jury." *Sands*, 64 S.W.3d at 493.

An exception to *Granger*'s rule was recognized in *Mays v. State*, 318 S.W.3d 368 (Tex. Crim. App. 2010), in which defendant Mays sought a mistake-of-fact instruction on the basis of a mistaken belief that he maintained was caused by his mental illness. Rejecting this, the court of criminal appeals explained—

> Although the "reasonableness" of a mistaken belief is generally a question for the jury, appellant cannot rely upon evidence of his paranoia and psychotic thinking to raise a "reasonable" mistaken belief concerning the officers' intentions. The law examines "reasonableness" from the perspective of an ordinary and prudent person, not from that of a paranoid psychotic who is, by psychiatric definition, "unreasonable" in his imagined suspicions, delusions, and fears. Mental disease is not an attribute of the reasonable, ordinary and prudent person. Thus, although the general rule is that the jury must determine the relative credibility of the evidence raising a "reasonable belief" about a fact, reliance upon paranoid beliefs and delusions negates the type of reasonableness that an ordinary and prudent person would have under the circumstances.

Mays, 318 S.W.3d at 383 (footnotes omitted).

Insofar as Texas Penal Code section 8.02 limits mistakes of fact to ones reasonably entertained, *Granger* somewhat mitigates the impact of this position. Unreasonableness can never be the basis for a trial judge's refusal to let a defendant make a claim of mistake of fact to the jury.

§ B5.7 Committee's Approach

Some members of the Committee concluded that instructions simply embodying the traditional construction of Texas Penal Code section 8.02(a) contain what the Texas courts will eventually acknowledge is a fatal federal and perhaps state constitutional defect. These members believed that the Committee should recommend that trial judges instruct juries in a manner making no reference to a requirement of reasonableness, because constitutional considerations bar application of the statutory requirement.

The Committee as a whole, however, offered and recommended an instruction embodying the section 8.02(a) requirement of reasonableness, based on several considerations.

First, the Committee remained unconvinced that application of the current provision would violate constitutional requirements. Apparently no court has found an actual constitutional violation. Despite the language in *Cheek v. United States*, 498 U.S. 192 (1991), the Supreme Court has shown considerable flexibility in this area, as illustrated by *Montana v. Egelhoff*, 518 U.S. 37 (1996), and *Clark v. Arizona*, 548 U.S. 735 (2006). A requirement of reasonableness has traditionally been accepted and remains the law in a number of American jurisdictions. See discussion of these issues at section B5.4 above.

Second, the Committee believed that any possible constitutional concerns are of minimal practical significance. Whatever the theory, juries—as a practical matter—will seldom or never credit defendants' arguments that they honestly entertained unreasonable but honest mistakes of fact. Few if any defendants are likely to be harmed by continuing to instruct juries in the manner apparently explicitly directed by the legislature.

Third, any questionable impact of a theoretical requirement that a mistake of fact be reasonable is minimized by the case law limiting trial judges' power to refuse jury submission because defense evidence does not raise a reasonable mistake of fact.

§ B5.8 Instruction—Mistake of Fact

If you all agree the state has proved, beyond a reasonable doubt, each of the [*number*] elements listed above, you must next consider whether the state has proved that the defendant did not make a mistake of fact constituting a defense.

Mistake of Fact

You have heard evidence that, when the defendant [*insert specific conduct constituting offense, e.g.*, took [*name*]'s car], he believed [*insert mistake claimed by defendant, e.g.*, he had effective consent from someone he reasonably believed to be the owner of the vehicle].

Relevant Statutes

A person's conduct that would otherwise constitute the crime of [*offense*] is not a criminal offense if the person 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.

Burden of Proof

The defendant is not required to prove that he made a mistake of fact. Rather, the state must prove, beyond a reasonable doubt, that the defendant did not make a mistake of fact constituting a defense.

Definition

Reasonable Belief

"Reasonable belief" means a belief that an ordinary and prudent person would have held in the same circumstances as the defendant.

Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the state has proved the defendant did not make a mistake of fact constituting a defense.

To decide the issue of mistake of fact, you must determine whether the state has proved, beyond a reasonable doubt, one of the following:

1. The defendant did not believe [*insert mistake claimed by defendant, e.g.*, he had effective consent from someone he reasonably believed to be the owner of the vehicle]; or

2. The defendant's belief that [*insert mistake claimed by defendant, e.g.*, he had effective consent from someone he reasonably believed to be the owner of the vehicle] was not reasonable.

You must all agree that the state has proved, beyond a reasonable doubt, either element 1 or 2 listed above. You need not agree on which of these elements the state has proved.

If you find that the state has failed to prove, beyond a reasonable doubt, either element 1 or 2 listed above, you must find the defendant "not guilty."

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of [*insert specific offense*], and you all agree the state has proved, beyond a reasonable doubt, either element 1 or 2 listed above, you must find the defendant "guilty."

[See chapter 2 for verdict instruction.]

COMMENT

Identifying Challenged Culpable Mental State. A jury instruction on mistake of fact must apply the law to the facts of the case. *Beggs v. State*, 597 S.W.2d 375, 380 (Tex. Crim. App. 1980) ("The trial court's refusal to give a charge that applied the law of mistake of fact to the very facts of the case, over the appellant's objection and in the face of a properly requested charge, was reversible error.").

This apparently means the instruction must identify the claimed mistake of fact and make clear that this claimed mistaken belief is inconsistent with the culpable mental state required.

In *Beggs*, the prosecution was for intentionally or knowingly causing serious bodily injury to a child, which required the defendant to at least know that her conduct (putting the child in a bath) was reasonably certain to cause serious bodily injury. She relied on evidence that she mistakenly believed the water was of normal bathwater temperature and thus not as hot as would cause serious bodily injury. The essence of the court of criminal appeals' holding was that the jury instructions must identify for the jury the claimed mistake—that the water was not as hot as would cause serious bodily injury—and must make clear that this mistaken belief could not logically coexist with the required culpable mental state—actual awareness that putting the child in the bathwater was reasonably certain to cause serious bodily injury.

The Committee considered suggesting that the instruction include, probably after the third paragraph, an additional paragraph that would identify the culpable mental state challenged by the mistake-of-fact evidence and explicitly tell the jury that the claimed mistake—if held by the defendant—was logically inconsistent with that required culpable mental state.

As applied to a possible mistake-of-fact defense in a prosecution for unauthorized use of a vehicle, for example, such a paragraph might read as follows:

> The offense of unauthorized use of a vehicle requires proof that the defendant knew he did not have the effective consent of the owner to the operation of the vehicle. This would be negated by credible evidence that the defendant reasonably believed he had effective consent from someone he reasonably believed to be the owner of the vehicle.

A majority of the Committee, however, declined to recommend that instructions include such a paragraph. They believed it would generally be unnecessary, as jurors would already be aware of this information. Further, they concluded it would too often generate controversy regarding the matters to be included and the detail and specificity with which they should be included.

§ B6.1 Statutory References

The role of voluntary intoxication in criminal liability is addressed in Tex. Penal Code § 8.04.

The definition of "intoxication" is based on Tex. Penal Code § 8.04(d).

§ B6.2 Voluntary Intoxication Generally

The significance of voluntary intoxication to criminal liability is addressed by section 8.04 of the Texas Penal Code. This statute has a long history.

In 1881, the legislature enacted the predecessor to the current provision. The operative portion of the 1881 statute provided: "[N]either intoxication, nor temporary insanity of mind, produced by the voluntary recent use of ardent spirits, shall constitute any excuse in this State for the commission of crime, nor shall intoxication mitigate either the degree or the penalty of crime . . . ." Act approved Feb. 17, 1881, 17th Leg., R.S., ch. 14 § 1, 1881 Tex. Gen. Laws 9, *reprinted in* 9 *H.P.N. Gammel, The Laws of Texas 1822–1897*, at 101 (Austin, Gammel Book Co. 1898).

The 46th legislature in 1939 responded to decisions limiting the statute to intoxication from alcohol by replacing the reference to "ardent spirits" with the broader phrase "ardent spirits, intoxicating liquor, or narcotics, or a combination thereof." Acts 1939, 46th Leg., R.S., ch. 1, § 1 (H.B. 988), eff. May 15, 1939, *repealed by* Acts 1973, 63d Leg., R.S., ch. 399, § 1 (S.B. 34), eff. Jan. 1, 1974.

The 1974 revision of the Penal Code replaced the older language with newer terminology specifying that voluntary intoxication is not a defense. Nothing in the Penal Code defines "voluntary intoxication."

Current practice is to instruct juries as was done in *Sakil v. State*, 287 S.W.3d 23, 25 (Tex. Crim. App. 2009): "You are instructed that voluntary intoxication does not constitute a defense to the commission of the crime. By the term 'intoxication' as used herein is meant disturbance of mental or physical capacity resulting from the introduction of any substance into the body." Current practice is to include no definition of "voluntary."

Court of criminal appeals' case law makes clear that the statutory provision bars juries from considering evidence of voluntary intoxication as negating or casting doubt on the state's proof of culpable mental state, even if that evidence logically tends to show the defendant lacked the culpable mental state required. Specifically, the case law makes clear that the jury instruction need not qualify its statement of the statutory rule by telling jurors that despite the rule they may consider voluntary intoxication as tending to show the defendant could not, or did not, have the culpable mental state required by the charged offense. *E.g., Crew v. State*, 23 S.W. 14 (Tex. Crim. App. 1893); *accord McElroy v. State*, 528 S.W.2d 831 (Tex. Crim. App. 1975).

The court of criminal appeals regards the statute as barring juries from considering this evidence on culpable mental state. In *Jaynes v. State*, 673 S.W.2d 198 (Tex. Crim. App. 1974), for example, the conviction was for failure to stop and render aid. The court acknowledged that whether Jaynes was aware that an accident had occurred was at issue in the case. Finding no error in the jury instruction, however, it noted that under the law and the instructions given, "The jury was free to find that appellant had

no knowledge of the accident as long as they did not attribute that lack of knowledge to intoxication." *Jaynes*, 673 S.W.2d at 202.

The court of criminal appeals has made clear that, while Tex. Penal Code § 8.04 bars a defendant from using evidence of intoxication to challenge his culpable mental state, even absent section 8.04 a voluntary intoxication instruction would not otherwise be appropriate: "No statute authorizes a defense of intoxication, or a special instruction on the mitigating value of intoxication, with respect to the guilt phase of trial in a capital murder case, nor does any statute make the absence of intoxication an element of the offense of capital murder." *Davis v. State*, 313 S.W.3d 317, 330 (Tex. Crim. App. 2010). Moreover, the court continued, an unauthorized instruction would be a comment on the weight of the evidence.

Some members of the Committee believed that the instructions should explicitly convey to jurors what all agree is Texas law—that jurors are barred from giving effect to even credible defense evidence that the defendant, because of intoxication, did not have the required culpable mental state.

Some members of the Committee also believed the jury instructions should address what they regarded as a logical inconsistency between instructions purporting to require proof of an actual culpable mental state and other instructions directing the jury to ignore what may be evidence logically indicating the lack of that culpable mental state.

Montana v. Egelhoff, 518 U.S. 37 (1996), made clear that the Supreme Court would not find the Texas approach to violate federal constitutional standards. It did not, however, address what if any federal constitutional considerations might bear on how this substantive law needs to be explained to jurors.

The concerns of these members of the Committee are illustrated by *Robinson v. State*, 971 S.W.2d 96 (Tex. App.—Beaumont 1998, pet. ref'd), a murder prosecution in which the jury had before it some evidence of intoxication. During deliberations, the jury returned a note: "If can't (sic) use intoxication as a defense how does that affect how a person's mind would be at time of offense— & if someone is intoxicated how can we compare that to anyone else that is reasonable." *Robinson*, 971 S.W.2d at 98. Over defense objection, the trial court responded—

> In response to your request, please be advised the law will not allow me to answer your question.
>
> Please continue with your deliberation.
>
> A person who is intoxicated voluntarily should be treated as though there were no intoxication.

Robinson, 971 S.W.2d at 98. The court of appeals assumed—for reasons not made clear—that the trial judge erred by giving the final sentence but that this did not affect

the defendant's substantial rights and thus was harmless error. *Robinson*, 971 S.W.2d at 98–99.

A majority of the Committee, however, concluded that limiting the jury instructions to the statutory language sufficiently conveyed the substance of the legislative position to jurors. Any effort to explain the legislative position further, they concluded, would serve no practical function but would significantly increase the risk of confusing jurors.

§ B6.3 Instruction—Voluntary Intoxication

Voluntary Intoxication

[Include the following in the definitions unit if applicable.]

Intoxication

"Intoxication" means a disturbance of mental or physical capacity resulting from the introduction of any substance into the body.

[Include the following in the application of law to facts unit.]

Voluntary intoxication is not a defense to the commission of a crime.

But you are reminded that the state must prove all elements of the offense beyond a reasonable doubt.

COMMENT

Given the substance of voluntary intoxication law, an instruction on voluntary intoxication generally favors the state. It is essentially an instruction on what is *not* a defense, that is, on what does not prevent criminal liability.

When Instruction Should or May Be Given. "[A] Section 8.04(a) instruction is appropriate if there is evidence from any source that might lead a jury to conclude that the defendant's intoxication somehow excused his actions." *Sakil v. State*, 287 S.W.3d 23, 26 (Tex. Crim. App. 2009) (citing *Taylor v. State*, 885 S.W.2d 154, 158 (Tex. Crim. App. 1994)). It may be appropriate even if the defense does not explicitly argue to the jury that the evidence of intoxication is in any way exculpatory. Only slight evidence is sufficient.

In *Sakil*, there was no direct evidence that Sakil was intoxicated at the time of the charged assault. The court concluded, however, that an instruction was permissible because the defense pursued evidence that Sakil engaged in bizarre behavior the day of the offense and had an extensive history of substance abuse. It added—

> Had Appellant not pursued testimony relating to his bizarre behavior the day of the offense and his extensive history of substance abuse, the following facts would support Appellant's position that "there was no evidence from which the jury could conclude Appellant was voluntarily intoxicated": (1) he had just been released from jail, so he did not have a significant amount of time to obtain drugs or alcohol, (2) [the assault victim] reported to the 911 operator that Appellant was not intoxicated at the time of the offense, (3) Appellant stated that his amphetamine use occurred at the age

> of eighteen, and (4), he told the physician that he was not taking his medication for hallucinations at the time of the offense.

Sakil, 287 S.W.3d at 27 n.9.

Definition of Voluntary Intoxication. Texas instructions never define voluntary intoxication. On the rare occasions when instructions address involuntary intoxication and define that term, they rely on the following: "To constitute involuntary intoxication, there must be an absence of an exercise of independent judgment and volition on the part of the accused in taking the intoxicant." *Torres v. State*, 585 S.W.2d 746, 748 (Tex. Crim. App. [Panel Op.] 1979) (quoting *Hanks v. State*, 542 S.W.2d 413, 416 (Tex. Crim. App. 1976) (citing *Johnson v. Commonwealth*, 115 S.E. 673, 677 (Va. 1923))).

In *Hanks*, the court held that involuntary intoxication was not raised because the defendant acknowledged suspecting that "something" had been placed in his drink. "If appellant was aware that a suspected drug had been placed in his drink, as he testified, and in spite of such knowledge he drank the beverage, any intoxication resulting therefrom could not be classified as *involuntary*." *Hanks*, 542 S.W.2d at 416.

It seems clear from the rather awkward definition of involuntary intoxication that intoxication is voluntary if it results from "volition" in ingestion of a substance known to have intoxicating characteristics. Volition apparently means simply the absence of duress.

Perhaps most importantly, the intoxication need not be the result of a decision to become intoxicated.

In other jurisdictions, jury instructions are often based on statutory provisions in turn based on the Model Penal Code:

> The Model Penal Code uses the term "self-induced" intoxication, rather than "voluntary" intoxication, and defines that term to mean, intoxication caused by substances which the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such circumstances as would afford a defense to a charge of crime. Model Penal Code § 2.08(5)(b).

Commonwealth v. Smith, 831 A.2d 636, 640 n.3 (Pa. Super. Ct. 2003). The provision for substances introduced pursuant to medical advice seems to cover prescription medications taken in a manner complying with directions. The extent to which it covers over-the-counter medications or substances is not clear. The provision for "circumstances as would afford a defense to a charge of crime" apparently refers to duress.

The Committee concluded that the Texas instruction should not attempt to define "voluntary" as it is used in the voluntary intoxication instruction. There is no statutory definition and no case law approving any particular definition. As applied in most situations, the term has a commonly understood meaning. If in a particular case an issue

regarding possible involuntary intoxication is presented, an instruction on it will adequately distinguish the two kinds of intoxication.

Voluntary Intoxication Disproving Commission of Crime. A defendant may argue that the charged offense requires more physical ability to commit the offense than the defendant had at the time, given the evidence that the defendant was at that time perhaps voluntarily intoxicated. *Skinner v. State*, 956 S.W.2d 532, 540 (Tex. Crim. App. 1997) (defense theory in capital murder case was that defendant, because of intoxication, was mentally and physically unable to commit charged murders). Nothing suggests that a defendant is barred by Texas voluntary intoxication law from relying on such a defensive theory.

The impropriety of a jury instruction on such a defensive theory would seem to be clear from *Giesberg v. State*, 984 S.W.2d 245, 249 (Tex. Crim. App. 1998): "Alibi is similar to other defensive issues which also negate an element or elements of the State's burden of proof, but do not warrant special jury instructions." Voluntary intoxication, under this defensive theory, is like alibi in that it simply contests the sufficiency of the state's evidence that the defendant engaged in the conduct constituting the crime or caused the result required by the crime. Under *Giesberg*, a jury instruction would seem to be a prohibited comment on the evidence.

Perhaps, however, *Giesberg*'s rationale does not apply if other proper parts of the jury instructions create a risk that the jury will misunderstand that the law bars defense reliance on the defensive theory at issue. The statement that voluntary intoxication is not a defense to the commission of crime might be construed by a jury as meaning that it cannot be considered in determining whether the defendant committed the offense.

Some members of the Committee were persuaded that in the unusual case raising a question of this sort, the general intoxication instruction posed too great a risk of obscuring that voluntary intoxication may be properly considered in this way. They would prefer that in such cases the instructions include the following:

> If the evidence that the defendant was intoxicated raises in your mind a reasonable doubt about whether the defendant engaged in the conduct or caused the result required by the crime, you must find the defendant "not guilty."

A defendant should be entitled to an instruction legitimizing this defensive theory, they believed, if both (1) the evidence would permit a reasonable jury to find a reasonable doubt about whether because of intoxication the defendant committed the charged offense and (2) the jury instructions will contain a general admonition to the effect that voluntary intoxication is not a "defense."

A majority of the Committee, however, concluded that it should take no position on the matter.

§ B7.1 Statutory References

The defense of insanity is provided for in Tex. Penal Code § 8.01.

§ B7.2 Insanity Generally

Texas Penal Code section 8.01 provides for a defense of insanity to those persons who, at the time of the offense's commission, did not know their conduct was wrong because of a mental disease or defect. Tex. Penal Code § 8.01(a). "Mental disease or defect" does not include abnormalities manifested only by repeated criminal conduct. Tex. Penal Code § 8.01(b). The defense is an affirmative one, placing the burden of persuasion on the defendant to prove the defense by a preponderance of the evidence. *Van Guilder v. State*, 709 S.W.2d 178, 180 (Tex. Crim. App. 1978), *overruled on other grounds by Meraz v. State*, 785 S.W.2d 146, 155 (Tex. Crim. App. 1990). Any "presumption of sanity" is "merely a rule fixing the burden of persuasion and is a correlative of the affirmative defense of insanity." *Madrid v. State*, 595 S.W.2d 106, 110 (Tex. Crim. App. 1979). The presumption of sanity "is not a true presumption at all; rather, it is a substantive rule of law." *Madrid*, 595 S.W.2d at 110.

The statute requires proof that the severe disease or defect existed at the very time of the alleged commission of the offense. The general rule in Texas is that the prosecution does not have to prove the defendant was sane at the time the defendant committed a criminal offense. *Riley v. State*, 830 S.W.2d 584, 585 (Tex. Crim. App. 1992).

The burden of proving sanity, however, shifts or belongs to the state if there is a prior adjudication of insanity by a court of competent jurisdiction. *Arnold v. State*, 873 S.W.2d 27, 30 (Tex. Crim. App. 1993) (citing *Manning v. State*, 730 S.W.2d 744, 748–50 (Tex. Crim. App. 1987)). Thus, evidence of a prior judgment of insanity may provide "presumptive or prima facie evidence of insanity as to the time covered by the finding of the mental status of the party prior to the adjudication." *Witty v. State*, 153 S.W. 1146, 1146 (Tex. Crim. App. 1913). The state may nonetheless rebut this presumption by proving beyond a reasonable doubt that the accused was sane at the time of the charged offense. *Witty*, 153 S.W. at 1146–47.

As proposed in 1970 and adopted in 1974, section 8.01 also permitted the defense of insanity if the actor, because of mental disease or defect, was unable to conform his or her conduct to the law. As originally enacted, the statute defined insanity to exonerate a broader range of mental disease than the rule derived from *M'Naghten's Case*, 8 Eng. Rep. 718, 10 Cl. & Fin. 200, 211 (1843), currently embodied in section 8.01. As a result of the outrage surrounding the exoneration of John Hinckley, the failed assassin of President Reagan, the legislature restricted the defense to the *M'Naghten* definition.

Judge Cochran has explained the Texas insanity defense as putting into contention matters other than those necessarily raised by criminal law's requirement of culpable mental states:

> Texas law, like that of all American jurisdictions, presumes that a criminal defendant is sane and that he intends the natural consequences of his

> acts. Texas law, like that of many American jurisdictions, excuses a defendant from criminal responsibility if he proves, by a preponderance of the evidence, the affirmative defense of insanity. This defense excuses the person from criminal responsibility even though the State has proven every element of the offense, including the *mens rea,* beyond a reasonable doubt. The test for determining insanity is whether, at the time of the conduct charged, the defendant—as a result of a severe mental disease or defect—did not know that his conduct was "wrong."

Ruffin v. State, 270 S.W.3d 586, 591–92 (Tex. Crim. App. 2008) (footnotes omitted).

§ B7.3 Consequences of Insanity Acquittal

Article 46C.154 of the Code of Criminal Procedure provides that the court "may not inform a juror . . . of the consequences to the defendant if a verdict of not guilty by reason of insanity is returned." Tex. Code Crim. Proc. art. 46C.154. This obviously precludes an instruction informing jurors specifically of the procedural steps that follow such a verdict.

It is less clear whether the statute bars a trial court from instructing a jury to give no consideration to what will happen to the defendant in the event of such a verdict. It is possible that the provision may permit an instruction that the jurors should simply assume that the legislature has made adequate provision for defendants so acquitted.

The Committee concluded that the propriety of any instruction on the matter is so unclear and the wisdom in such dispute that it would not recommend that the instruction address the matter.

§ B7.4 Defining "Wrong"

The Committee considered whether the instruction on insanity should go beyond the language of the Texas Penal Code provision and define what is meant by "wrong."

An ongoing debate in criminal law generally is whether "wrong" as used in insanity formulations such as that in Penal Code section 8.01(a) does or should mean "legal" wrong or rather "legal or moral" wrong. The court of criminal appeals has clearly stated that "[u]nder Texas law, 'wrong' in this context means 'illegal.'" *Ruffin v. State*, 270 S.W.3d 586, 592 (Tex. Crim. App. 2008) (relying on *Bigby v. State*, 892 S.W.2d 864, 878 (Tex. Crim. App. 1994)). Some members of the Committee questioned whether, despite this language in the opinions, the meaning of "wrong" has in fact been definitively and fairly resolved as a matter of Texas law.

In any case, the court of criminal appeals has held that section 8.01 is not unconstitutional because it fails to define "wrong" (or "know"). In the course of the discussion, the court suggested that this was in part because "wrong" needs no definition in jury instructions:

> [A]ppellant contends that Texas Penal Code section 8.01 is unconstitutional because it does not define the words "know" and "wrong." He claims that the result is the arbitrary and capricious imposition of the death penalty.
>
> There is no error in omitting the definition of a word used in the statute when the word is used in its ordinary sense and is easily comprehended by everyone. If there is no statutory definition of a term, the trial court is not obligated to define the term when it "has such a common and ordinary meaning that jurors can be fairly presumed to know and apply such meaning." Likewise, when the terms used are simple in themselves and are used in their ordinary meaning, such as they are in this case, jurors are supposed to know their meaning, and therefore, a definition in the jury charge is not necessary. The terms "know" and "wrong," though not defined in the statute, are common and easily comprehended. Appellant's . . . point of error is overruled.

Resendiz v. State, 112 S.W.3d 541, 550 (Tex. Crim. App. 2003) (citations omitted). *Resendiz* does not, of course, definitely hold that an instruction defining "wrong" would be legally inaccurate or even inappropriate.

Nevertheless, the Committee was persuaded that the ongoing disagreements and the flavor of *Resendiz* meant that the Committee should not recommend going beyond existing practice of instructing the jury in the statutory language with "wrong" undefined.

§ B7.5 Defining "Severe Mental Disease or Defect"

Neither the Texas Penal Code nor the case law provides any definitions of "mental disease," "mental defect," or "severe." Consequently, none is provided in the instruction.

The provision in Penal Code section 8.01(b) is, in some sense, a partial definition that excludes very limited situations from the defense. In fact, there are unlikely to be many cases in which there is evidence from which a jury could find that the defendant had a condition (or abnormality) that was "manifested only by repeated criminal or otherwise antisocial conduct." Tex. Penal Code § 8.01(b). In most cases where such repeated conduct is shown, there will also be evidence that the underlying abnormality was manifested by other symptoms or signs. In any case, the Committee recommends including this exclusion only if the evidence is such that the jury could conclude that the abnormality was manifested only by conduct of the sort described.

The Committee considered whether other limited definitional instructions might be appropriate in some situations. Older cases, for example, suggest that an insanity defense could be based on delirium tremens, although this condition was the result of repeated and voluntary consumption of intoxicating substances. *Erwin v. State*, 10 Tex. Ct. App. 700, 704 (1881) ("The evidence tending, whether strongly or otherwise, to establish delirium tremens, the charge should have explained that species [of insanity], and applied the legal principles thereto. This should have been done clearly, distinctly and affirmatively."). *See also Thomas v. State*, 177 S.W.2d 777, 778 (Tex. Crim. App. 1944) (jury instruction permitting insanity acquittal on basis of condition "resulting from the long continued use of alcoholic beverages" was not defective because it failed to specifically mention delirium tremens).

These holdings suggest that under current law a severe mental disease or defect may include a relatively settled condition even if that is the result of repeated instances of voluntary intoxication. If this is current law, that aspect of the definition of mental disease or defect may be so sufficiently specialized as to permit and perhaps require an instructional explanation.

The matter is both unsettled and unusual, the Committee decided, and thus it did not take a position on the issue.

§ B7.6 Instruction—Insanity

If you all agree the state has proved, beyond a reasonable doubt, each of the [*number*] elements listed above, you must next consider whether the defense of insanity applies.

Insanity

You have heard evidence that, when the defendant [*insert specific conduct constituting offense*], as a result of a severe mental disease or defect, he did not know his conduct was wrong.

Relevant Statutes

A person's conduct that would otherwise constitute the crime of [*offense*] is not a criminal offense if, at the time of that conduct, the person, as a result of severe mental disease or defect, did not know that the conduct was wrong and thus was insane.

Insanity is an affirmative defense. Therefore the defendant must prove, by a preponderance of the evidence, both of the following:

1. At the time of the conduct alleged, the defendant had a severe mental disease or defect; and

2. As a result of the severe mental disease or defect, the defendant did not know his conduct was wrong and thus was insane.

Burden of Proof

The burden is on the defendant to prove, by a preponderance of the evidence, that he comes within the affirmative defense of insanity.

Definitions

Preponderance of the Evidence

The term "preponderance of the evidence" means the greater weight and degree of the credible evidence.

[Include the following only if the evidence suggests that the only credible evidence of a mental disease or defect is repeated criminal or antisocial conduct.]

Mental Disease or Defect

"Mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the defendant has proved, by a preponderance of the evidence, that he comes within the affirmative defense of insanity.

To decide the issue of insanity, you must decide whether the defendant has proved, by a preponderance of the evidence, both of the following:

1. At the time of the conduct alleged, the defendant had a severe mental disease or defect; and

2. As a result of the severe mental disease or defect, the defendant did not know his conduct was wrong and thus was insane.

If you find that the defendant has proved, by a preponderance of the evidence, both elements 1 and 2 listed above, you must find the defendant "not guilty by reason of insanity" and specify this in your verdict.

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of [*insert specific offense*], and you all agree the defendant has not proved, by a preponderance of the evidence, both elements 1 and 2 listed above, you must find the defendant "guilty."

[See chapter 2 for verdict instruction.]

§ B8.1 Diminished Capacity Generally

The Committee considered at length whether to recommend jury instructions triggered by a defendant's successful invocation of what is widely—although most likely inaccurately—called the "diminished capacity" doctrine. Ultimately the Committee decided not to formulate such instructions. The following discussion reviews the law of mental condition evidence disproving culpable mental state as it applies to jury instructions.

§ B8.2 *Jackson-Ruffin* Doctrine—Mental Condition Evidence Disproving Culpable Mental State Is Admissible

In *Jackson v. State*, 160 S.W.3d 568, 574 (Tex. Crim. App. 2005), the court of criminal appeals made clear that, as a general rule, defendants can introduce relevant evidence in support of an argument that evidence of their mental impairment at least raises a reasonable doubt about whether they acted with the culpable mental state required by the charged offense.

Ruffin v. State, 270 S.W.3d 586, 595 (Tex. Crim. App. 2008), reaffirmed that *Jackson* makes admissible, as a general rule, "expert mental-disease testimony" that because of a mental illness the defendant did not have the culpable mental state claimed by the state. *Ruffin* held that the rule that such evidence is admissible is not limited to murder prosecutions. *Ruffin*, 270 S.W.3d at 596.

Despite this general rule, *Ruffin* also confirmed that such evidence may be inadmissible in a specific case for one or more of three reasons.

First, if the evidence "does not truly negate the required *mens rea*," it is inadmissible. *Ruffin*, 270 S.W.3d at 596.

Second, a trial judge has considerable discretion to exclude such testimony pursuant to Texas Rule of Evidence 403 if the probative value of the evidence is substantially exceeded by the danger of unfair prejudice, such as jury confusion. *Ruffin*, 270 S.W.3d at 595.

Third, if the defense evidence consists of expert testimony, that evidence may be inadmissible under the evidentiary requirements for expert testimony. This might be the case, for example, "if the expert is insufficiently qualified, or the testimony is insufficiently relevant or unreliable." *Ruffin*, 270 S.W.3d at 595–96.

In *Jackson*, the court noted that "Texas does not recognize diminished capacity as an affirmative defense i.e., a lesser form of the defense of insanity." *Jackson*, 160 S.W.3d at 573. It did, however, then refer to "the diminished-capacity doctrine at issue in this case," which it characterized as "simply a failure-of-proof defense." *Jackson*, 160 S.W.3d at 573.

Ruffin did not use any "diminished capacity" terminology. It did not, however, offer an alternative term for what *Jackson* had described as a diminished capacity "doctrine."

The Committee decided that the position of law discussed in these cases might best be described as a doctrine or rule that—subject to exception—mental "condition" evidence disproving or negating the required culpable mental state is admissible when offered by a criminal defendant. The bench and bar, however, have tended to continue to use the term *diminished capacity*, and the Committee recognized that it could not ignore the continued—albeit unfortunate—use of that phrase.

This rule is independent of the insanity defense. It may be invoked in a case in which no jury issue on insanity is raised, or it can be invoked as an alternative to the insanity defense. In theory, at least, in a case of the latter sort it might not prevent any criminal conviction, as would a successful insanity defense. The rule might, however, persuade the jury that the state failed to prove the defendant guilty of at least the charged offense, thus resulting in conviction of only a submitted lesser included offense.

Some language in the case law suggests that a defendant is not permitted under *Jackson* to argue (or introduce evidence tending to show) that at the time of the conduct charged he lacked the capacity to form the culpable mental state required by the charged offense. Such a reading of *Jackson* might require defense experts to testify only in terms of what mental state the defendant actually had or lacked and to avoid discussion of any lack of capacity to form particular states of mind.

§ B8.3 Jury Instructions on *Jackson-Ruffin* Actually Given

If mental impairment evidence is admitted under *Jackson* and *Ruffin* (discussed at section B8.2 above), a jury might be instructed on the defensive theory on which the evidence was admissible. This has been done in several recent cases.

In *Ward v. State*, No. AP-75750, 2010 WL 454980 (Tex. Crim. App. Feb. 10, 2010) (not designated for publication), the trial court admitted some defense evidence under *Jackson* as tending to show the capital murder defendant, when he intentionally killed the victim, did not do so with the culpable mental state required to make the killing one in the course of committing obstruction or retaliation. The trial judge apparently concluded that the jury needed some instructional guidance on the *Jackson* matter. With the consent of both parties, and—according to the court of criminal appeals' opinion—"to prevent the jury from considering the evidence for insanity or competency," the judge instructed the jury:

> [T]he testimony of [the defense expert] is admitted for the sole purpose of assisting the Jury, if it does, in determining what mental impairments or illness, if any, [Ward] had on June 13, 2005. And if he had any, how, if at all,

> those impairments or illnesses influenced the mental state of [Ward] on June 13, 2005. And it is admitted for no other purpose.

Ward, 2010 WL 454980, at *5. On appeal, no issue was raised concerning the propriety of this instruction. The unreported decision of the court of criminal appeals does not, of course, approve this instruction.

In *Mays v. State*, 318 S.W.3d 368 (Tex. Crim. App. 2010), the defendant was charged with capital murder of a peace officer. The trial court admitted expert testimony concerning the defendant's alleged mental impairment. The defendant objected to the trial judge's proposed instruction "for failing to instruct the jury that evidence of mental illness may be considered in determining whether or not he acted intentionally or knowingly." *Mays*, 318 S.W.3d at 380. The trial judge then added to the instruction:

> You are further instructed that you may consider any mental condition, if any, of the defendant, that he did or did not act intentionally or knowingly in committing the alleged offense, but you cannot consider any mental condition, if any, that the defendant lacked the capacity to act intentionally or knowingly.

Mays, 318 S.W.3d at 380. The trial judge apparently attempted to convey to the jury that it could not consider the defense evidence as tending to show lack of the required culpable mental states because the defendant lacked the capacity to form those states.

On appeal, Mays challenged the instruction given. He argued that "the trial judge erred by instructing the jury that it was not permitted to consider mental-illness evidence that appellant 'lacked the capacity to act intentionally or knowingly.'" *Mays*, 318 S.W.3d at 380.

The court of criminal appeals concluded that the defense evidence tended to show only why the defendant intentionally or knowingly killed the victims and had no tendency to prove that he did not kill them either intentionally or knowingly. It therefore raised no issue under the *Jackson* line of cases. The court then commented: "[A]ppellant was not entitled to any jury instruction concerning that evidence. But having requested such an instruction, appellant has not shown that he suffered any harm when the trial judge gave the jury a legally correct, if unnecessary, instruction concerning the use of that evidence." *Mays*, 318 S.W.3d at 382.

§ B8.4 Other Alternative Instructions Considered

The Committee considered a variety of possible approaches to instructing juries on the *Jackson* rule. It noted, of course, the instructions actually given in *Ward* and *Mays*.

Several other possible instructions were also considered. One might be appropriate in any case in which evidence is admitted under *Jackson* and *Ruffin* but no issue on insanity is raised:

> You have heard evidence that the defendant had a mental disease or defect and, as a result, did not have the culpable mental state these instructions have told you the state must prove. This case does not involve a claim by the defendant that he was insane at the time of the offense.
>
> If you find the defense evidence credible, you may consider it in deciding whether the state has proved the defendant had the required culpable mental state.

Another might be appropriate if the jury is being instructed on insanity. It would serve to alert the jury to the separate issues on which the evidence might be relevant:

> You have heard evidence that the defendant had a mental disease or defect at the time of the conduct constituting the charged offense. If you find this evidence credible, you may consider it on either or both of two distinguishable issues presented by this case.
>
> One is whether the state has proved the defendant acted with the required culpable mental state. [Specifically, the defense contends this evidence at least raises a reasonable doubt about whether the defendant acted with [*insert specific challenged culpable mental state, e.g.*, the intent to cause the death of [*name of victim*]]].
>
> The other is whether the defendant has proved that although he acted with the required culpable mental state he was insane. Specifically, the defense contends that this evidence shows that even if the defendant acted with the culpable mental state required, he did not know his conduct was wrong.

§ B8.5 Permissibility of Instruction

If mental impairment evidence is admitted under *Jackson* and *Ruffin*, would Texas law permit a jury to be instructed regarding the defensive theory on which the evidence was admitted and under which the jury could consider it?

Giesberg v. State, 984 S.W.2d 245 (Tex. Crim. App. 1998), suggests that a jury instruction on this defensive theory is prohibited by article 36.14 of the Texas Code of Criminal Procedure as a comment on the evidence. This is because the defensive theory—the "failure-of-proof" defense—is not explicitly provided for by statute.

Giesberg may, however, have some flexibility. Perhaps some nonstatutory defensive theories, possibly as raised in some situations, pose such unusual risks of jury confusion that an explanatory instruction is permissible and desirable.

In *Walters v. State*, 247 S.W.3d 204 (Tex. Crim. App. 2007), the court developed *Giesberg* and indicated generally:

> [N]either 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.

In *Walters*, however, the court did give significance to its conclusions that the instruction there at issue (on prior verbal threats as relevant to self-defense) "is a marginally 'improper judicial comment' because it is simply unnecessary and fails to clarify the law for the jury." *Walters*, 247 S.W.3d at 213–14. This suggests that an instruction providing necessary clarification of the law for the jury, even if not based on a current statutory provision, would be at least acceptable.

The case law contains some indications otherwise. In *Jackson*, the court of criminal appeals repeated a prior suggestion in *Penry v. State*, 903 S.W.2d 715 (Tex. Crim. App. 1995), that at least some type of instruction on the law recognized in *Jackson* would be inappropriate:

> Penry presented evidence of his mental impairments at trial and emphasized this evidence in closing arguments. Penry argued that the charge to the jury should have included an instruction to consider abnormal physical or mental conditions when deciding the issue of intent. We stated that there was no reason to conclude that the jury failed to consider Penry's proffered evidence and held that "[a] specific instruction calling attention to the evidence on appellant's impaired mental abilities was unnecessary, and might have inappropriately vested this evidence with a disproportionate legal significance in the eyes of the jury."

Jackson v. State, 160 S.W.3d 568, 573 (Tex. Crim. App. 2005) (citations omitted). *Penry* appears to hold that an instruction that the jury should consider such evidence is not required. It certainly does not hold that an instruction that the jury may consider such evidence is impermissible.

If a jury is instructed on insanity and the defendant also relies on diminished capacity, that jury may benefit from—or even need—some guidance on distinguishing the diminished capacity issue from the insanity issue. The argument that article 36.14 at least permits a jury instruction mentioning diminished capacity and distinguishing it from insanity is strongest in these situations. Conceptually, the instruction can be regarded as part of the instruction on the statutory affirmative defense of insanity

rather than as based on the nonstatutory defensive theory legitimized by *Jackson* and *Ruffin*.

The Committee was uncertain about the significance of the court of criminal appeals' discussion in *Mays* (discussed at section B8.3 above). What did the court mean when it commented that the instruction given was "legally correct"? Perhaps the comment referred only to that part of the instruction saying, "[Y]ou may consider any mental condition, if any, of the defendant, that he did or did not act intentionally or knowingly in committing the alleged offense." Or perhaps it also referred to the last part: "[B]ut you cannot consider any mental condition, if any, that the defendant lacked the capacity to act intentionally or knowingly." *Mays v. State*, 318 S.W.3d 368, 380 (Tex. Crim. App. 2010).

Mays characterized the instruction given as "legally correct" but suggested it was "unnecessary." *Mays*, 318 S.W.3d at 382. It gave no hint that some or all of the instruction might have been a prohibited comment on the weight of the evidence. Some members of the Committee regarded *Mays* as signaling that any instruction is undesirable and perhaps prohibited. Others read *Mays* as perhaps carefully avoiding any confirmation of the *Penry* indication that an instruction is barred. They considered the court's characterization of the instruction given as "unnecessary"—but with no additional comment that it was inappropriate or erroneous—as leaving open whether such an instruction might be appropriate.

§ B8.6 Committee's Position

Some members of the Committee believed the case law makes clear that any instruction would be a prohibited comment on the evidence. Others were not convinced of that but believed that an instruction—even if permissible—is undesirable as unnecessary and potentially confusing to jurors. Still others believed that an instruction is desirable and might well be held permissible under what the courts would recognize as an exception to the *Giesberg* rule.

In light of this division among the members, the Committee decided that it could not make any recommendation on this matter.

§ B9.1 Statutory References

The defense of insanity is provided for in Tex. Penal Code § 8.01.

The definition of "intoxication" is based on Tex. Penal Code § 8.04(d).

§ B9.2 Involuntary Intoxication Generally

In *Torres v. State*, 585 S.W.2d 746, 749 (Tex. Crim. App. [Panel Op.] 1979), the court of criminal appeals concluded that it would be "inconsistent" to deny the defense created by the insanity statute to a person who loses his ability to perceive the culpability of his conduct because of involuntary intoxication. As a result, "[w]e find that the defense of involuntary intoxication is well founded in the common law and implicit in our statutory scheme." *Torres*, 585 S.W.2d at 749. It added that the test used for insanity is to be used to determine whether an involuntarily intoxicated person is to be relieved of the criminal consequences of his act. *Torres*, 585 S.W.2d at 749.

The precise basis for *Torres*'s holding is not entirely clear. Conceptually, *Torres* may have meant that involuntary intoxication was—or at least could be found to be by a trier of fact—a kind of severe mental disease or defect that would literally trigger insanity as provided for in the Texas Penal Code and the Texas Code of Criminal Procedure. This, however, would mean that acquittal on this basis would result in a verdict of not guilty by reason of insanity, which would in turn set in motion the process for evaluation and possible commitment under the Code of Criminal Procedure.

Alternatively, *Torres* may have been an exercise of some sort of common-law authority in the judiciary to recognize defenses for which the legislature made no provision in the Penal Code or otherwise. If this is the case, it is not entirely clear why, given *Giesberg v. State*, 984 S.W.2d 245 (Tex. Crim. App. 1998), a jury instruction on the defense is permitted. *See Alexander v. State*, No. 03-01-00263-CR, 2002 WL 436993 (Tex. App.—Austin Mar. 21, 2002, no pet.) (not designated for publication) ("Whether *Torres* remains good law is open to question in light of the recent holding in *Giesberg* . . . .").

The appellate courts considering this issue have determined that because the offense of driving while intoxicated does not require a culpable mental state, involuntary intoxication cannot be a defense. See *Brown v. State*, 290 S.W.3d 247, 250 (Tex. App.—Fort Worth 2009, pet. ref'd). *See also* Comm. on Pattern Jury Charges—Criminal, State Bar of Tex., *Texas Criminal Pattern Jury Charges—Intoxication & Controlled Substances* § A4.10 (2013).

§ B9.3 Committee's Position

There was agreement that under *Torres v. State*, 585 S.W.2d 746 (Tex. Crim. App. [Panel Op.] 1979), certain evidence of involuntary intoxication entitled a defendant to some sort of instruction. The Committee was somewhat split, however, on specifically how *Torres* should be implemented in jury instructions.

Torres itself is not of much help. The court there found reversible error in the trial judge's failure to instruct the jury on involuntary intoxication. Defendant Torres had sought an instruction directing the jury "to acquit her if they found that she was involuntarily intoxicated and further found that she did not act voluntarily in the commission of the offense because of this intoxication." *Torres*, 585 S.W.2d at 748. The court held that the trial judge did not err in failing to give the requested instruction because it did not accurately state the applicable law. The request for the inaccurate instruction nevertheless preserved the error in failing to give any instruction at all on the subject. *Torres*, 585 S.W.2d at 749–50.

Some members of the Committee noted that in *Mendenhall v. State*, 77 S.W.3d 815, 817 (Tex. Crim. App. 2002), the court of criminal appeals explained: "In *Torres v. State* . . . we held that the defense of insanity due to involuntary intoxication was 'implicit' in the language of § 8.01(a)." This, these members believed, suggested that jury submission should be under Texas Penal Code section 8.01's insanity defense.

Such an instruction might tell the jury to acquit the defendant only if the defense evidence showed that as a result of involuntary intoxication the defendant suffered from a mental disease or defect and as a result did not know his conduct was wrong. It might be labeled "Insanity by Involuntary Intoxication." This approach would tie the involuntary intoxication defense closely to its only possible statutory basis, the insanity defense in section 8.01.

But this approach may also suggest that the jury be told that if it resolved the matter in favor of the defendant, this should result in a verdict of not guilty by reason of insanity. This, in turn, would trigger the procedure in chapter 46C of the Code of Criminal Procedure for processing a defendant acquitted on insanity grounds. Even those members of the Committee favoring tying involuntary intoxication to section 8.01 believed this would be undesirable. The chapter 46C procedure assumes the acquittal was based on a potentially continuing impairment of the defendant—a "severe mental disease or defect." *See* Tex. Penal Code § 8.01(a). Any acquittal on involuntary intoxication grounds would not be based on such impairments but rather on the temporary effect of intoxicating substances.

Consequently, the Committee concluded, not without difficulty, that *Torres* establishes that Texas law establishes an affirmative defense of involuntary intoxication implicit in the insanity defense. Whether involuntary intoxication should result in acquittal, under *Torres*, depends on whether the evidence shows that the defendant

meets the standard that section 8.01(a) provides for an insanity defense based on a severe mental disease or defect.

The defense should be explained to the jury in terms of an involuntary intoxication defense rather than as a variant of insanity. Finally, the Committee recommends the jury be told that a defendant successful in asserting the defense is entitled to a simple "not guilty" verdict.

On the other hand, the court of criminal appeals in *Giesberg v. State*, 984 S.W.2d 245, 250–51 (Tex. Crim. App. 1998), made clear that if a defense is not set out in the Penal Code, as a defense or an affirmative defense, the defendant is not entitled to a stand-alone instruction.

The court in *Mendenhall* was compelled to tie involuntary intoxication to the insanity defense set forth in Penal Code section 8.01 to label it an affirmative defense. *Mendenhall*, 77 S.W.3d at 815, 818 (the legislature intended section 8.01(a) to encompass the defense of insanity due to involuntary intoxication; it is now an affirmative defense to prosecution that, at the time of the alleged offense, the defendant, as a result of a severe mental defect caused by involuntary intoxication, did not know that his conduct was wrong). Thus, an argument could be made that a correct charge would require the jury to be instructed that at the time of the defendant's conduct, as a result of severe mental disease or defect, he did not know that his conduct was wrong.

Some members of the Committee reasoned that a charge on involuntary intoxication should include (1) as a result of a severe mental defect or disease caused by involuntary intoxication (2) the defendant did not know his conduct was wrong, in order to be consistent with case law. *Mendenhall*, 77 S.W.3d at 818. The concern is predicated on the belief that, by deleting from the charge the language "as a result of a severe mental disease or defect," the charge may fail to follow the mandate of that provision. Without that language, the charge is not an insanity charge as required by *Mendenhall*. Rather, it might be construed as a charge on the defense of "involuntary intoxication," which is not authorized by the Penal Code and runs afoul of the *Giesberg* holding.

§ B9.3.1 Burden of Proof

Torres v. State did not explicitly address whether involuntary intoxication should be treated as an affirmative defense, with the defendant having the burden of proof, or as a defense, with the prosecution having the burden of proving that it does not apply. But *Torres*'s reliance on the insanity defense as at least a partial basis for the involuntary intoxication defense suggests the matter should be treated as an affirmative defense.

A number of case discussions have assumed this to be the case. *Ex parte Martinez*, 195 S.W.3d 713 (Tex. Crim. App. 2006), for example, described *Mendenhall v. State*, 77 S.W.3d 815 (Tex. Crim. App. 2002), as standing for the proposition that "it is *an affirmative defense* to prosecution that, at the time of the alleged offense, the defen-

dant, as a result of a severe mental defect caused by involuntary intoxication, did not know that his conduct was wrong." *Ex parte Martinez*, 195 S.W.3d at 722 (emphasis added). *See also Hardie v. State*, 588 S.W.2d 936, 939 (Tex. Crim. App. 1979) (in *Torres*, "this Court has held that a defendant may raise *the affirmative defense* of involuntary intoxication") (emphasis added); *Strickland v. State*, No. 09-09-00081-CR, 2010 WL 546727, at *2 (Tex. App.—Beaumont Feb. 17, 2010, no pet.) (not designated for publication) ("Involuntary intoxication is an affirmative defense to a criminal indictment if, at the time of the alleged offense, the defendant, as a result of a severe mental defect caused by involuntary intoxication, did not know that his conduct was wrong.").

The Committee was persuaded that the court of criminal appeals intended involuntary intoxication, like insanity, to have the procedural characteristics of an affirmative defense.

§ B9.3.2 Definition of "Involuntary" Intoxication—Generally

A major problem for the Committee was formulating a satisfactory definition of the involuntary intoxication required by the defense.

On the rare occasions when instructions have addressed involuntary intoxication and defined that term, they have relied on the following language from *Torres*: "To constitute involuntary intoxication, there must be an absence of an exercise of independent judgment and volition on the part of the accused in taking the intoxicant." *Torres v. State*, 585 S.W.2d 746, 748 (Tex. Crim. App. [Panel Op.] 1979) (quoting *Hanks v. State*, 542 S.W.2d 413, 416 (Tex. Crim. App. 1976)) (citing *Johnson v. Commonwealth*, 115 S.E. 673, 677 (Va. 1923)).

In *Brockman v. State*, No. 05-01-00064-CR, 2002 WL 24395 (Tex. App.—Dallas Jan. 10, 2002, pet. ref'd) (not designated for publication), for example, the instruction provided:

> You are instructed that involuntary intoxication is a defense to prosecution for an offense *when it is shown that the accused has exercised no independent judgment or volition in taking the intoxicant or intoxicants* and that as a result of his intoxication the accused did not know that his conduct was wrong, or was incapable of conforming his conduct to the requirements of the law he allegedly violated.

Brockman, 2002 WL 24395, at *2.

In *Hanks*, the court held that involuntary intoxication was not raised because the defendant acknowledged suspecting that "something" had been placed in his drink. "If appellant was aware that a suspected drug had been placed in his drink, as he testified, and in spite of such knowledge he drank the beverage, any intoxication resulting therefrom could not be classified as *involuntary*." *Hanks*, 542 S.W.2d at 416.

It seems clear from the rather awkward definition of involuntary intoxication that intoxication is voluntary if it results from "volition" in ingestion of a substance known to have intoxicating characteristics. Volition apparently means simply the absence of duress.

Perhaps most importantly, the intoxication need not be the result of a decision to become intoxicated.

In other jurisdictions, jury instructions are often based on statutory provisions in turn based on the Model Penal Code:

> The Model Penal Code uses the term "self-induced" intoxication, rather than "voluntary" intoxication, and defines that term to mean, intoxication caused by substances which the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such circumstances as would afford a defense to a charge of crime. Model Penal Code § 2.08(5)(b).

Commonwealth v. Smith, 831 A.2d 636, 640 n.3 (Pa. Super. Ct. 2003).

The instruction at section B9.4 below contains a definition that avoids the Texas case law's somewhat awkward phraseology but is consistent with that case law.

§ B9.3.3 Definition of "Involuntary" Intoxication—Substances Taken on Medical Advice

Should a defendant be able to base the defense on evidence that he introduced into his body a substance he was aware might cause "a disturbance of mental or physical capacity" but that he did so on medical advice? One Texas court has suggested not: "Involuntary intoxication by prescription medication occurs only 'if the individual had no knowledge of possible intoxicating side effects of the drug, since independent judgment is exercised in taking the drug as medicine, not as an intoxicant.'" *Nelson v. State*, 149 S.W.3d 206, 210 (Tex. App.—Fort Worth 2004, no pet.) (quoting *Mendenhall v. State*, 15 S.W.3d 560, 565 (Tex. App.—Waco 2000), *rev'd on other grounds*, 77 S.W.3d 815, 818 (Tex. Crim. App. 2002)).

Most jurisdictions (and, as indicated in section B9.3.2 above, the Model Penal Code) appear to provide otherwise. This is apparently on the rationale that a patient is entitled to rely on an assumption that a health professional would not direct the taking of such a substance unless the possible resulting disturbances of capacity were minimal or justified by the medical need for the substance. Of course, a defendant who takes medication contrary to the terms of the medical advice does not take it pursuant to that advice and the resulting intoxication is not involuntary for purposes of this defense.

The Committee considered adding to the definition of involuntary intoxication the following:

> Intoxication is involuntary if it results from the introduction of a substance into the body pursuant to medical advice [*or* pursuant to the advice of a medical professional].

A majority of the Committee concluded, however, that there was sufficient doubt whether this reflected Texas law and that it should not be included.

§ B9.4 Instruction—Involuntary Intoxication

If you all agree the state has proved, beyond a reasonable doubt, each of the [*number*] elements listed above, you must next consider whether the defense of involuntary intoxication applies.

Involuntary Intoxication

You have heard evidence that, when the defendant [*insert specific conduct constituting offense*], as a result of involuntary intoxication, he did not know his conduct was wrong.

Relevant Statutes

A person's conduct that would otherwise constitute the crime of [*offense*] is not a criminal offense if, at the time of that conduct, the person, as a result of involuntary intoxication, did not know that the conduct was wrong.

Involuntary intoxication is an affirmative defense. Therefore the defendant must prove, by a preponderance of the evidence, both of the following:

1. At the time of the conduct alleged, the defendant was involuntarily intoxicated; and

2. As a result of that involuntary intoxication, the defendant did not know his conduct was wrong.

Burden of Proof

The burden is on the defendant to prove, by a preponderance of the evidence, that he comes within the affirmative defense of involuntary intoxication.

Definitions

Intoxication

"Intoxication" means a disturbance of mental or physical capacity resulting from the introduction of any substance into the body.

Involuntary Intoxication

"Intoxication" is involuntary if the intoxication is (1) the result of the introduction of a substance into the defendant's body without his knowledge or (2) the result of the defendant's introduction of a substance into his body under circumstances in which the defendant neither knew nor should have known, with

the exercise of reasonable care, that the substance had a tendency to cause intoxication.

Preponderance of the Evidence

The term "preponderance of the evidence" means the greater weight and degree of the credible evidence.

Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the defendant has proved, by a preponderance of the evidence, that he comes within the affirmative defense of involuntary intoxication.

To decide the issue of involuntary intoxication, you must decide whether the defendant has proved, by a preponderance of the evidence, both of the following:

1. At the time of the conduct alleged, the defendant was involuntarily intoxicated; and

2. As a result of that involuntary intoxication, the defendant did not know his conduct was wrong.

If you find that the defendant has proved, by a preponderance of the evidence, both 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, each of the elements of the offense of [*insert specific offense*], and you all agree the defendant has not proved, by a preponderance of the evidence, both elements 1 and 2 listed above, you must find the defendant "guilty."

[See chapter 2 for verdict instruction.]

COMMENT

Limitation on Involuntary Intoxication Defense. A major limitation on the involuntary intoxication defense was established in *Mendenhall v. State*, 77 S.W.3d 815, 818 (Tex. Crim. App. 2002).

Mendenhall's evidence was that he was diabetic and that he received an insulin injection as part of the treatment for this condition. This caused a decrease in his blood sugar and rendered him "unconscious or semi-conscious due to hypoglycemia (*i.e.*,

low blood sugar)." *Mendenhall*, 77 S.W.3d at 816. While in this condition he committed the charged assault.

The trial court did not err in refusing to instruct the jury on involuntary intoxication, *Mendenhall* held. This was because the defense evidence failed to raise a jury issue about whether, as a result of his apparently involuntary intoxication, he did not know his conduct was wrong. The court explained:

> [I]s the insanity defense available to a defendant who was unconscious or semi-conscious at the time of the alleged offense, so that it might be said of him that he did not know his conduct was wrong only because he did not consciously know of his conduct at all? We conclude the answer to that question is "no."

Mendenhall, 77 S.W.3d at 818 (nothing in legislative history of section 8.01(a) "suggests that any legislators intended for the insanity defense to apply to persons who were unconscious or semi-conscious at the time of the alleged offense").

Mendenhall appears to hold that a defendant's evidence must show that involuntary intoxication's impact was more than (or different from) simply rendering the defendant "unconscious or semi-conscious at the time of the alleged offense."

The Committee considered whether the *Mendenhall* limitation was one appropriate for communication to juries, perhaps as part of the instruction on the showing required to establish that the defendant did not know his conduct was wrong. It decided, however, that *Mendenhall* reflected law to be applied by trial judges in deciding whether to instruct juries and by appellate courts in evaluating the sufficiency of evidence to reject a defense of involuntary intoxication. Therefore the Committee's instructions make no attempt to incorporate the holding.

§ B10.1 Statutory References

The entrapment "defense" is based on Tex. Penal Code § 8.06(a).

§ B10.2 Entrapment Generally

A Texas defendant may raise a claim of entrapment pretrial as a matter of law. Tex. Code Crim. Proc. art. 28.01, § 1(9). Pretrial resolution of such a claim is, however, disfavored: "[A] defendant is entitled to dismissal of the charges under section 8.06 in the pretrial hearing context only when he can establish entrapment as a matter of law with *conflict-free, uncontradicted, uncontested* or *undisputed* evidence." *Hernandez v. State*, 161 S.W.3d 491, 499 (Tex. Crim. App. 2005).

When entrapment is submitted to the trial judge, the trial court should instruct the jury on the abstract law and apply that law to the facts of the case. The application provision of the instruction should identify all the individuals the defendant claims engaged in entrapment. *Vega v. State*, 394 S.W.3d 514 (Tex. Crim. App. 2013). The application provision need not summarize the defendant's version of the facts. *Kennard v. State*, 649 S.W.2d 752, 761–62 (Tex. App.—Fort Worth 1983, pet. ref'd). *Accord Bocanegra v. State*, No. 05-97-00492-CR, 1999 WL 482629 (Tex. App.—Dallas July 12, 1999, pet. ref'd) (not designated for publication).

§ B10.2.1 Objective–Subjective Approach

Texas Penal Code section 8.06(a) was construed in *England v. State*, 887 S.W.2d 902 (Tex. Crim. App. 1994), as imposing a combined subjective and objective approach. The persuasion used must be such as is "likely to cause persons to commit the offense." Tex. Penal Code § 8.06(a). This is an objective standard.

England recognized that, in some jurisdictions, the requirement that the accused have been induced also requires a purely objective inquiry into whether the defendant was subject to efforts at persuasion. Section 8.06(a), however, reflects an intention to impose a subjective requirement. A person was induced to engage in criminal conduct, under *England*, only if "but for the persuasive aspect of the police conduct, [the person] would not have engaged in the conduct charged." *England*, 887 S.W.2d at 912.

England addressed the matter in the context of whether the state was entitled to offer evidence of extraneous offenses by the accused in response to a claim of entrapment. Since the inducement matter involves the subjective motivation of the accused, *England* held, the state was entitled to introduce such evidence.

Nothing in *England* addressed the question of whether jury charges may or perhaps must go beyond the statutory language to implement the legislative intent discerned in the decision. As the *England* analysis itself suggested, the court's own nearly twenty-year delay in recognizing the meaning of the statutory language suggests that this meaning might not be effectively conveyed in a jury charge that simply tracks the statute.

§ B10.2.2 Subjective "Inducement" Prong

The subjective requirement that the defendant have been induced to engage in the conduct constituting the offense by persuasion or other means used by law enforcement agents appears to inject into Texas entrapment law the concept of "predisposition" that is the major focus of entrapment under a purely subjective approach.

Clearly, inducement is not established by proof that but for the law enforcement agents' actions the defendant would not have engaged in the precise criminal activity he did commit, at the precise time and location involved in the case. The question is whether he was sufficiently predisposed to commit offenses similar to the one charged in the case that had he not been offered the opportunity to commit this specific offense he would nevertheless have committed another similar one.

This arguably meshes with the explicit statutory statement, "Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment." Tex. Penal Code § 8.06(a). If the officers simply afford the defendant an opportunity to commit in their presence an offense that the defendant is already predisposed to commit, the officers have not induced him to commit the offense.

The hard question is the extent to which the charge should attempt to convey this concept to the jury.

The instruction at section B10.3 below offers statements of the law of entrapment going considerably beyond the statutory language.

§ B10.2.3 "Predisposition" under Texas Entrapment Law

The Texas court of criminal appeals' development of the entrapment issue of inducement has not explicitly used the term *predisposition* that is so frequently emphasized in other jurisdictions' entrapment discussions.

Nevertheless, the courts of appeals have quite offhandedly used that terminology to explain analyses under the Texas statute. *E.g., Y'Barbo v. State*, No. 05-98-01903-CR, 2000 WL 1035871, at *3 (Tex. App.—Dallas July 19, 2000, pet. ref'd) (not designated for publication) (noting that "[a]ppellant's predisposition to sell drugs" is indicated by certain evidence); *Lawrence v. State*, 1997 WL 627616, at *3 (Tex. App.—Dallas Oct. 13, 1997, no pet.) (not designated for publication) (citing *Martinez v. State*, 802 S.W.2d 334, 337 (Tex. App.—Houston [1st Dist.] 1990, pet. ref'd) as holding "need for money for his family would not induce a person with no predisposition to deliver cocaine to sell cocaine for 'quick money'"); *Kilbourn v. State*, 1997 WL 295337, at *3 (Tex. App.—Houston [14th Dist.)] June 5, 1997, no pet.) (not designated for publication) (identifying evidence that "refuted [appellant's] claim that she was not predisposed to commit the offenses").

The Dallas court of appeals held that a trial court did not err in refusing the defendant's request to instruct the jury: "You may not consider whether the defendant was predisposed to commit the crime." *Tanner v. State*, No. 05-91-00619-CR, 1992 WL 186259, at *3 (Tex. App.—Dallas Aug. 5, 1992, no pet.) (not designated for publication). Applying pre-*England* law, the court assumed that the requested charge accurately stated the applicable law but found that position adequately set out in the charge given. After *England*, the charge would not accurately convey the substantive law.

Although Penal Code section 8.06 does not use predisposition terminology, the case law suggests that a jury charge could properly use that terminology. The critical question is whether that terminology is useful in conveying to juries the full meaning of section 8.06 as construed in *England*.

§ B10.2.4 Objective Prong

The objective prong of the entrapment standard is stated in Texas Penal Code section 8.06(a) in bare-bones terms: The persuasion or other means used to induce the defendant to engage in the conduct charged must be "likely to cause persons to commit the offense." Tex. Penal Code § 8.06(a).

The leading discussions make clear the court of criminal appeals has read this bare-bones language as incorporating what general law usually requires in these situations: persuasion likely to cause unpredisposed and ordinary persons to develop the intention to commit the offense. As noted in *England*—

> Once inducement is shown, the issue becomes whether the persuasion was such as to cause an ordinarily lawabiding person of average resistance nevertheless to commit the offense. This is the objective component of § 8.06.

England v. State, 887 S.W.2d 902, 914 (Tex. Crim. App. 1994). Eleven years later, the court observed:

> [E]ntrapment issues are generally considered appropriate ones for the jury "because the jury has a 'particular claim to competence' on the question of what temptations would be too great for an ordinary law-abiding citizen."

Hernandez v. State, 161 S.W.3d 491 (Tex. Crim. App. 2005) (quoting 2 Wayne R. LaFave, Jerold H. Israel & Nancy J. King, *Criminal Procedure* § 5.3(c), at 421 (2d ed. 1999) (citations omitted)).

A jury charge using simply the statutory language fails to convey the full meaning of the objective prong as that prong has been construed by the courts. Therefore, the instruction at section B10.3 below uses language consistent with the case law discussions.

§ B10.2.5 Confession and Avoidance

Since at least *Byerley v. State*, 417 S.W.2d 407, 408 (Tex. Crim. App. 1967), Texas law has been that the defendant is not entitled to a jury instruction on entrapment if by his testimony at trial he denied committing the act constituting the offense. *Byerley* cited only Fifth Circuit federal law for the controlling proposition of law.

Elsewhere, the court has provided something of a rationale for the rule: "The reason that the defense of entrapment is not available to one who denies he committed the offense is that the defense of entrapment necessarily assumes that the act charged was committed." *Warren v. State*, 565 S.W.2d 931, 933 (Tex. Crim. App. 1978) (citations omitted).

The court of criminal appeals has made clear that this rule does not require a formal admission of the offense:

> [T]he defendant who pleads not guilty and who does not take the stand or offer any testimony inconsistent with her commission of the crime would still be entitled to offer a defense of entrapment. Thus, the defendant is not required to admit the commission of the offense in each case.

Norman v. State, 588 S.W.2d 340, 345 (Tex. Crim. App. [Panel Op.] 1979) (citation omitted).

Juarez v. State, 308 S.W.3d 398, 404 (Tex. Crim. App. 2010), reaffirming that confession and avoidance applies with regard to the defense of necessity, did not address that case law apparently applying some version of this doctrine in entrapment cases.

§ B10.2.6 Evidence Required to Mandate Jury Charge

Regarding when a charge on entrapment should be given, the court of criminal appeals explained:

> Under Texas law, when a defendant raises the defense of entrapment at trial, he has the burden of producing evidence to establish every element of that defense. He must present a *prima facie* case that:
>
> 1) he engaged in the conduct charged;
>
> 2) because he was induced to do so by a law enforcement agent;
>
> 3) who used persuasion or other means; and
>
> 4) those means were likely to cause persons to commit the offense.

Hernandez v. State, 161 S.W.3d 491, 497 (Tex. Crim. App. 2005).

This does not mean that *defense* evidence must support each of these. Ordinarily, for example, the state's evidence will support the proposition that the defendant

engaged in the conduct charged. To establish a right to a charge, the defendant need not himself offer evidence that he committed the conduct.

§ B10.2.7 Status of "Informers"

A special problem of jury submission arises when the defendant claims to have been entrapped by a person the defendant contends was a "person acting in accordance with instruction from [personnel of federal, state, or local law enforcement agencies]," that is, an informer. *See* Tex. Penal Code § 8.06(b). When, if ever, should the jury charge tell the jurors that the person was a law enforcement agent as a matter of law? If the issue is left for the jury, should the jury be given any guidance for determining whether the informer was a law enforcement agent?

The leading case is the panel decision in *Rangel v. State*, 585 S.W.2d 695 (Tex. Crim. App. [Panel Op.] 1979). The jury charge on entrapment, in part, told the jury to focus on whether "[the defendant] was induced to [commit the offense] by Johnny Rodriguez, who was a person acting in accordance with instructions from a law enforcement agent, to-wit: Richard Moreno . . . ." *Rangel*, 585 S.W.2d at 697. The opinion leaves somewhat unclear whether Rangel contended that this improperly submitted the status of Rodriguez to the jury or rather that it did so by improperly telling the jury that it should find entrapment only if it found Moreno specifically instructed Rodriguez to entrap Rangel. In any case, the panel found no error and seemed to approve the jury submission: "The language of the charge merely tracked . . . the statutory language, and by tracking the language of Sec. 8.06(b) the charge of the trial court correctly instructed the jury on the law of entrapment." *Rangel*, 585 S.W.2d at 698.

Rangel's discussion continued to address in obvious dicta the analysis necessary to determine whether an informer who entraps does so as a law enforcement agent:

> [The] examination must cover two areas.
>
> The first area of inquiry should be the specific case at bar. A search must be made to determine if the officer specifically instructed his agent or informant to use an improper procedure to "make a case" against a particular defendant. If such specific instructions are discovered, the entrapment defense is available. . . . However, there is a second area of inquiry to which attention must also be given.
>
> The control or instruction from a police officer to his informant which would constitute entrapment may also be of a general nature. Such general control might arise when an informant has been used repeatedly. After the informant becomes "experienced," he realizes how to "set up" people to make cases. In such a situation, there is no specific instruction but the police official is still exercising control by failing to properly instruct his

> agents. Factors for consideration in such cases include number of cases this informant has been involved in and their disposition, if available; the amount and method of compensating the informant; the working relationship between the police officer and the informant; and his contacts with police officers.

Rangel, 585 S.W.2d at 699. Texas appellate courts continue to inquire whether an informer was under either the specific or general control of law enforcement. *E.g., Beal v. State*, 35 S.W.3d 677, 687 (Tex. App.—Houston [1st Dist.] 2000), *rev'd on other grounds*, 91 S.W.3d 794 (Tex. Crim. App. 2002); *Gonzalez v. State*, No. 2-02-291-CR, 2003 WL 21101520 (Tex. App.—Fort Worth June 23, 2003, pet. ref'd) (not designated for publication), *overruled on other grounds by Howard v. State*, 145 S.W.3d 327 (Tex. App.—Fort Worth 2004, no pet.).

In *England v. State*, 887 S.W.2d 902 (Tex. Crim. App. 1994), the defendant claimed he was entrapped by Ayala, a probationer acting as a paid informant. The court of criminal appeals noted, "The trial court in this cause instructed the jury that Ayala was a 'person acting in accordance with instructions from' a law enforcement agent as a matter of law. Whether that was a correct instruction on the facts of this case is not before us." *England*, 887 S.W.2d at 908 n.5.

One court noted that no authority was cited in support of a claim that the defendant was entitled, on the basis of uncontested evidence, to have the jury told that the informant involved was a law enforcement agent as a matter of law. It found insufficient evidence to establish the informer's status as a matter of law. *Bocanegra v. State*, No. 05-97-00492-CR, 1999 WL 482629 (Tex. App.—Dallas July 12, 1999, pet. ref'd) (not designated for publication). *See also Farris v. State*, No. 07-95-0189-CR, 1997 WL 136447 (Tex. App.—Amarillo Mar. 26, 1997, pet. ref'd) (not designated for publication) (any error in submitting informer's status to jury was not preserved); *McKinney v. State*, No. 01-89-00538-CR, 1990 WL 151232 (Tex. App.—Houston [1st Dist.] Oct. 11, 1990, no pet.) (not designated for publication) (evidence did not show informers were law enforcement agents as a matter of law, so trial judge did not err in failing to "name" them in jury charge on entrapment).

If an informer's status is submitted to the jury, the charge should permit the jury to find the informer a law enforcement agent under either of the alternatives set out in *Rangel*. One court explained:

> The jury charge in this case instructed the jury to find appellant not guilty if it found that informant was *specifically* instructed by law enforcement to entrap appellant. This improperly limits the entrapment defense by omitting the situation in which there is no specific instruction but the informant is still acting under the general control of law enforcement.

Garza v. State, No. 05-96-00711-CR, 1998 WL 546134, at *4 (Tex. App.—Dallas Aug. 27, 1998, no pet.) (not designated for publication).

In *Beal*, the court found no error in a charge requiring specific instruction when there was no evidence of general control. The discussion suggested, however, that in an appropriate case the defendant would be entitled to what the court called "a general agent charge." *Beal*, 35 S.W.3d at 687.

The instruction at section B10.3 below contains provisions permitting the trial judge to, in effect, submit to the jury the question of whether a private person was acting in accordance with instructions from law enforcement agency personnel. Alternatively, the jury can be instructed that the private person was, as a matter of law, a law enforcement agent.

§ B10.3 Instruction—Entrapment

If you all agree the state has proved, beyond a reasonable doubt, each of the [*number*] elements listed above, you must next consider whether the state has proved that the defense of entrapment does not apply.

Entrapment

You have heard evidence that, if the defendant [*insert specific conduct constituting offense*], he was entrapped into doing so. Specifically, the defendant contends he was entrapped by [*name*], [a law enforcement agent/a person acting in accordance with instructions from law enforcement agency personnel].

Relevant Statutes

A person's conduct that would otherwise constitute the crime of [*offense*] is not a criminal offense if the person engaged in the conduct because he was induced to do so by a law enforcement agent using persuasion or other means likely to cause an ordinary person to commit the offense.

The defendant was not induced to commit the offense by a law enforcement agent if the defendant was already inclined to commit offenses such as the one charged in this case before being approached by a law enforcement agent.

Conduct of [a law enforcement agent/a person acting in accordance with instructions from law enforcement agency personnel] that merely affords a person an opportunity to commit an offense does not constitute entrapment.

The defendant is not entitled to the defense of entrapment if he was inclined and willing to commit offenses such as the one charged before he was approached by [a law enforcement agent/a person acting in accordance with instructions from law enforcement agency personnel] and the [law enforcement agent/person acting in accordance with instructions from law enforcement agency personnel] merely gave the defendant an opportunity to commit the offense.

Burden of Proof

The defendant is not required to prove that he was entrapped into [*insert specific conduct constituting offense*]. Rather, the state must prove, beyond a reasonable doubt, that entrapment did not take place.

Definitions

Law Enforcement Agent

"Law enforcement agent" includes—

1. personnel of United States, state, and local law enforcement agencies; and

2. any person acting in accordance with instructions from such law enforcement agency personnel.

[Include the following if an informer's status is submitted to the jury.]

Acting in Accordance with Instructions from Law Enforcement Personnel

A person acts in accordance with instructions from law enforcement personnel if—

1. the person has been specifically instructed to use persuasion or other means constituting entrapment by law enforcement agency personnel; or

2. the person is under the general control of law enforcement agency personnel [as may result from repeated use of the person as an informer] and the law enforcement agency personnel fail to properly instruct the person to avoid use of persuasion or other means constituting entrapment.

[Include the following if an informer's status is determined to be that of a law enforcement agent as a matter of law.]

With regard to the events at issue in this case, [*name*] was [acting in accordance with instructions from law enforcement agency personnel/was a law enforcement agent].

Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the state has proved the defendant was not entrapped into committing the offense.

To decide the issue of entrapment, you must determine whether the state has proved, beyond a reasonable doubt, one of the following:

[Include the following if a law enforcement agent is claimed to have committed entrapment.]

1. The defendant was not induced to commit the offense by [*name*], a law enforcement agent; or

2. [*Name*] may have induced the defendant to commit the offense but did not use persuasion or other means likely to cause ordinary law-abiding persons not already inclined to commit offenses to form the intent to commit such crimes.

[Include the following if an informant is claimed to have committed entrapment.]

1. The defendant was not induced to commit the offense by [*name*]; or

2. [*Name*] was neither member of a United States, state, or local law enforcement agency nor a person acting in accordance with instructions from such law enforcement agency personnel; or

3. [*Name*] may have induced the defendant to commit the offense but did not use persuasion or other means likely to cause ordinary law-abiding persons not already inclined to commit offenses to form the intent to commit such crimes.

[Continue with the following.]

You must all agree that the state has proved, beyond a reasonable doubt, [either or both of elements 1 and 2/one or more of elements 1, 2, and 3] listed above. You need not agree on which of these elements the state has proved.

If you find that the state has failed to prove, beyond a reasonable doubt, [either or both of elements 1 and 2/one or more of elements 1, 2, and 3] listed above, you must find the defendant "not guilty."

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of [*insert specific offense*], and you all agree the state has proved, beyond a reasonable doubt, [either or both of elements 1 and 2/one or more of elements 1, 2, and 3] listed above, you must find the defendant "guilty."

[See chapter 2 for verdict instruction.]

§ B11.1 Statutory References

The defense of necessity is provided for in Tex. Penal Code § 9.22.

The definition of "reasonable belief" is based on Tex. Penal Code § 1.07(a)(42).

§ B11.2 Necessity Generally—Need to "Admit" Offense

The defense of necessity raises a question common to many defenses—the extent to which a defendant's right to an instruction depends on the defendant's having in some sense admitted the charged offense.

This question is possibly a part of, or related to, the question of whether a defendant's positions regarding the jury instructions must be internally consistent.

§ B11.2.1 Inconsistent Defensive Positions

Apparently, a defendant's right to an instruction on one defense is not affected by a demonstration that the defendant's reliance on that defense is logically inconsistent with the defendant's reliance on another defense about which the jury will be instructed.

In *Bowen v. State*, 162 S.W.3d 226 (Tex. Crim. App. 2005), the court of criminal appeals apparently disavowed any general rule that a defendant's right to an instruction on a defensive matter is defeated by the fact that the defense position on that matter is inconsistent with the defense's position on other defensive matters on which the jury will be instructed. The court explained:

> We have recognized the independence of separate defenses by holding that a defendant is entitled to the submission of every defensive issue raised by the evidence, even if the defense may be inconsistent with other defenses. We reaffirm this principle by holding self-defense's statutorily imposed restrictions do not foreclose necessity's availability.

Bowen, 162 S.W.3d at 229–30 (footnote omitted).

Apparently, then, the fact that a defendant's request for a jury instruction on a defensive matter is inconsistent with that defendant's position on other parts of the jury instructions does not defeat the defendant's right to the instruction.

If the evidence raises several possible defenses, the trial court cannot require the defense to in some sense "elect" only one position on which the court will instruct the jury.

Bowen might be at odds with any requirement that a defendant in some sense "admit" the charged offense as a condition of seeking an instruction on a defensive matter.

§ B11.2.2 Confession and Avoidance

The confession and avoidance doctrine was applied to necessity in *Juarez v. State*, 308 S.W.3d 398, 404 (Tex. Crim. App. 2010).

In *Juarez*, a prosecution for aggravated assault on a peace officer by biting the officer, the court found the defendant entitled to an instruction on necessity. The defendant had in conclusory terms and in response to leading questions denied that he bit the officer intentionally, knowingly, or recklessly. Nevertheless, the court explained:

> Juarez's mental state—that the biting was done either intentionally, knowingly, or recklessly—could have reasonably been inferred from his testimony about the circumstances surrounding his conduct. Thus, the confession and avoidance doctrine was satisfied because Juarez had admitted to both the act and the requisite mental state.

Juarez, 308 S.W.3d at 405 (footnote omitted). A summary denial of the required culpable mental state apparently does not preclude an instruction if the defendant's testimony nevertheless would permit a reasonable inference that he in fact had the required culpable mental state.

Confession and avoidance in the necessity context was addressed in two recent pre-*Juarez* decisions by the court. In *Bowen v. State*, 162 S.W.3d 226 (Tex. Crim. App. 2005), the defendant was charged with resisting arrest. Bowen testified and admitted struggling with the arresting officers. She disputed some of the details of the officers' description of her actions. Further, "She also contested that the kicking was intended to prevent Hamilton from taking her into custody. She alleged that the kicking was in response to the pain of being lifted in this manner and attempting to regain her balance." *Bowen*, 162 S.W.3d at 227. The court of appeals had held that she was not barred from relying on necessity by her testimony:

> While the cases generally state that a defendant must admit committing the "offense," defendants have been held entitled to submission of a justification defense such as necessity where they admit the conduct alleged even though they deny an element of the offense such as intent. . . .
>
> . . . .
>
> We agree with Appellant that she sufficiently met the judicially imposed requirement of admitting commission of the alleged offense of resisting arrest by admitting the alleged act of kicking the officer even though she denied her intent to resist arrest by that conduct.

Bowen v. State, 117 S.W.3d 291, 295–97 (Tex. App.—Fort Worth 2003). It held necessity inapplicable on other grounds.

On discretionary review, the court of criminal appeals reversed the intermediate court's holding that necessity was unavailable. It approved the intermediate's court's analysis of the effect of the defendant's trial testimony as sufficiently admitting the charged offense. *Bowen*, 162 S.W.3d at 230.

Young v. State, 991 S.W.2d 835 (Tex. Crim. App. 1999), reached the opposite result. The state's evidence at trial for attempted murder was that the defendant, in a truck

with the victims, threatened to kill them. He then "put his foot on the gas pedal and grabbed the steering wheel, causing the truck to careen off the road and crash into a set of gasoline pumps at a convenience store." *Young*, 991 S.W.2d at 836. The defendant testified and denied threatening to kill the victims. He also denied putting his foot on the gas pedal and grabbing the steering wheel. He testified he reached for the door handle to exit the truck, but one of the victims grabbed his arm, hitting the steering wheel in the process and causing the truck to veer off the road. At issue was whether defense counsel was deficient for failing to request a jury instruction on necessity. *Young*, 991 S.W.2d at 837. Finding counsel deficient, the court of appeals had reasoned in part:

> The State argues that Young was not entitled to a defense of necessity because he did not admit to the offense. . . . Although there is a conflict as to specifically what happened at the time of the wreck, Young does not deny that his efforts to escape the vehicle caused the wreck, but states a different version of how the wreck happened. Both versions of the events indicate that Young's attempt to escape from the vehicle was the act in question. His variation in testimony from his accuser does not deny his causation of the collision that led to the injuries, and is not such a denial of the occurrence that would have negated the jury having the opportunity to consider an instruction on necessity.

Young v. State, 957 S.W.2d 923, 927 (Tex. App.—Texarkana 1997). On discretionary review, the court of criminal appeals disagreed:

> To raise necessity, Appellant must admit he committed the offense and then offer necessity as a justification. Here, Appellant did not admit to attempted murder, albeit one that was justified by the defense of necessity. Appellant argued he did not commit the offense because he did not have the requisite intent and he did not perform the actions the State alleged. Appellant was therefore not entitled to a jury instruction on the defense of necessity.

Young, 991 S.W.2d at 839.

Young makes clear that an instruction on necessity is not permitted if the defendant by testimony denies the conduct constituting the crime. The discussion suggests that an instruction is also unavailable if the defendant unequivocally denied the required culpable mental state. Both *Bowen* and *Juarez* suggest such a denial must be truly unequivocal.

§ B11.3 Instruction—Necessity

If you all agree the state has proved, beyond a reasonable doubt, each of the [*number*] elements listed above, you must next consider whether the state has proved that the defense of necessity does not apply.

Necessity

You have heard evidence that, when the defendant [*insert specific conduct constituting offense*], he believed that his conduct was necessary to avoid [*describe harm defendant sought to avoid, such as the death of or serious bodily injury to someone*].

Relevant Statutes

A person's conduct that would otherwise constitute the crime of [*offense*] is not a criminal offense if both—

1. the person reasonably believed the conduct was immediately necessary to avoid imminent harm, and

2. the desirability and urgency of avoiding the harm clearly outweighed, according to ordinary standards of reasonableness, the harm sought to be prevented by the law prohibiting the conduct constituting the crime.

Burden of Proof

The defendant is not required to prove that necessity applies to this case. Rather, the state must prove, beyond a reasonable doubt, that the defendant did not act out of necessity.

Definition

Reasonable Belief

"Reasonable belief" means a belief that an ordinary and prudent person would have held in the same circumstances as the defendant.

Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the state has proved that the defendant's conduct was not justified by necessity.

To decide the issue of necessity, you must determine whether the state has proved, beyond a reasonable doubt, one of the following:

1. The defendant did not reasonably believe the conduct was immediately necessary to avoid an imminent harm, in this case [*describe harm defendant sought to avoid, such as the death of or serious bodily injury to someone*]; or

2. The desirability and urgency of avoiding [*describe harm defendant sought to avoid, such as the death of or serious bodily injury to someone*] did not clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law prohibiting [*insert specific offense*].

You must all agree that the state has proved, beyond a reasonable doubt, either element 1 or 2 listed above. You need not agree on which of these elements the state has proved.

If you find that the state has failed to prove, beyond a reasonable doubt, either element 1 or 2 listed above, you must find the defendant "not guilty."

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of [*insert specific offense*], and you believe, beyond a reasonable doubt, that the defendant did not act out of necessity, you must find the defendant "guilty."

[See chapter 2 for verdict instruction.]

COMMENT

Relationship of Necessity to Other Defensive Positions. There is some question whether a defendant is entitled to an instruction on the defense of necessity if the evidence also raises a different defensive doctrine.

In *Bowen v. State*, 162 S.W.3d 226 (Tex. Crim. App. 2005), the trial judge instructed the jury on self-defense, and the question before the court of criminal appeals was whether she was also entitled to an instruction on necessity. Presiding Judge Keller reasoned that the nature of the two defenses meant that necessity was not available:

> By its nature, the "necessity" defense is a catch-all provision designed to afford a defense in situations where a defense is clearly warranted but is not afforded by any other statutory provision. I would hold that a necessity defense is not raised if the evidence presented merely raises an issue under another statutory defense. Otherwise, entitlement to an instruction for certain defenses such as self-defense and defense of a third person would *always* also entail entitlement to an instruction on the defense of necessity.

> Submitting wholly redundant defenses would not aid the truth-finding function of the trial and risks confusing the jury.

Bowen, 162 S.W.3d at 230 (Keller, P.J., dissenting). The majority rejected this analysis, apparently on the following grounds:

> We have recognized the independence of separate defenses by holding that a defendant is entitled to the submission of every defensive issue raised by the evidence, even if the defense may be inconsistent with other defenses. We reaffirm this principle by holding self-defense's statutorily imposed restrictions do not foreclose necessity's availability.

Bowen, 162 S.W.3d at 229–30 (footnote omitted).

Judge Cochran indicated: "I agree with the majority that the statutory defenses of self-defense under Texas Penal Code, section 9.31, and necessity under section 9.22 are not mutually exclusive in the context of a resisting arrest prosecution." *Bowen*, 162 S.W.3d at 231 (Cochran, J., dissenting). She concluded, however, that the testimony in the case did not raise necessity as well as self-defense. While she indicated that in some situations necessity could be raised in a resisting arrest case (*see Bowen*, 162 S.W.3d at 233–34), it is not clear whether she believed a defendant would ever be entitled to instructions on *both* necessity and some other defense such as public duty.

One court has held that *Bowen* does not apply where the defendant has received an instruction on deadly force in self-defense and that instruction includes a requirement of retreat in certain circumstances. *Perry v. State*, No. 06-07-00113-CR, 2008 WL 3287038 (Tex. App.—Texarkana Aug. 12, 2008, no pet.) (not designated for publication) (inclusion of justification of necessity, on facts such as these, which implicate the application of self-defense using deadly force, would undermine legislature's purpose in imposing duty to retreat). *Contra Fox v. State*, No. 13-03-230-CR, 2006 WL 2521622 (Tex. App.—Corpus Christi Aug. 31, 2006, pet. ref'd) (not designated for publication).

See also section B13.2 in this volume.

§ B12.1 Statutory References

The defense of mistake of law is provided for in Tex. Penal Code § 8.03(b).

The definition of "reasonable belief" is based on Tex. Penal Code § 1.07(a)(42).

§ B12.2 Texas Penal Code Distinction between Mistakes of "Fact" and Mistakes of "Law"

The Texas Penal Code provides separately and differently for what it calls "Mistake of Fact" (covered in section 8.02) and "Mistake of Law" (covered in section 8.03).

Many modern criminal codes, following the lead of the Model Penal Code, do not distinguish between these types of mistake, that is, between mistakes of fact and those of law. Any evidence of mistake or ignorance "as to a matter of fact or law" requires acquittal of a defendant if it raises a reasonable doubt about whether the prosecution has proved the required culpable mental state. Model Penal Code § 2.04(1) (titled "Ignorance or Mistake") (Proposed Official Draft 1962). These are what the Texas case law would call failure-of-proof defenses.

The Model Penal Code distinguishes these matters from a third, which consists of proof that the defendant believed the conduct involved did not legally constitute a defense. *See* Model Penal Code § 2.04(3). In such cases, the defendant has the burden of proof by a preponderance of the evidence. Model Penal Code § 2.04(4). The Model Penal Code did not explicitly call this mistake of law.

The drafters of the Texas Penal Code took the defense defined in section 2.04(3) of the Model Penal Code, labeled it "Mistake of Law," and embodied it in section 8.03 of the Texas Penal Code. They took the general doctrine of mistake from section 2.04(1) of the Model Penal Code, deleted the language that made it applicable to matters of law as well as to matters of fact, labeled it "Mistake of Fact," and—with other modifications—embodied it in section 8.02 of the Texas Penal Code.

A general question raised by this is what the legislative intent was regarding what the Model Penal Code would call simple mistakes of fact, that as a logical matter suggest the defendant lacked the culpable mental state required for the charged offense. Did the legislature intend to deny defendants the ability to rely on evidence of mistake showing the lack of the required culpable mental state? Did it intend to limit defendants to section 8.03?

Perhaps mistake of (or ignorance about) law that logically tends to show the defendant lacked the required culpable mental state is a viable failure-of-proof defense. But since the Texas Penal Code makes no explicit reference to it, the jury instructions need not address it and, perhaps, must avoid any reference to it.

A mistake-of-law instruction should be submitted only if a defendant establishes that he (1) reasonably believed that his conduct did not constitute a crime and (2) reasonably relied on either an administrative order or a written interpretation of the law contained in an opinion of a court of record. *Green v. State*, 829 S.W.2d 222, 223 (Tex. Crim. App. 1992); *see also Celis v. State*, 354 S.W.3d 7 (Tex. App.—Corpus Christi 2011), *aff'd*, Nos. PD-1584-11, PD-1585-11, 2013 WL 2373114 (Tex. Crim. App. May 15, 2013, pet. granted) (discussing mistake-of-fact defense, mistake-of-law

defense, and required culpable mental states). Moreover, the defense must be based on controlling law, because it was "not created to allow a criminal defendant to rely upon old 'interpretive opinions, opinions that conflict with others, or on overruled opinions.'" *Green*, 829 S.W.2d at 223 (rejecting reliance on 1873 U.S. Supreme Court case applying Connecticut common law); *Stauder v. State*, No. 07-10-0221-CR, 2011 WL 1643689 (Tex. App.—Amarillo May 2, 2011, pet. ref'd) (mem. op., not designated for publication) (rejecting reliance on vacated Texas case).

§ B12.3 Instruction—Mistake of Law

If you all agree the state has proved, beyond a reasonable doubt, each of the [*number*] elements listed above, you must next consider whether the defense of mistake of law applies.

Mistake of Law

You have heard evidence that, when the defendant [*insert specific conduct constituting offense*], he believed that his conduct did not constitute a crime.

Relevant Statutes

A person's conduct that would otherwise constitute the crime of [*offense*] is not a criminal offense if the person reasonably believed as a result of mistake of law that the conduct charged did not constitute a crime and that he acted in reasonable reliance on either—

1. an official statement of the law contained in a written order or grant of permission by an administrative agency charged by law with responsibility for interpreting the law in question; or

2. a written interpretation of the law contained in an opinion of a court of record or made by a public official charged by law with responsibility for interpreting the law in question.

Mistake of law is an affirmative defense. Therefore the defendant must prove, by a preponderance of the evidence, three elements:

[Select one of the following.]

1. At the time of the conduct, the defendant believed that the conduct did not constitute a crime; and

[or]

1. The defendant, before or during his conduct, considered the law applicable to his conduct and mistakenly concluded the law did not make the conduct a crime; and

[or]

1. The defendant [mistakenly] believed the law did not make the conduct a crime; and

[Continue with the following.]

2. The defendant's belief was reasonable; and

3. The defendant reached this [mistaken] belief in reasonable reliance on either—

a. an official statement of the law contained in a written order or grant of permission by an administrative agency charged by law with responsibility for interpreting the law in question; or

b. a written interpretation of the law contained in an opinion of a court of record; or

c. a written interpretation of the law made by a public official charged by law with responsibility for interpreting the law in question.

The affirmative defense of mistake of law is not established by proof that the defendant was simply ignorant of the provisions of any law after the law took effect. The evidence must show the defendant addressed the law and reached a mistaken conclusion about what the law meant.

Burden of Proof

The burden is on the defendant to prove, by a preponderance of the evidence, that he comes within the affirmative defense of mistake of law.

Definitions

Law

"Law" means the constitution or a statute of this state or of the United States, a written opinion of a court of record, a municipal ordinance, an order of a county commissioners court, or a rule authorized by and lawfully adopted under a statute.

Reasonable Belief

"Reasonable belief" means a belief that an ordinary and prudent person would have held in the same circumstances as the defendant.

Reasonable Reliance

The defendant's reliance on a source was reasonable if an ordinary and prudent person in the same circumstances as the defendant would have relied on

that source and reached any mistaken conclusion or belief that the defendant reached.

Preponderance of the Evidence

The term "preponderance of the evidence" means the greater weight and degree of the credible evidence.

Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the defendant has proved, by a preponderance of the evidence, that he comes within the affirmative defense of mistake of law.

To decide the issue of mistake of law, you must determine whether the defendant has proved, by a preponderance of the evidence, the following three elements:

[Select one of the following.]

1. The defendant believed his conduct did not constitute a crime; and

[or]

1. The defendant, before or during his conduct, considered the law applicable to his conduct and mistakenly concluded the law did not make the conduct a crime; and

[or]

1. The defendant [mistakenly] believed the law did not make the conduct a crime; and

[Continue with the following.]

2. The defendant's belief was reasonable; and

3. The defendant reached this [mistaken] belief in reasonable reliance on either—

   a. an official statement of the law contained in a written order or grant of permission by an administrative agency charged by law with responsibility for interpreting the law in question; or

b. a written interpretation of the law contained in an opinion of a court of record; or

c. a written interpretation of the law made by a public official charged by law with responsibility for interpreting the law in question.

If you find that the defendant has proved, by a preponderance of the evidence, all three elements listed above, you must find the defendant "not guilty."

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of [*insert specific offense*], and you all agree the defendant has not proved, by a preponderance of the evidence, all three elements listed above, you must find the defendant "guilty."

[See chapter 2 for verdict instruction.]

COMMENT

Format of Instruction. It is possible that the instructions for affirmative defenses should not use the same format as is used for the definitions of offenses—first setting out the statutory language and then setting out in more flexible language the elements of the matter. The instruction above, however, uses the same format.

Statement of "Rule." There is a question about how to state the basic "rule." Although the affirmative defense is titled "Mistake of Law," the actual statement of the defense does not use that terminology. Instead, it mandates a decision whether the actor "reasonably believed the conduct charged did not constitute a crime." Tex. Penal Code § 8.03(b). The instruction assumes that communication of the substance of this to juries would be furthered if the instruction makes explicit that this belief must be based on a mistaken perception of the law.

Several alternative formulations of the basic rule are also set out.

Elements of Defense. The instruction refers to the "units" of the defenses as "elements." Such terminology may not be appropriate with regard to defenses because it suggests a burden of proof on the defendant. But with regard to affirmative defenses such as mistake of law, the burden is on the defendant and so this convenient terminology is appropriate.

Further Specification of Defense "Theory." The instruction might specifically set out the defense theory and perhaps identify the offered source for the defendant's mistaken belief—as, for example, the official statement of the law in a written order by an administrative agency or the written interpretation of the law contained in an opinion of a court of record. Doing this might focus the jury's attention on the need for the defendant to establish that this source is within Penal Code section 8.03(c).

Thus the instruction might specify, for example, that the defendant introduced testimony that he relied on what he regarded as an official statement of the law contained in a hypothetical written opinion of the United States Supreme Court in *Jones v. Arkansas*.

However, article 36.14 of the Code of Criminal Procedure prohibits the charge from summing up the testimony or discussing the facts.

Ignorance. The final paragraph of the relevant statutes unit is based on the explicit statement in Penal Code section 8.03(a) that ignorance of the provisions of any law is not a defense.

Additional Definitions. A number of additional terms might be defined:

1. "a court of record"

2. "a public official charged by law with responsibility for interpreting the law in question"

3. "an official statement of the law"

4. "an administrative agency charged by law with responsibility for interpreting [a specific] law"

No definitions of these terms or phrases are readily available.

Guilt of Lesser Included Offense. The instruction does not provide for implementation of Penal Code section 8.03(c). Under that section, a defendant who prevails on a mistake-of-fact contention to the charged offense is nevertheless potentially convictable of a lesser included offense of which he would be guilty if the law were as the evidence shows he believed it was.

Certainly a jury should not be instructed on section 8.03(c) unless a lesser included offense is submitted on the basis of this provision. Arguably the instruction on the lesser included offense should incorporate the substance of section 8.03(c).

Problem of Mistaken Belief in Constitutional Protection. A special problem is presented if a defendant does not claim that he misconstrued the substantive criminal law but instead argues that he erroneously believed that constitutional law made his conviction under that substantive law impermissible.

Whether Texas law provides an affirmative defense in these situations is not clear. The critical question seems to be what is meant in Penal Code section 8.03(b) by "believ[ing] the conduct charged did not constitute a crime."

Arguably, the statutory defense covers a person who at the time of the conduct acknowledged a penal statute purported to cover his conduct but believed a constitution bars his conviction under that statute. Such a person arguably believes his conduct does not constitute an *enforceable* crime and thus, for all practical purposes, a crime at

all. If this is the case, the literal words of the mistake-of-law statute may not convey this to juries.

If it is desirable to provide for this, a special version of the defense of mistake of law might be drafted perhaps by substituting the following for the first part of the relevant statutes unit:

> A person's conduct that would otherwise constitute the crime of [*offense*] is not a criminal offense if—
>
> 1. the person [mistakenly] believed constitutional law barred his criminal conviction for this conduct.

The court might provide this for use only in an unusual situation in which the evidence raised this specific kind of mistake regarding law.

Problem of Mistake-of-Law Evidence Offered to "Negate" Required Culpable Mental State. In some unusual situations, a criminal offense requires some awareness of the law. When this is the case, a defendant is almost certainly entitled to rely on evidence that because of his mistake about—or ignorance of—that law, he lacked the required culpable mental state.

Section 39.03(a)(1) of the Penal Code, for example, provides: "A public servant acting under color of his office or employment commits an offense if he . . . intentionally subjects another to mistreatment or to arrest, detention, search, seizure, dispossession, assessment, or lien that he knows is unlawful . . . ."

Suppose a police officer is charged with this offense based on evidence that he arrested the victim. The officer would certainly be entitled to introduce evidence that he mistakenly believed Texas law authorized an arrest of the sort involved. He would even be entitled to introduce evidence that he was simply unaware that Texas law made this sort of arrest unlawful.

If this scenario is correct, should the jury ever be instructed on this? See section B12.2 above for discussion regarding the failure of the Texas Penal Code to address this question.

As an initial matter, this would seem to be a nonstatutory defensive matter no different from alibi. It would follow that a jury instruction is not only unnecessary but if given would also constitute a prohibited comment on the evidence.

On the other hand, it is arguable that unlike the alibi situation, the mistake-of-law area includes multiple rules that a jury might well confuse. An instruction on this permissible defensive use of evidence of mistake of law, then, might be justified to assure that the jury understands two things. First, this use of evidence is not barred by Penal Code section 8.03(a)'s statement that ignorance of the law "is no defense." Second, this use of evidence is completely independent of the very limited defensive use of such evidence permitted under section 8.03(b).

Conceptually, these arguments are really those of mistake of "fact" in which "law" becomes a "fact." Arguably, defendants' interests are adequately protected by a plain mistake-of-fact instruction. Or, if special accommodation is to be made, it might be best made in connection with the instruction on mistake of fact.

Accommodation might be made for situations in which the defendant claims a mistake about such law with an instruction along the following lines:

> You have heard evidence that the defendant harbored a mistaken belief about the law governing the right of an officer to make an arrest. If you decide to credit this evidence, you may consider it in deciding whether the state has proved the defendant knew the arrest at issue in this case was unlawful.

§ B13.1 Statutory References

The defense of duress is provided for in Tex. Penal Code § 8.05.

The definition of "reasonable belief" is based on Tex. Penal Code § 1.07(a)(42).

§ B13.2 General Law of Duress

Duress is an affirmative defense requiring the accused to prove, by a preponderance of the evidence, that he committed the offense "because he was compelled to do so by threat of imminent death or serious bodily injury to himself or another." Tex. Penal Code §§ 2.04(d), 8.05(a); *Edwards v. State*, 106 S.W.3d 833, 843 (Tex. App.—Dallas 2003, pet. ref'd). To raise the defense, the evidence must show both compulsion and imminence. Compulsion "exists only if the force or threat of force would render a person of reasonable firmness incapable of resisting the pressure," and imminence exists if the person making the threat intends and is prepared to carry out the threat immediately on the accused's failure to commit the charged offense. Tex. Penal Code § 8.05(c); *Anguish v. State*, 991 S.W.2d 883, 886 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (holding threat of future harm cannot be construed as "imminent" under the statute). This affirmative defense is not available to an accused if he "intentionally, knowingly, or recklessly placed himself in a situation in which it was probable that he would be subjected to compulsion." Tex. Penal Code § 8.05(d).

Compulsion. To establish compulsion, a defendant must prove that "the force or threat of force [rendered] a person of reasonable firmness incapable of resisting the pressure." Tex. Penal Code § 8.05(c); *Edwards*, 106 S.W.3d at 843. "Reasonable firmness" is evaluated on an objective standard. *See United States v. Willis*, 38 F.3d 170, 176 (5th Cir. 1994); *Wood v. State*, 18 S.W.3d 642, 651 n.8 (Tex. Crim. App. 2000); *Kessler v. State*, 850 S.W.2d 217, 222 (Tex. App.—Fort Worth 1993, no pet.). Therefore, the defendant's personal proclivities or idiosyncrasies are not relevant to establish compulsion.

Relationship to Necessity Defense. If the evidence before the jury appears to raise both duress and necessity, should the jury be instructed on both?

In *Bowen v. State*, 162 S.W.3d 226, 229–30 (Tex. Crim. App. 2005), the court rejected the argument that submitting both self-defense and necessity was inappropriate: "[S]elf-defense's statutorily imposed restrictions do not foreclose necessity's availability." *See also Gilbert v. State*, No. PD-1645-08, 2010 WL 454966 (Tex. Crim. App. Feb. 10, 2010) (not designated for publication) (necessity instruction not supported by evidence; duress instruction submitted).

One pre-*Bowen* case took the opposite position regarding necessity and duress. In *Hermosillo v. State*, 903 S.W.2d 60, 68–69 (Tex. App.—Fort Worth 1995, pet. ref'd), the court held that although the facts logically raised both necessity and duress, the defendant was entitled only to a duress instruction. Giving a necessity instruction, it reasoned, would nullify the legislature's careful placement of the burden of proof on the defendant. *Hermosillo*, 903 S.W.2d at 69.

Hermosillo relied heavily on *Butler v. State*, 663 S.W.2d 492, 496 (Tex. App.—Dallas 1983), *aff'd on other grounds*, 736 S.W.2d 668 (Tex. Crim. App. 1987), finding

necessity instructions inappropriate where self-defense instructions were properly given. *Butler* may have been implicitly disapproved by *Bowen*. *But see Perry v. State*, No. 06-07-00113-CR, 2008 WL 3287038, at *2–3 (Tex. App.—Texarkana Aug. 12, 2008) (not designated for publication) (*Butler* and similar cases rather than *Bowen* apply when defendant seeks instructions on both necessity and self-defense involving deadly force under section 9.32, because applying *Bowen* would circumvent then-applicable retreat provision in section 9.32).

Defining "Threat" Required. The U.S. Supreme Court has commented that "[m]odern cases have tended to blur the [common-law] distinction between duress and necessity." *United States v. Bailey*, 444 U.S. 394, 410 (1980) (declining to speculate on "precise contours" of whatever defenses of or akin to duress or necessity might be available under federal law in prosecution for escape).

In fact, however, much of any such blurring as might have occurred is due in large part to at least occasional failures to recognize the kind of threat on which a claim of duress must be based. The threat must be one conditioned on the subject's refusal or failure to commit the offense. Other threats may serve as the basis for a claim of necessity or perhaps self-defense, but not duress.

For example, a prison inmate charged with escape might produce evidence that prison guards beat him and threatened to continue those beatings out of general hostility to the inmate and that he escaped in response to these threats. This defendant has not, however, produced evidence of a threat as that term is used in duress law. Suppose, however, the inmate's evidence is that a fellow prisoner threatened to kill the inmate unless the inmate accompanied the fellow prisoner in his escape. Now the evidence shows a threat conditioned on the defendant's refusal to himself commit the crime of escape. In the first situation, the threats might well raise an issue of necessity, but they do not trigger duress law under Penal Code section 8.05.

This thesis is not explicitly recognized in Texas case law. It is, however, consistent with the results and is implicit in at least some judicial decisions and discussions. *Johnson v. State*, 638 S.W.2d 636 (Tex. App.—El Paso 1982), *aff'd*, 650 S.W.2d 414 (Tex. Crim. App. 1983), *overruled on other grounds by Boget v. State*, 74 S.W.3d 23 (Tex. Crim. App. 2002), for example, was a prosecution for carrying a weapon on licensed premises. The evidence tended to show that other persons threatened Johnson with physical harm and he carried the weapon in response to these threats. The court of appeals held that the trial court erred in refusing instructions on necessity and self-defense. The trial court did not err in refusing an instruction on duress:

> Under the facts of this case, a reading of the plain language of Penal Code Section 8.05 would seem to support [Johnson's] position. The State, however, correctly points to the fact that opinions dealing with Section 8.05 all involve situations in which the defendant is compelled to do an illegal act which is desired by the one exerting the threats or force. That is not the case

> here. This interpretation is further supported by reading Section 8.05 in conjunction with Sections 9.22 (necessity), and 9.31 and 9.32 (self-defense). [Johnson's] position would entail an unnecessary overlap in these provisions. His defensive theory was very clear and properly subject to scrutiny under the latter provisions, in lieu of Section 8.05.

Johnson, 638 S.W.2d at 637. On discretionary review, the court of criminal appeals held that the nature of the charged offense made self-defense inapplicable. It added that the availability of necessity "is sufficient to protect the interest of the accused" and would avoid "the dire consequences envisioned by the Court of Appeals." *Johnson*, 650 S.W.2d at 416.

Further, in *Jackson v. State*, 50 S.W.3d 579 (Tex. App.—Fort Worth 2001, pet. ref'd), Jackson was charged with intoxication manslaughter. He sought a duress instruction on the basis of evidence that he drove as he did to escape from one Shepard. Jackson believed Shepard was chasing and threatening him. The court found insufficient evidence of the threat required by duress, because the evidence failed to show "that Shepard threatened [Jackson] with imminent death or serious bodily injury if he did not drive [in the manner constituting the charged offense]." *Jackson*, 50 S.W.3d at 596. Rather, the evidence tended to show that "Shepard was motioning for [Jackson] to pull over." *Jackson*, 50 S.W.3d at 596. *Accord Smith v. State*, No. 06-02-00144, 2003 WL 21665013 (Tex. App.—Texarkana July 17, 2003) (not designated for publication) (evidence in prosecution for evading arrest did not raise duress because it tended to show only that defendant fled because he feared officer was one of several corrupt law enforcement officers who had targeted him, and because the evidence failed to show that the threats were to harm him if he did not flee from the arresting officer).

Johnson and *Jackson* clearly require that the threat be one to inflict some harm if the defendant does not engage in the conduct constituting the charged offense. In the *Johnson* court's terminology, the threat must be made to implement the threatening person's desire that the defendant engage in that conduct.

The instructions embody the approach of *Johnson* and *Jackson* by putting the basic requirement for the defense as demanding proof that the defendant "was compelled to engage in the conduct [by force or a threat of the required severity] if he did not engage in that conduct."

This formulation, of course, goes beyond the statutory language. Additional specificity is necessary to avoid confusion between duress and other defenses, such as necessity and self-defense. Steps to avoid such confusion are particularly demanded if under *Bowen* (as discussed above) juries will often be instructed on overlapping defenses.

Unanimity. The instructions require that the jury be unanimous on whether the defendant has proved that duress applies. They do not require unanimity on the specific reason for finding duress inapplicable, that is, what the defendant failed to prove.

Admission of Proscribed Conduct. To assert the defense of duress, the defendant must admit to committing the proscribed conduct. *Bernal v. State*, 647 S.W.2d 699, 706 (Tex. App.—San Antonio 1982, no pet.) (concluding that a defendant was not entitled to duress instruction because he denied having participated in offense); *see also Anguish*, 991 S.W.2d at 885 ("[A] defendant who claims duress must establish that the threatened harm was conditioned on his committing the charged offense, as opposed to some other offense.").

Burden of Proof. The defendant has the burden of proving an affirmative defense by a preponderance of the evidence. Tex. Penal Code § 2.04(d).

Confession and Avoidance. There is growing and so far uncontroverted authority for the proposition that the defense of duress also requires some sort of admission to the conduct constituting the crime. In *Bernal*, a sexual assault defendant was held not entitled to an instruction on duress because he did not offer evidence that he had been threatened with imminent death or serious bodily injury and, "[m]ore importantly, [he] denied having had sexual intercourse with the complainant, and thus did not raise the issue of his having 'engaged in the proscribed conduct' because of duress." *Bernal*, 647 S.W.2d at 706.

This suggestion in *Bernal* has been followed in a number of cases. *See Gomez v. State*, 380 S.W.3d 830, 834 (Tex. App.—Houston [14th Dist.] 2012, no pet.) ("Duress is, on its face, a confession-and-avoidance or 'justification' type of affirmative defense."); *Rodriguez v. State*, 368 S.W.3d 821, 824 (Tex. App.—Houston [14th Dist.] 2012, no pet.); *Ramirez v. State*, 336 S.W.3d 846, 851 (Tex. App.—Amarillo 2011, pet. ref'd) ("To avail oneself of the affirmative defense of duress, the accused must admit to having engaged in the proscribed conduct.").

Juarez v. State, 308 S.W.3d 398, 404 (Tex. Crim. App. 2010), reaffirming that confession and avoidance applies with regard to the defense of necessity, did not address the doctrine's application to duress.

§ B13.3 Instruction—Duress (Felony)

If you all agree the state has proved, beyond a reasonable doubt, each of the [*number*] elements listed above, you must next consider whether the defense of duress applies.

Duress

You have heard evidence that, when the defendant [*insert specific conduct constituting offense*], he did so because he was compelled by a threat of imminent death or serious bodily injury to himself or another.

Relevant Statutes

A person's conduct that would otherwise constitute the crime of [*offense*] is not a criminal offense if the person was compelled to engage in that conduct by a threat of imminent death or serious bodily injury to himself or another.

Duress is an affirmative defense. Therefore the defendant must prove, by a preponderance of the evidence, [two/three] elements:

1. The defendant was compelled to engage in the conduct by a threat of imminent death or serious bodily injury to [himself/another person] if he did not engage in that conduct; [and]

2. The threat would render a person of reasonable firmness incapable of resisting the pressure [./; and]

[Include the following if raised by the evidence.]

3. The defendant did not intentionally, knowingly, or recklessly place himself in a situation in which it was probable that he would be subject to compulsion.

[Include the following if raised by the evidence.]

It is no defense to the offense charged that a person acted at the command or persuasion of his spouse, unless he acted under compulsion that would establish the defense of duress as explained above.

Burden of Proof

The burden is on the defendant to prove, by a preponderance of the evidence, that he comes within the affirmative defense of duress.

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.

Preponderance of the Evidence

"Preponderance of the evidence" means the greater weight and degree of the credible evidence.

[Include the following if raised by the evidence.]

Intentionally Placed Himself in a Situation in Which It Was Probable That He Would Be Subject to Compulsion

A person intentionally placed himself in a situation in which it was probable that he would be subject to compulsion when a person had the conscious objective or desire to be in a situation in which it was probable he would be subject to compulsion.

Knowingly Placed Himself in a Situation in Which It Was Probable That He Would Be Subject to Compulsion

A person knowingly placed himself in a situation in which it was probable that he would be subject to compulsion when a person was reasonably certain his actions would result in his being in a situation in which it was probable he would be subject to compulsion.

Recklessly Placed Himself in a Situation in Which It Was Probable That He Would Be Subject to Compulsion

A person recklessly placed himself in a situation in which it was probable that he would be subject to compulsion when he was aware of but consciously disregarded a substantial and unjustifiable risk that his actions would result in his being in a situation in which it was probable he would be subject to the compulsion. 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

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the defendant has proved, by a preponderance of the evidence, that he comes within the affirmative defense of duress.

To decide the issue of duress, you must determine whether the defendant has proved, by a preponderance of the evidence, [each/all] of the following elements:

1. The defendant was compelled to engage in the conduct by a threat of imminent death or serious bodily injury to [himself/another person] if he did not engage in that conduct; [and]

2. The threat would make a person of reasonable firmness incapable of resisting the pressure [./; and]

[Include the following if raised by the evidence.]

3. The defendant did not intentionally, knowingly, or recklessly place himself in a situation in which it was probable that he would be subject to compulsion.

You must all agree on whether the defendant has proved [each/all] of the elements listed above. If you do not all agree that defendant has proved [each/all] of these elements, however, you need not all agree on which one or more of these elements the defendant failed to prove.

If you find that the defendant has proved, by a preponderance of the evidence, [each/all] of the elements listed above, you must find the defendant "not guilty."

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of [*insert specific offense*], and you all agree the defendant has not proved, by a preponderance of the evidence, [each/all] of the elements listed above, you must find the defendant "guilty."

[See chapter 2 for verdict instruction.]

COMMENT

Imminent Threat Defined. "'Imminent' means something that is impending, not pending; something that is on the point of happening, not about to happen." *Schier v. State*, 60 S.W.3d 340, 343 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd) (quoting *Smith v. State*, 874 S.W.2d 269, 272–73 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd)). Harm is imminent when there is an emergency situation and it is immediately necessary to avoid that harm; when a split-second decision is required without time to consider the law. *Schier*, 60 S.W.3d at 343 (citing *Smith*, 874 S.W.2d at 273).

"Imminent threat" exists if (1) the person making the threat intended and was prepared to carry out the threat immediately and (2) carrying out the threat was predicated on the threatened person's failure to commit the charged offense immediately. *Devine v. State*, 786 S.W.2d 268, 270–71 (Tex. Crim. App. 1989) (holding threats of future harm only were not sufficient threats of imminent bodily injury or death to uphold conviction for robbery); *Anguish v. State*, 991 S.W.2d 883, 886 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (holding that alleged threat that appellant rob a bank or he and his family would be killed made four days before appellant committed robbery was not imminent); *Cameron v. State*, 925 S.W.2d 246, 250 (Tex. App.—El Paso 1995, no pet.) (holding that appellant's general fear of coactor's temper did not constitute any evidence of specific, objective threat sufficient to warrant duress instruction); *Bernal v. State*, 647 S.W.2d 699, 706 (Tex. App.—San Antonio 1982, no pet.) (defendant's testimony that he feared codefendant "might get violent" held insufficient to support duress instruction).

§ B13.4 Instruction—Duress (Misdemeanor)

If you all agree the state has proved, beyond a reasonable doubt, each of the [*number*] elements listed above, you must next consider whether the defense of duress applies.

Duress

You have heard evidence that, when the defendant [*insert specific conduct constituting offense*], he did so because he was compelled by force or a threat of force.

Relevant Statutes

A person's conduct that would otherwise constitute the crime of [*offense*] is not a criminal offense if the person was compelled to engage in that conduct by force or a threat of force.

Duress is an affirmative defense. Therefore the defendant must prove, by a preponderance of the evidence, [two/three] elements:

1. The defendant was compelled to engage in the conduct by force or a threat of force if he did not engage in that conduct; [and]

2. The force or threat of force would render a person of reasonable firmness incapable of resisting the pressure [./; and]

[Include the following if raised by the evidence.]

3. The defendant did not intentionally, knowingly, or recklessly place himself in a situation in which it was probable that he would be subject to compulsion.

[Include the following if raised by the evidence.]

It is no defense to the offense charged that a person acted at the command or persuasion of his spouse, unless he acted under compulsion that would establish the defense of duress as explained above.

Burden of Proof

The burden is on the defendant to prove, by a preponderance of the evidence, that he comes within the affirmative defense of duress.

Definitions

Preponderance of the Evidence

"Preponderance of the evidence" means the greater weight and degree of the credible evidence.

[Include the following if raised by the evidence.]

Intentionally Placed Himself in a Situation in Which It Was Probable That He Would Be Subject to Compulsion

A person intentionally placed himself in a situation in which it was probable that he would be subject to compulsion when a person had the conscious objective or desire to be in a situation in which it was probable he would be subject to compulsion.

Knowingly Placed Himself in a Situation in Which It Was Probable That He Would Be Subject to Compulsion

A person knowingly placed himself in a situation in which it was probable that he would be subject to compulsion when a person was reasonably certain his actions would result in his being in a situation in which it was probable he would be subject to compulsion.

Recklessly Placed Himself in a Situation in Which It Was Probable That He Would Be Subject to Compulsion

A person recklessly placed himself in a situation in which it was probable that he would be subject to compulsion when he was aware of but consciously disregarded a substantial and unjustifiable risk that his actions would result in his being in a situation in which it was probable he would be subject to the compulsion. 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

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the defendant has proved, by a preponderance of the evidence, that he comes within the affirmative defense of duress.

To decide the issue of duress, you must determine whether the defendant has proved, by a preponderance of the evidence, [each/all] of the following elements:

1. The defendant was compelled to engage in the conduct by force or a threat of force if he did not engage in that conduct; [and]

2. The force or threat of force would render a person of reasonable firmness incapable of resisting the pressure [./; and]

[Include the following if raised by the evidence.]

3. The defendant did not intentionally, knowingly, or recklessly place himself in a situation in which it was probable that he would be subject to compulsion.

You must all agree on whether the defendant has proved [each/all] of the elements listed above. If you do not all agree that defendant has proved [each/all] of these elements, however, you need not all agree on which one or more of these elements the defendant failed to prove.

If you find that the defendant has proved, by a preponderance of the evidence, [each/all] of the elements listed above, you must find the defendant "not guilty."

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of [*insert specific offense*], and you all agree the defendant has not proved, by a preponderance of the evidence, [each/all] of the elements listed above, you must find the defendant "guilty."

[See chapter 2 for verdict instruction.]

COMMENT

Force or Threat of Force. Unlike the provisions for the defense of duress in a felony case, Texas Penal Code section 8.05(b) provides for the affirmative defense in a misdemeanor case to be based on either "force" or a "threat of force." Compulsion "exists only if the force or threat of force would render a person of reasonable firmness incapable of resisting the pressure." Tex. Penal Code § 8.05(c). This affirmative defense is not available to an accused if he intentionally, knowingly, or recklessly placed himself in a situation in which it was probable that he would be subject to compulsion. Tex. Penal Code § 8.05(d).

Conceptually, expanding the affirmative defense to "force" does not make sense, particularly since this is not provided for in the felony defense. If the evidence shows

that a third person literally compelled the defendant to engage in the prescribed conduct "by force," that conduct would not be voluntary within the meaning of Penal Code section 6.01(a). Evidence of this would trigger the state's obligation to prove that the conduct was voluntary, and this would seem to supersede any possible question of duress on which the defendant has the burden of persuasion.

Although section 8.05(b) uses the term *force*, it most likely means *harm*, and more specifically harm less serious than the death or serious bodily injury described in section 8.05(a). Of course, the legislature could easily have used terms such as *harm*, *injury*, or *bodily injury*, but did not.

Apparently, force could possibly include effort applied to a person or even to property, without regard to whether that force caused any pain, damage, disruption, or any adverse impact whatever.

The instruction follows the statutory pattern, even though this structure seems to make little sense.

I. Basic Self-Defense Standards

§ B14.1 Statutory References

The defense of self-defense is provided for in Tex. Penal Code § 9.31.

The justification for the use of deadly force in defense of a person is provided for in Tex. Penal Code § 9.32.

The definition of "reasonable belief" is based on Tex. Penal Code § 1.07(a)(42).

The definition of "deadly force" is based on Tex. Penal Code § 9.01(3).

§ B14.2 Self-Defense Generally

§ B14.2.1 Basic Self-Defense Law

Texas self-defense law is embodied in Texas Penal Code sections 9.31 (covering nondeadly force) and 9.32 (covering deadly force). Self-defense is labeled a justification, but under section 9.02 such justifications are treated procedurally as defenses. Thus the procedural aspects of jury instructions for self-defense are addressed by section 2.03.

The basic standard for self-defense is set out in section 9.31(a): force used does not constitute a crime if the defendant reasonably believed the force used was immediately necessary to protect himself against another's use or attempted use of unlawful force.

Exceptions to this defense are set out in section 9.31(b), although the presentation is somewhat confusing. Essentially, a criminal defendant has no defense, despite the general rule in section 9.31(a), in the following situations:

1. The force constituting the crime was used to resist an arrest or search being made by a person the defendant knew was a peace officer (section 9.31(b)(2));

2. The defendant consented to the exact force used or attempted by the injured party (section 9.31(b)(3)); and

3. The defendant provoked the injured party's attack on the defendant (section 9.31(b)(4)).

Section 9.31(b)(1) contains language referring to "verbal provocation" that misleadingly suggests it is creating another exception. As addressed below, the Committee had difficulty determining the actual significance of this language.

Section 9.31(b)(5), which concerns the carrying of a weapon, appears to create another exception. As explained below, however, the Committee concluded that the section actually creates (or recognizes and explains) an exception to the exception concerning provocation.

This chapter contains instructions on the general rule (Part II) and exception numbers two (Part III) and three (Part IV) as the exceptions are listed above. It then addresses the first exception and the exception to that exception (Part V). Finally, Part VI offers a tentative approach to modifying the instructions for a case in which the charged offense involves deadly force and thus the defense position is based on section 9.32.

§ B14.2.2 Need for Instruction and Application Units

The court of criminal appeals has explained:

> A defendant is entitled to an instruction on the law of self-defense if there is some evidence that he intended to use force against another and he did use force, but he did so only because he reasonably believed it was necessary to prevent the other's use of unlawful force. In *Ferrel v. State* [55 S.W.3d 586 (Tex. Crim. App. 2001)] this Court stated that "[a] defendant is entitled to an instruction on self-defense if the issue is raised by the evidence." However, "if the evidence, viewed in the light most favorable to the defendant, does not establish self-defense, the defendant is not entitled to an instruction on the issue."

Ex parte Nailor, 149 S.W.3d 125, 132 (Tex. Crim. App. 2004) (footnotes omitted).

Since self-defense is a defensive matter, however, a trial judge has no obligation to instruct on the matter in the absence of a request by the defendant. *Barrera v. State*, 982 S.W.2d 415, 416 (Tex. Crim. App. 1998).

If the jury instruction includes the abstract law on self-defense, it should also include an application of that abstract statement to the facts of the case. A judge who without a defense request includes self-defense in the instruction then has a duty to apply that law to the facts of the case. *Barrera*, 982 S.W.2d at 416. Unobjected-to failure to apply self-defense law can be fundamental error cognizable on appeal despite the lack of a defense objection at trial.

§ B14.2.3 Confession and Avoidance

How confession and avoidance applies to self-defense and related matters is somewhat unclear.

What appears to be the leading court of criminal appeals case, *Martinez v. State*, 775 S.W.2d 645 (Tex. Crim. App. 1989), involved a murder prosecution. The defendant testified that the victim, Gonzales, threatened to kill him and grabbed his shirt. Thinking the victim was going for a knife, he pulled his gun and fired several warning shots. His mother-in-law then grabbed his arm, causing the gun to discharge several times, and the victim was struck by one of these shots. On these facts, the trial judge erred in refusing to instruct on self-defense because Martinez did not admit to the offense:

> [A]ppellant did sufficiently admit to the commission of the offense. Appellant admitted to pulling out the gun, firing it into the air, and having his finger on the trigger when the fatal shot was fired. While appellant specifically denied intending to kill Gonzales, this alone does not preclude an instruction on self-defense.

Martinez, 775 S.W.2d at 647.

In *Juarez v. State*, 308 S.W.3d 398, 403 (Tex. Crim. App. 2010), the court of criminal appeals cited *Martinez* as an example of "a handful of cases [in which] we have

ignored the confession and avoidance doctrine altogether." *Martinez* might also be regarded as assuming application of the confession and avoidance doctrine to self-defense but finding it inapplicable in the case for reasons not entirely clear from the opinion.

The courts of appeals have assumed that some form of confession and avoidance applies to self-defense. They have not, however, agreed on specifically what this means.

"To be entitled to a self-defense instruction, a defendant must admit to the conduct alleged in the indictment." *Rogers v. State*, No. 2-04-212-CR, 2005 WL 1593933, at *2 (Tex. App.—Fort Worth July 7, 2005, pet. dism'd) (per curiam) (not designated for publication). *Rogers* relied on *Hill v. State*, 99 S.W.3d 248, 250–51 (Tex. App.—Fort Worth 2003, pet. ref'd), in which the court in analyzing the sufficiency of the evidence commented that self-defense was properly submitted because defendant Hill admitted the act: "Because self-defense is a justification defense, the defendant is essentially required to admit committing the conduct giving rise to the indictment in order to be entitled to the charge."

Withers v. State, 994 S.W.2d 742, 745–46 (Tex. App.—Corpus Christi 1999, pet. ref'd), cited by *Hill*, held that the defendant was entitled to a self-defense instruction when she admitted attacking the victim although she denied the specific assaultive acts specified in the charging instrument.

VanBrackle v. State, 179 S.W.3d 708, 714–15 (Tex. App.—Austin 2005, no pet.), acknowledged a general requirement that a defendant seeking a self-defense instruction "admit" the offense. But it held that defense evidence supporting a contention that the shooting was an involuntary act did not preclude an instruction on self-defense when there was other defense evidence supporting the contention that the defendant voluntarily pulled the trigger of the gun but did so in order to prevent harm to himself.

More recently, the Waco court of appeals has put the requirement as one that the defendant admit, or at least "substantially admit," committing the conduct that forms the basis of the indictment. *Zeigler v. State*, No. 10-07-00053-CR, 2008 WL 975089, at *5–6 (Tex. App.—Waco Apr. 9, 2008, pet. ref'd) (not designated for publication).

§ B14.2.4 Pre-1974 Penal Code Self-Defense Law and Jury Instructions

Instructions on self-defense pose particular problems because pre-1974 case law contains and appears to require a considerable number of traditional instructions. In *Walters v. State*, 247 S.W.3d 204 (Tex. Crim. App. 2007), the court of criminal appeals made clear that much of that traditional law is no longer appropriate for jury instructions under the 1974 Penal Code.

In *Walters*, the murder defendant complained of the trial court's refusal to give a "prior verbal threats" instruction that prior case law indicated was required in the situation. The requested instruction was—

> You are instructed that where a defendant accused of murder seeks to justify himself on the grounds of threats against his own life, he is permitted to introduce evidence of the threats made, but the same shall not be regarded as affording justification for the offense unless it be shown that at the time of the killing, the person killed, by some act then done, manifested an intention to execute the threats so made and provided that a reasonable person in the defendant's situation would not have retreated.

The court commented, "[W]e have already held that some pre-1974 common-law instructions on self-defense survived in the 1974 Code." *Walters*, 247 S.W.3d at 210. But, it continued—

> generally 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.
>
> . . . .
>
> In this case, the "prior verbal threats" instruction meets all three criteria.
>
> First, the former penal code provisions, on which [early cases approving the instruction] relied, contained specific language pertaining to acts or words of the victim, but the current statutes do not.
>
> Second, the charge requested was covered by the self-defense charge given—one that included an instruction on apparent danger. . . .
>
> Third, the requested instruction is not benign. Instead, it focuses the jury's attention on a specific type of evidence that could support a finding of self-defense.

Walters, 247 S.W.3d at 212–13 (footnotes omitted).

Walters distinguished traditional jury instructions that concerned the evidence necessary or sufficient to establish a matter as part of self-defense law from other instructions that concerned the substance of self-defense law. Instructions of the first type were often based on specific statutory provisions that were not incorporated into the 1974 Penal Code. Consequently, those instructions no longer fall within any exception to the general prohibition against instructions that call juries' attention to particular categories of evidence. *Walters*, 247 S.W.3d at 211–12.

Under *Walters*, courts must give careful consideration to any proposed instruction on self-defense that does not state law explicitly set out in the current Penal Code.

Walters suggests that, for purposes of the Committee's task, particular attention might usefully be given to whether self-defense instructions should include traditional "multiple-assailant" and "apparent danger" instructions. These are addressed at section B14.3 and the comment to the instruction at section B14.4 below.

§ B14.2.5 Role of "Provocation" in Self-Defense Instructions

Whether jury instructions should and perhaps must address "provocation" has become a more difficult issue with recent changes in statutory self-defense law.

Traditionally, instructions on self-defense did not need, as a general matter, to address provocation. It was necessary to do so only if the facts raised a question about whether a defendant otherwise entitled to prevail because of self-defense was barred under Texas Penal Code section 9.31(b)(4) from so prevailing because the evidence showed the defendant provoked the incident in which the defendant acted in self-defense.

In 2007, however, the legislature added provisions creating a presumption applicable in certain circumstances and specifying when self-defense does not require retreat. These provisions are discussed at sections B14.2.7 and B14.2.8 below. Both new provisions used the term *provoke* without defining it.

As a result, it is now necessary to determine whether provocation needs to be defined in any situation in which the jury instructions include either the statutory presumption or the statutory retreat law or both. Further, if a definition is required, is the term defined the same way for purposes of these rules as it is for the basic provocation exception to the right to use force in self-defense?

The instruction at section B14.4 below simply sets out the statutory law without defining *provocation* as that term or concept is used in this body of law.

The term *provocation* also appears in the so-called verbal provocation rule. As discussed at section B14.2.6 below, this seems to be a different matter. It is best addressed by careful provision for what the verbal provocation rule is intended to mean.

§ B14.2.6 Statutory Provision on Verbal Provocation

Texas Penal Code section 9.31(b)(1) provides: "The use of force against another is not justified . . . in response to verbal provocation alone." The Committee had some difficulty deciding what effect to give to this provision in the instructions.

Current practice is generally to simply instruct the jury in the language of the statute.

The Committee was confident that under present law the language has the effect of limiting self-defense by establishing that verbal action by the victim amounting to no more than "verbal provocation" of the defendant is not the "use or attempted use of unlawful force." If the facts show no more than that the victim engaged in verbal provocation, the defendant did not have the legal right to use force in self-defense.

In *Hamel v. State*, 916 S.W.2d 491 (Tex. Crim. App. 1996), for example, the evidence was that the victim (Charlie) said he was going to shoot the defendant and that he had something in his car to shoot him with. He then started to go out the front door toward his car. Finding that the defendant was entitled to a jury instruction on self-defense, the court explained, "[A]ppellant was not entitled to a self-defense instruction if his use of force was in response to verbal provocation alone. But Charlie's threat did not stand alone. His move toward the car was the physical act that rendered his conduct more than a mere threat." *Hamel*, 916 S.W.2d at 494. The victim's threat to shoot the defendant was only verbal provocation that alone could not have served as the basis for self-defense.

Smith v. State, 965 S.W.2d 509 (Tex. Crim. App. 1998), the leading recent court of criminal appeals' discussion of provocation and self-defense, assumed that a defendant could properly be held to have lost the right of self-defense by verbal provocation. The *Smith* court, for example, described *Morrison v. State*, 256 S.W.2d 410, 411 (Tex. Crim. App. 1953), as meaning that "[w]ords alone may provoke a difficulty if they are clearly designed to do so." *Smith*, 965 S.W.2d at 517. "[V]erbal threats alone do not justify the use of force against another. Because the evidence in this case shows nothing more than verbal threats made to appellant, we conclude the evidence did not raise the issue of self-defense." *Lane v. State*, 957 S.W.2d 584, 586 (Tex. App.—Dallas 1997, pet. ref'd) (citation omitted). *See also Trammell v. State*, 287 S.W.3d 336, 342 (Tex. App.—Fort Worth 2009, no pet.) (while aggravated assault victim's words "could be viewed as an expression of his desire to fight [the defendant], his words alone did not justify appellant's shooting the shotgun"); *Gomez v. State*, 991 S.W.2d 870, 873 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) ("Although there is evidence that King told appellant, 'I am going to blow you away,' verbal provocation alone does not entitle appellant to use deadly force to defend himself. Tex. Penal Code Ann. § 9.31(b)(1) (Vernon Supp. 1998)."); *Espinoza v. State*, 951 S.W.2d 100, 101 (Tex. App.—Corpus Christi 1997, pet. ref'd) ("Mere words without an accompanying threatening action or gesture are not enough to constitute an act of aggression, nor foster an apprehension of danger which would permit the use of deadly force.").

Some members of the Committee believed that current law, as *Hamel* indicated, is that the statutory phrase means that a claim of self-defense is not raised by evidence showing only a verbal threat to harm the defendant. They believed that this is not effectively communicated to juries by instructing them by use of the statutory phrase *verbal provocation*. To the contrary, they argued, the statutory language misleadingly

suggests self-defense can somehow be based on "provocation" if it is not merely verbal. These Committee members favored the following paragraph:

> Self-defense does not cover conduct in response to verbal provocation alone. The defendant must have reasonably believed the other person had done more than verbally threaten the defendant.

A majority of the Committee decided, however, to recommend the paragraph above with *provoke* substituted for *threaten*. They believed that, despite some case law discussions, the statutory language reflected legislative intent to give juries some flexibility in this area and that flexibility is best facilitated by instructing juries using the statutory term *verbal provocation*.

§ B14.2.7 Statutory Presumption

In 2007, the legislature added presumptions to both sections 9.31(a)) and 9.32(b)) of the Texas Penal Code. These presumptions trigger section 2.05(b), specifying the procedural effect of a presumption favoring a criminal defendant.

Drafting jury instructions implementing these presumptions poses unusual difficulties because these presumptions favor the party who does not have the burden of persuasion on the relevant issue. Generally, a presumption is used to ease the burden of persuasion placed on the party given the presumption.

Another problem is identifying what section 2.05(b) calls "the presumed fact." Jury instructions on presumptions must, under section 2.05(b), identify and distinguish between (1) the facts giving rise to the presumption and (2) the presumed fact. Although section 2.05(b) is phrased in singular terms, most likely a presumption might provide for multiple facts to be presumed.

The "facts" that might be presumed include the following:

1. The defendant believed the force used was immediately necessary to protect the defendant against the injured person's use or attempted use of unlawful force; or

2. The defendant's belief was reasonable.

The specific terms of the statute suggest the only presumed fact is that the defendant's belief was reasonable. This means the presumption does not assist the state in proving the defendant did not believe the force was immediately necessary when the state must do so. The language concerning the presumption could have been phrased to include both the belief and its reasonableness (for example, "The actor is presumed to have acted in the reasonable belief that the force used was immediately necessary as described by this subsection if . . . . ").

The Committee concluded that the legislature provided for a presumption only with regard to the reasonableness of the belief and not the belief itself. Consequently, the instruction at section B14.4 below is framed to so provide.

§ B14.2.8 Retreat

Under prior law, deadly force was justified in self-defense only "if a reasonable person in the actor's situation would not have retreated." *See* Acts 1973, 63d Leg., R.S., ch. 399, § 1 (S.B. 34), eff. Jan. 1, 1974, *amended by* Acts 2007, 80th Leg., R.S., ch. 1, § 3 (S.B. 378), eff. Sept. 1, 2007. Legislation in 2007 eliminated that provision and inserted in both sections 9.31 and 9.32 nearly identical provisions identifying situations in which persons are not required to retreat before using force in self-defense (sections 9.31(e) and 9.32(c)) and in which a fact finder is barred from considering failure to retreat in determining whether a defendant reasonably believed the use of force was necessary (sections 9.31(f) and 9.32(d)). *See* Tex. Penal Code §§ 9.31(e), (f), 9.32(c), (d).

As a result, neither statutory provision addresses specifically when, if ever, retreat is required or the effect of a defendant's failure to retreat when retreat is required.

The only reasonable reading of the statutes is that when the provisions do not apply, retreat is required.

The most reasonable—although not the only possible—reading of the provisions is that if a trier of fact finds the defendant was required to retreat and did not do so, this is to be considered as bearing on whether the defendant reasonably believed the force the defendant used was necessary as required by the general rule of self-defense.

The instruction at section B14.4 below attempts to implement this.

Perhaps ironically, this means that one of the effects of the 2007 legislation was to increase the significance of failure to retreat in some situations—those involving nondeadly force.

§ B14.2.9 Converse Instructions on Self-Defense

Traditional Texas self-defense case law contains considerable discussion concerning the need for, or at least the permissibility of, what are often labeled "converse" instructions. Early cases often involved instructions on provoking the difficulty. When this was covered by the instructions, the case law made clear, it was appropriate for the instructions to also address the converse—that is, that the defendant was entitled to prevail on self-defense if the issue of provoking the difficulty was resolved in favor of the defendant. *E.g., Flewellen v. State*, 204 S.W. 657, 660–61 (Tex. Crim. App. 1917). "It is well settled that where the court instructs the jury on the effect of provoking a difficulty it should also instruct on the converse of the proposition and the instructions

on the converse should be given from the defendant's viewpoint untrammeled by any extra burden or insinuation." *Dirck v. State*, 579 S.W.2d 198, 203 (Tex. Crim. App. 1978) (opinion on rehearing) (citation omitted).

Other cases, however, used the term in a different manner, that is, in contexts involving no provocation-related issues. These decisions involved instructions properly telling juries that the state had the burden of proving self-defense inapplicable. They declined to disapprove a following converse instruction that told juries that if the state met its burden, the juries should find against the defendants on the issue of self-defense. *See Whitaker v. State*, 174 S.W.2d 975, 976 (Tex. Crim. App. 1943) (no harm was caused to defendant by converse instruction telling jury to find against defendant on his issue of self-defense if it found beyond a reasonable doubt that defendant did not reasonably believe he was in danger of death or serious bodily harm from deceased).

Such a converse instruction provides as follows:

> If you find from the evidence beyond a reasonable doubt that at the time and place in question the defendant did not reasonably believe that he was in danger of death or serious bodily injury, . . . or that defendant, under the circumstances, did not reasonably believe that the degree of force actually used by him was immediately necessary to protect himself against [the victim's] use or attempted use of unlawfully deadly force, if any as viewed from defendant's standpoint, at the time, then you must find against the defendant on the issue of self defense.

Gonzales v. State, 762 S.W.2d 583, 587 (Tex. Crim. App. 1988).

The Dallas court of appeals in 1999 appeared sympathetic to a defendant's argument that a converse instruction of the second type is an "anachronism in Texas law" that violates the spirit of the prohibition against comment on the evidence. Nevertheless, it held that it was bound to precedent establishing that the giving of such a converse instruction is not a basis for reversing a conviction. *Aldana v. State*, No. 05-98-00135-CR, 1999 WL 357355, at *6–7 (Tex. App.—Dallas June 4, 1999, pet. ref'd) (not designated for publication) (relying on *Powers v. State*, 396 S.W.2d 389, 391–92 (Tex. Crim. App. 1965)).

The Committee concluded that if jury instructions on self-defense are properly crafted, so-called converse instructions are neither necessary nor desirable. Thus the instruction at section B14.4 below does not include them.

II. General Rule of Self-Defense

§ B14.3 Nondeadly Force in Self-Defense

The instruction at section B14.4 below provides for a separate unit, simply titled "Self-Defense," that would be placed after the unit requiring proof of the elements of the offense. The unit would contain six subunits:

Self-Defense

Relevant Statutes

Burden of Proof

Definitions

Failure to Retreat

Presumption

Application of Law to Facts

§ B14.3.1 Defining "Provocation"

Both retreat and the statutory presumption refer to provocation. The instructions for use when the facts raise provocation under Texas Penal Code section 9.31(b)(4), which also refers to provocation, include a definition based on case law under that limitation on self-defense.

The Committee concluded, however, that in the provisions governing retreat and the presumption, the legislature used the term *provocation* in its ordinary sense rather than in the specialized way the term has come to be defined under section 9.31(b)(4). Consequently, no definition is provided in this instruction.

§ B14.3.2 Multiple-Assailant Instruction Generally

Before the 1974 Penal Code, Texas case law was clear that self-defense instructions had to be modified somewhat when the evidence raised the issue of multiple assailants. *E.g., McCuin v. State*, 505 S.W.2d 831 (Tex. Crim. App. 1974) (instruction on law of self-defense, which confined defense to an attack by deceased and not by multiple assailants, was reversible error). This multiple-assailant instruction has an impressive historical pedigree. *See, e.g., McLaughlin v. State*, 10 Tex. Ct. App. 340 (1881).

In a series of decisions beginning with *Sanders v. State*, 632 S.W.2d 346, 348 (Tex. Crim. App. [Panel Op.] 1982) ("Having found that appellant was entitled to an instruction on self-defense relating to multiple assailants, we find that there was reversible error."), the court of criminal appeals held that a multiple-assailant instruction is

required under 1974 Penal Code self-defense law. *See Frank v. State*, 688 S.W.2d 863, 867–68 (Tex. Crim. App. 1985) (denial of defendant's requested instruction on right of self-defense against multiple assailants was reversible error); *Brown v. State*, 651 S.W.2d 782, 783–84 (Tex. Crim. App. 1983) (trial court erred in failing to instruct jury on law of self-defense from multiple assailants); *Horn v. State*, 647 S.W.2d 283, 285 (Tex. Crim. App. [Panel Op.] 1983) (trial court erred in refusing to instruct jury on law of self-defense from multiple assailants). *See also Dickey v. State*, 22 S.W.3d 490, 492 (Tex. Crim. App. 1999) (no actual harm shown from failure to give multiple-assailant instruction, so reversal of conviction not required).

The courts of appeals have followed this line of decisions. *E.g., Kemph v. State*, 12 S.W.3d 530, 533 (Tex. App.—San Antonio 1999, pet. ref'd) (error in denying requested multiple-assailant self-defense instruction required reversal); *Romero v. State*, No. 13-00-134-CR, 2001 WL 1559239, at *3–4 (Tex. App.—Corpus Christi Dec. 6, 2001, no pet.) (not designated for publication) (reversing conviction, and explaining "the trial court erred in failing to give the requested instruction on self-defense against multiple assailants").

As Judge Keller explained in 1999, the traditional underlying substantive self-defense law is essentially that the principle of parties liability applies to the self-defense context:

> The theory behind the multiple assailants charge is that, when it is clear that an attack is being conducted by multiple people as a group, a defendant is justified in using force against any member of the group, even if the recipient of that force is not engaging in conduct that would, by itself, justify the use of force (or deadly force as the case may be). . . . The rule concerning multiple assailants is essentially an application of the law of parties to the defendant's assailants.

Dickey, 22 S.W.3d at 493 (Keller, J., concurring).

At least one discussion by the court of criminal appeals suggests that the instruction must effectively—and perhaps explicitly—convey to the jury that if A and B were joint assailants of the defendant, the defendant was entitled to use force against B if the defendant reasonably believed force was necessary to prevent A from using unlawful force against the defendant. *Brown*, 651 S.W.2d at 783–84 (where evidence suggested defendant was attacked by Leonard Bernard and then Jeffry Bernard (Leonard's son) joined the events, "the jury should have been instructed that the appellant had a right to act in self-defense against Jeffry Bernard if he was in fear of death or serious bodily injury at the hands of either Jeffry Bernard or Leonard Bernard").

Some members of the Committee believed that multiple-assailant instructions are among the "pre-1974 common-law instructions" that under *Walters v. State*, 247 S.W.3d 204, 211–12 (Tex. Crim. App. 2007) (discussed at section B14.2.4 above) should be treated as not surviving the enactment of the 1974 Penal Code. Apparently

no Texas court has carefully considered this possibility. The panel decision in *Sanders* uncritically assumed in 1982 that the instruction remained appropriate, and this assumption has continued to control.

These members of the Committee reasoned that the basic rule of self-defense in section 9.31(a) is that "a person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor *against the other's use or attempted use of unlawful force.*" Tex. Penal Code § 9.31(a) (emphasis added). The other whose use of force must justify the defendant's actions is clearly the person the defendant is accused of harming. There simply is no basis in the section 9.31(a) statutory rule for the position that a person is justified in using force against another because the actor reasonably believed such force was necessary to protect the actor against the use or attempted use of force *by someone else.*

A majority of the Committee, however, concluded that existing law firmly gives defendants a right—in appropriate cases—to multiple-assailant instructions. This majority was further persuaded that the conceptual basis for the instruction was sufficiently firm that, despite *Walters*, the court of criminal appeals will conclude that it remains part of Texas law. In addition, the majority noted that multiple-assailant instructions are commonly given in existing practice and that the Committee's instruction should include a provision for those who decide to instruct juries in accordance with this prevailing practice.

The instruction at section B14.4 below therefore includes for use in appropriate cases a modernized version of the traditional multiple-assailant instruction.

§ B14.3.3 Structuring Multiple-Assailant Instruction

Arguably a self-defense instruction incorporating the multiple-assailant rule should be completely different from the ordinary self-defense instruction because it covers law that differs so fundamentally from ordinary self-defense law.

The Committee concluded, however, that it would be best to follow the traditional approach. Therefore, it recommends that if the facts raise multiple-assailant law, this be first explained in general terms in the relevant statutes unit. Second, the application of law to facts unit should be redone to reflect the showing that the state must make to establish the inapplicability of self-defense in this context.

When Multiple-Assailant Instruction Should Be Given. In *Frank v. State*, 688 S.W.2d 863 (Tex. Crim. App. 1985), the court of criminal appeals explained:

> [A] defendant is entitled to a charge on the right of self-defense against multiple assailants if "there is evidence, viewed from the accused's standpoint, that he was in danger of an unlawful attack or a threatened attack at the hands of more than one assailant." *Wilson v. State,* 140 Tex. Crim 424, 145 S.W.2d 890, 893 (1940).

Frank, 688 S.W.2d at 868.

This analysis, however, requires more evidence than simply that persons other than the actual attacker were present. The evidence must tend to show that the others joined the attack or at least were present pursuant to an agreement to do so. *Juarez v. State*, 886 S.W.2d 511, 514 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd) (Evidence that seven or eight other men were present did not require multiple-assailant instruction, because "[t]he record is silent about the conduct of the seven or eight other men. There is no evidence to suggest that it was reasonable to think that any or all were about to attack with deadly force."). *See also Jimmerson v. State*, No. 05-97-01148-CR, 1999 WL 153228, at *7 (Tex. App.—Dallas Mar. 23, 1999, no pet.) (not designated for publication) (defendant's testimony that he thought another occupant of the complainant's car was attacking him because that person "was acting as though he had a gun" and that person repeatedly told the defendant to "come on down here" did not raise the possibility of a reasonable belief that the other occupant as well as the complainant was attacking the defendant); *Vargas v. State*, No. 14-96-01352-CR, 1998 WL 820703, at *4 (Tex. App.—Houston [14th Dist.] Nov. 25, 1998, pet. ref'd) (not designated for publication) (defendant's testimony that driver of car made gang signals and followed defendant did not raise possibility that defendant reasonably thought he was being attacked by both passenger with gun and driver).

§ B14.3.4 Commission of Weapons Offense as Rendering Self-Defense Inapplicable

The literal language of Texas Penal Code section 9.31(b) suggests that the state can render self-defense inapplicable by showing that at the time of the incident the defendant was carrying, possessing, or transporting a weapon in violation of section 46.02 or 46.05. Some appellate case law analyses of sufficiency of the evidence suggest that a showing of unlawfully carrying a weapon to a discussion automatically renders self-defense inapplicable. *See Elmore v. State*, 257 S.W.3d 257, 259 (Tex. App.—Houston [1st Dist.] 2008, no pet.) ("Appellant's testimony satisfied, as a matter of law, all of the elements of 'carrying a gun to a discussion,' and we conclude that he was, therefore, not entitled to a self-defense instruction. *See* Tex. Penal Code Ann. § 9.31(b)(5)."). *See also Weatherall v. State*, No. 06-09-00095-CR, 2009 WL 3349039, at *2 (Tex. App.—Texarkana Oct. 20, 2009, no pet.) (not designated for publication) (no error in refusing self-defense instruction), relying on *Williams v. State*, 35 S.W.3d 783 (Tex. App.—Beaumont 2001, pet. ref'd).

If this analysis is correct as a matter of substantive law, arguably this should be explicitly set out in the instructions.

In *Sheppard v. State*, 545 S.W.2d 816 (Tex. Crim. App. 1997), however, the court explained:

> When an unlimited charge on self-defense is given, a charge on the right of the accused to arm himself is not required. But as stated in many decisions of this Court, if the charge on self-defense is limited by "a charge on provoking the difficulty or otherwise", a charge on the accused's right to arm himself should be given.

Sheppard, 545 S.W.2d at 820 (citations omitted). This makes clear that the right to arm oneself—and the limitation on this right embodied in section 9.31(b)(5)—apply only when the case involves an issue concerning provocation.

Thus arming oneself and doing so in violation of the Penal Code is addressed only as a part of provocation.

§ B14.4 Instruction—Nondeadly Force in Self-Defense

If you all agree the state has proved, beyond a reasonable doubt, each of the [*number*] elements listed above, you must next consider whether the defendant's use of force was made in self-defense.

Self-Defense

You have heard evidence that, when the defendant [*insert specific conduct constituting offense*], he believed his use of force was necessary to defend himself against [*name*]'s use [or attempted use] of unlawful force.

Relevant Statutes

A person's use of force against another that would otherwise constitute the crime of [*offense*] is not a criminal offense if the person reasonably believed the force used was immediately necessary to protect the person against the other's use [or attempted use] of unlawful force.

Self-defense does not cover conduct in response to verbal provocation alone. The defendant must have reasonably believed the other person had done more than verbally provoke the defendant.

[Include the following if the facts raise the issue of multiple assailants (and use the alternative application of law to facts provision).]

If a person reasonably believes he is threatened with the use or attempted use of unlawful force against him by several others all present and acting together to attack him and he has a right under the law set out above to use force against at least one of them, he may use force against any or all of them.

Burden of Proof

The defendant is not required to prove self-defense. Rather, the state must prove, beyond a reasonable doubt, that self-defense does not apply to the defendant's conduct.

Definition

Reasonable Belief

"Reasonable belief" means a belief that an ordinary and prudent person would have held in the same circumstances as the defendant.

Failure to Retreat

A person who has a right to be present at a location where the person uses force against another is not required to retreat before using force in self-defense if both—

1. the person with the right to be present did not provoke the person against whom the force is used; and

2. the person was not engaged in criminal activity at the time the force is used.

Therefore, in deciding whether the defendant reasonably believed his use of force was necessary, you must not consider any failure of the defendant to retreat that might be shown by the evidence if you find both—

1. the defendant did not provoke [*name*], the person against whom the defendant used force; and

2. the defendant was not engaged in criminal activity at the time he used the force.

If you do not find both 1 and 2, you may consider any failure of the defendant to retreat that might be shown by the evidence in deciding whether the defendant reasonably believed his use of force was necessary.

Presumption

Under certain circumstances, the law creates a presumption that the defendant's belief—that the force he used was immediately necessary—was reasonable. A presumption is a conclusion the law requires you to reach if certain other facts exist.

Therefore, you must find the defendant's belief—that the force he used was immediately necessary—was reasonable unless you find the state has proved, beyond a reasonable doubt, at least one of the following:

[Include only those elements supported by the evidence.]

1. The defendant neither knew nor had reason to believe that [*name*]—

   a. unlawfully and with force entered, or was attempting to enter unlawfully and with force, the defendant's occupied habitation, vehicle, or place of business or employment; or

b. unlawfully and with force removed, or was attempting to remove unlawfully and with force, the defendant from the defendant's habitation, vehicle, or place of business or employment; or

c. was committing or attempting to commit aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery; or

2. The defendant provoked [*name*]; or

3. The defendant, at the time the force was used, was engaged in criminal activity other than a class C misdemeanor that is a violation of a law or ordinance regulating traffic.

If you find the state has proved element 1, 2, or 3 listed above, the presumption does not apply and you are not required to find that the defendant's belief was reasonable.

Whether or not the presumption applies, the state must prove, beyond a reasonable doubt, that self-defense does not apply to this case.

Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the state has proved that the defendant's conduct was not justified by self-defense.

To decide the issue of self-defense, you must determine whether the state has proved, beyond a reasonable doubt, one of the following:

1. The defendant did not believe his conduct was immediately necessary to protect himself against [*name*]'s use [or attempted use] of unlawful force; or

2. The defendant's belief was not reasonable.

[Use the following if instructions include coverage of multiple assailants.]

To decide the issue of self-defense, you must determine whether the state has proved, beyond a reasonable doubt, one of the following:

1. The defendant did not believe his conduct was immediately necessary to protect himself against—

a. [*name*]'s use [or attempted use] of unlawful force; or

b. if [*name*] and [*name of other person*] were both present and acting together to attack the defendant, [*name of other person*]'s use [or attempted use] of unlawful force; or

2. The defendant's belief was not reasonable.

[Continue with the following.]

You must all agree that the state has proved, beyond a reasonable doubt, either element 1 or 2 listed above. You need not agree on which of these elements the state has proved.

If you find that the state has failed to prove, beyond a reasonable doubt, either element 1 or 2 listed above, you must find the defendant "not guilty."

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of [*insert specific offense*], and you all agree the state has proved, beyond a reasonable doubt, either element 1 or 2 listed above, you must find the defendant "guilty."

[See chapter 2 for verdict instruction.]

COMMENT

Definition of Unlawful Force. The Committee considered recommending that unlawful force be defined based on section 1.07(48) of the Texas Penal Code. Such a definition might be as follows:

> A person's use or attempted use of force is unlawful if it is a crime or a civil tort or if it would be a crime or a civil tort except for a defense not amounting to justification or privilege.

It concluded, however, that such a definition would not be useful.

Instructions on "Apparent Danger." In *Walters v. State*, 247 S.W.3d 204 (Tex. Crim. App. 2007), the instructions included a portion covering what has traditionally been termed "apparent danger":

> It is not necessary that there be an actual attack or attempted attack, a person is justified in using force against another in self-defense from apparent danger to the same extent as he would be had the danger been real, provided [that] he acted upon a reasonable belief that the other person was using or attempting to use unlawful force . . . .

Walters, 247 S.W.3d at 213 n.37. The court noted that the validity of this portion of the instruction was not before it. Nevertheless, it continued—

> In [*Jones v. State*, 544 S.W.2d 139 (Tex. Crim. App. 1976),] we stated,
>
> > Where the evidence raises the issue of apparent danger, the court, in instructing the jury on the law of self-defense, should tell it that a person has a right to defend from apparent danger to the same extent as he would had the danger been real, provided he acted upon a reasonable apprehension of danger as it appeared to him from his standpoint at the time.
>
> [544 S.W.2d at 142.] Three years later, in *Valentine v. State*, 587 S.W.2d 399 (Tex. Crim. App. 1979), we held that an additional charge on apparent danger was not required, when, as part of its charge on the law of self-defense, the court instructed the jury on the statutory definition of "reasonable belief." *Id.* at 401. This had not happened in *Jones*. *Id.* In *Valentine*, we stated, "By defining the term 'reasonable belief' as it did, the court instructed the jury that a reasonable apprehension of danger, whether it be actual or apparent, is all that is required before one is entitled to exercise the right of self-defense against his adversary." *Id.* And we observed that "the court's charge is in accordance with Sections 1.07(31) [now section 1.07(42)], 9.31, and 9.32 of the Penal Code, all of which adequately presented the appellant's defensive theory and protected her rights." *Id.*

Walters, 247 S.W.3d at 213 n.37.

Walters's discussion makes clear that the court of criminal appeals would hold an apparent-danger instruction unnecessary (and perhaps improper) when the instructions make clear the defense turns on the defendant's reasonable belief. Consequently, the Committee concluded no such instruction should be mandated.

Instruction to Consider All Facts and Circumstances. Many Texas jury instructions include, often after what the discussion above calls an "apparent danger" instruction, a paragraph such as the following:

> In determining the existence of real or apparent danger, you should consider all the facts and circumstances in the case in evidence before you, together with all relevant facts and circumstances going to show the condition of the mind of the defendant at the time of the occurrence in question, and in considering such circumstances, you should place yourselves in the defendant's position at that time and view them from his standpoint alone.

One court recently held that a trial judge did not err in refusing to add such a paragraph to an instruction that apparently tracked the language of the current statutes without what the section above calls the apparent-danger instruction. *Bundy v. State*, 280 S.W.3d 425, 429–31 (Tex. App.—Fort Worth 2009, pet. ref'd). *Bundy* treated the

request for this paragraph as a request for an apparent-danger instruction and held it unnecessary.

The paragraph in fact is not a necessary part of an apparent-danger instruction. In part, it tells the jury to consider the situation from the defendant's perspective. This is arguably also done by the definition of reasonable belief. In part, it tells the jury to consider all facts and circumstances bearing on the defendant's state of mind. This may be unnecessary because it is obvious and also because it possibly may be a comment on the evidence.

Instructions without an apparent-danger provision could include a paragraph along the traditional lines but modified to delete any reference to apparent danger. Such an instruction might be along the following lines:

> In determining whether the defendant reasonably believed he was being attacked with unlawful force, you should consider all the facts and circumstances in the case in evidence before you, together with all relevant facts and circumstances going to show the condition of the mind of the defendant at the time of the occurrence in question, and in considering such circumstances, you should place yourselves in the defendant's position at that time and view them from his standpoint alone.

The Committee concluded, however, that such a paragraph is unnecessary and potentially confusing. Therefore, the instruction does not include it.

III. Nondeadly Force in Self-Defense with Consent Issue

§ B14.5 Nondeadly Force in Self-Defense with Consent Issue

What traditionally has been called mutual combat is now embodied in Tex. Penal Code § 9.31(b)(3): "The use of force against another is not justified . . . if the actor consented to the exact force used or attempted by the other . . . ."

This continues a version of the substantive law announced in 1875 by the Texas Supreme Court:

> If the defendant voluntarily engages in a combat, knowing that it will or may result in death, or some serious bodily injury which may probably produce the death either of his adversary or himself, or by his own wrongful act brings about the necessity of taking the life of another to prevent being himself killed, he cannot say that such killing was in his necessary self-defense.

Gilleland v. State, 44 Tex. 356, 359 (1875).

Apparently this aspect of self-defense turns on the actual fact—whether the defendant in actual fact consented to the exact force which, under the defense theory, entitled the defendant to engage in the conduct constituting the charged offense. Reasonable beliefs do not control. Thus if the defendant in fact consented, he has no defense based on evidence that he believed—even reasonably—that he had not consented to what he believed was the degree of force being used against him.

This provision has almost never been discussed in appellate litigation. One of the few exceptions, *Padilla v. State*, No. 03-07-00513-CR, 2008 WL 5423139 (Tex. App.—Austin Dec. 31, 2008, no pet.) (not designated for publication), illustrates the application of the provision. The question in *Padilla* was whether one Orive had a right to defend himself against force being used by the complainant, Lopez. Orive had agreed to fight Lopez. "It was agreed that this would be a 'clean fight' between the two using no weapons." *Padilla*, 2008 WL 5423139, at *1. During the fight, Lopez forced Orive to his knees and placed him in a head lock or choke hold. Testimony indicated that Orive's face was turning purple and that he appeared to have trouble breathing. Orive himself testified, "I couldn't talk, I couldn't breathe, I couldn't do anything. I was afraid for my life." *Padilla*, 2008 WL 5423139, at *1. Orive obtained a gun and shot Lopez.

Holding that the jury could have rejected the defense contention that Orive had a right to shoot Lopez in self-defense, the court explained—

> The use of force against another is not justified if the actor consented to the exact force used or attempted by the other. Tex. Penal Code Ann. § 9.31(b)(3) (West Supp. 2008). Appellant argues that although Orive

> agreed to fight Lopez, he did not agree to Lopez's use of a choke hold that left Orive unable to speak or breathe. The evidence was undisputed, however, that the parties agreed only that no weapons would be used in the fight. There is no basis in the evidence for appellant's assertion that Lopez and Orive had agreed that the fight would be over, or would be temporarily suspended, if one of the fighters fell to the ground. It was neither manifestly unjust nor against the great weight of the available evidence for the jury to conclude that Orive, by agreeing to fight Lopez, consented to the exact force used by Lopez in the fight.

Padilla, 2008 WL 5423139, at *2.

§ B14.6 Instruction—Nondeadly Force and Consent Issue

If you all agree the state has proved, beyond a reasonable doubt, each of the [*number*] elements listed above, you must next consider whether the defendant's use of force was made in self-defense.

Self-Defense

You have heard evidence that, when the defendant [*insert specific conduct constituting offense*], he believed his use of force was necessary to defend himself against [*name*]'s use [or attempted use] of unlawful force.

Relevant Statutes

A person's use of force against another that would otherwise constitute the crime of [*offense*] is not a criminal offense if the person reasonably believed the force used was immediately necessary to protect the person against the other's use [or attempted use] of unlawful force.

A person cannot use force against another in self-defense if the person consented to the exact force used or attempted by the other person.

Self-defense does not cover conduct in response to verbal provocation alone. The defendant must have reasonably believed the other person had done more than verbally provoke the defendant.

Burden of Proof

The defendant is not required to prove self-defense. Rather, the state must prove, beyond a reasonable doubt, that self-defense does not apply to the defendant's conduct.

Definition

Reasonable Belief

"Reasonable belief" means a belief that an ordinary and prudent person would have held in the same circumstances as the defendant.

Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the state has proved that the defendant's conduct was not justified by self-defense.

To decide the issue of self-defense, you must determine whether the state has proved, beyond a reasonable doubt, one of the following:

1. The defendant did not believe his conduct was immediately necessary to protect himself against [*name*]'s use [or attempted use] of unlawful force; or

2. The defendant's belief was not reasonable; or

3. The defendant consented to the exact force used [or attempted] by [*name*] against the defendant.

You must all agree that the state has proved, beyond a reasonable doubt, either element 1, 2, or 3 listed above. You need not agree on which of these elements the state has proved.

If you find that the state has failed to prove, beyond a reasonable doubt, either element 1, 2, or 3 listed above, you must find the defendant "not guilty."

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of [*insert specific offense*], and you all agree the state has proved, beyond a reasonable doubt, either element 1, 2, or 3 listed above, you must find the defendant "guilty."

[See chapter 2 for verdict instruction.]

IV. Nondeadly Force in Self-Defense with Provocation Issue

§ B14.7 Nondeadly Force in Self-Defense with Provocation Issue

If the facts raise not only basic self-defense but also the possibility that provocation of the complainant by the defendant occurred, the instructions become considerably more complicated.

Provocation law was discussed at length by the court of criminal appeals in *Smith v. State*, 965 S.W.2d 509 (Tex. Crim. App. 1998).

§ B14.7.1 Structure of Instructions

If provocation is raised so as to require an instruction, the issue essentially provides an additional way in which the state can prove that self-defense is not applicable.

Therefore, the instruction at section B14.8 below introduces provocation at the beginning as one of the ways in which the state can prevail on the issue of self-defense.

The instruction should not address abandonment unless the evidence raises it. Therefore, the instruction provides options for use when the evidence does or does not raise abandonment.

There is some question whether all instructions that address abandonment would best also address continuation of the attack by the complainant after the abandonment. The instruction assumes that this already-complicated instruction should not be burdened with information on such continuation of the attack unless the evidence presents an issue regarding that matter.

This would be the case if (1) the state has proved the defendant provoked the encounter; (2) the state has failed to prove the defendant neither abandoned the encounter nor communicated a desire to do so; and (3) the state has produced evidence from which the jury could find, beyond a reasonable doubt, that the complainant did not continue his use of force after any abandonment or communication of a desire to abandon that may have occurred.

In those situations, the instruction attempts to tell the jury that the state can prevail by proving that the complainant did not continue the attack after any abandonment by the defendant.

Even if the instruction is technically correct, it may be too complicated to be practical. The problem is taking a "rule" drafted on the assumption that the defendant must prove the "defense" and putting it in a manner that explains the law in terms of what the state's burden of proof on the matter means.

§ B14.7.2 No Self-Defense Instruction If Provocation Established as Matter of Law

Generally, "the defendant is not entitled to a self-defense instruction if the evidence establishes as a matter of law that one of the exceptions to self-defense listed in section 9.31(b) applies." *Johnson v. State*, 157 S.W.3d 48, 50 (Tex. App.—Waco 2004, no pet.).

Therefore, no jury instruction on self-defense should be given at all if a reasonable jury could find only that the evidence proves, beyond a reasonable doubt, facts that would make self-defense inapplicable. For example, a jury instruction was properly denied when the defendant admitted he provoked the victim and there was no evidence that he abandoned the attack. *Dyson v. State*, 672 S.W.2d 460, 464–65 (Tex. Crim. App. 1984).

§ B14.7.3 When Instruction on Provocation Is Proper—In General

If the facts raise a jury issue about whether provocation precludes application of self-defense, the issue should be submitted to the jury.

In 1979, the court of criminal appeals commented, "[E]very trial judge of any experience knows that submitting [an instruction on provoking the difficulty] to a jury is fraught with difficulty and the chance of error is great." *Dirck v. State*, 579 S.W.2d 198, 203 n.5 (Tex. Crim. App. 1978) (opinion on rehearing).

Smith v. State, 965 S.W.2d 509 (Tex. Crim. App. 1998), however, appeared to signal that trial judges are to have less to fear from appellate review on this matter. In *Smith*, the court of criminal appeals explained generally:

> A charge on provocation is required when there is sufficient evidence (1) that the defendant did some act or used some words which provoked the attack on him, (2) that such act or words were reasonably calculated to provoke the attack, and (3) that the act was done or the words were used for the purpose and with the intent that the defendant would have a pretext for inflicting harm upon the other. . . .
>
> . . . .
>
> An instruction on provocation should only be given when there is evidence from which a rational jury could find every element of provocation beyond a reasonable doubt.

Smith, 965 S.W.2d at 513–14.

The words or actions may be ones directed at a third party, that is, someone other than the person who in fact was provoked. *Smith*, 965 S.W.2d at 514–15.

§ B14.7.4 When Instruction on Provocation Is Proper—Raising Whether Provocation Occurred

A traditional problem for trial judges is avoiding error by instructing on provocation when the facts raise only whether the defendant or the complainant made the "first attack." This was the reversible error in *Dirck v. State*, 579 S.W.2d 198, 203 (Tex. Crim. App. 1978) (opinion on rehearing), as well as in numerous earlier cases.

Smith v. State, 965 S.W.2d 509 (Tex. Crim. App. 1998), reaffirmed this rule but made clear that the rule is in essence the question of whether the evidence generates a jury issue regarding the first of the three requirements for a provocation instruction: "[evidence] that the defendant did some act or used some words which provoked the attack on him." An instruction on provocation is proper if that version of the facts showing the complainant made the first attack also would permit the jury to conclude that the defendant provoked this attack. *Smith*, 965 S.W.2d at 514 ("Absent any evidence that an act or words of the defendant caused the attack on him, the case merely involves the question of which of the two parties used unlawful force," citing *Dirck*.).

More significantly, *Smith* relaxed application of the traditional rule by rejecting the suggestions of some prior decisions that "where there is no evidence of what specific act or words were used to provoke the difficulty, the State necessarily is unable to prove [the defendant did some act or used some words that provoked the attack on him]." *Smith*, 965 S.W.2d at 515. Instead, it observed:

> The better reasoned opinions did not find it to be essential that there be conclusive evidence as to what the act or words which caused the provocation actually were; the jury did not need to be able to put its hands on the particular act or words which resulted in the attack. Rather, the jury must merely be able to find that there was *some* provoking act or words.

Smith, 965 S.W.2d at 515. The evidence may be circumstantial. Therefore—

> [i]f the evidence allows an inference beyond a reasonable doubt that the victim attacked the defendant in response to something the defendant did or said, this will be sufficient to allow the jury to find [the defendant did some act or used some words that provoked the attack on him].

Smith, 965 S.W.2d at 516.

Smith, then, suggests that trial judges should be more willing than has traditionally been the case to submit provocation instructions despite the rule that such instructions are improper if the only factual issue is who made the "first attack." Circumstantial evidence of provocation, even if it not specific as to the provoking words or acts, is enough for juries to find a complainant's "first attack" was provoked and thus the defendant had no right of self-defense.

§ B14.7.5 When Instruction on Provocation Is Proper—Raising Whether Provocation Was Reasonably Calculated to Provoke Attack

As to when a jury issue is raised concerning the second requirement—reasonableness—*Smith v. State*, 965 S.W.2d 509 (Tex. Crim. App. 1998), explained:

> An act is reasonably calculated to cause an attack if it is reasonably capable of causing an attack, or if it has a reasonable tendency to cause an attack. Some provoking acts or words can by their own nature be legally sufficient to support a jury finding. *See, e.g., Bateson v. State*, 46 Tex. Crim. 34, 80 S.W. 88, 93 (1904) ("if the jury believed that appellant called deceased a son of a bitch, this would certainly be sufficient to provoke an assault by deceased."). Alternatively, the act or words taken in conjunction with the relations of the parties and other circumstances surrounding the difficulty can provide the basis for such a finding. *Tate v. State*, 35 Tex. Crim. 231, 33 S.W. 121, 123 (1895) ("we can appeal to the antecedent acts and conduct of the parties"). The question of whether an act or words were reasonably calculated to cause an attack is a question of fact for the jury to resolve. As above, whether an act is reasonably calculated to cause an attack can be determined from circumstantial evidence.

Smith, 965 S.W.2d at 518 (some citations omitted).

§ B14.7.6 When Instruction on Provocation Is Proper—Raising Whether Provocation Was "Intentional"

Ordinarily, as explained in *Smith v. State*, 965 S.W.2d 509 (Tex. Crim. App. 1998), whether provocation was made with the required intent is a jury question. Only in "exceptional and extraordinary situations" is evidence of intent so lacking that "the jury is prevented from considering the question of what the defendant's intent was in provoking an attack from the deceased." *Smith*, 965 S.W.2d at 519.

§ B14.7.7 Defining Provocation

The instruction at section B14.8 below includes a detailed presentation of the case law requirements for provocation, as apparently directed by present law. *See Dirck v. State*, 579 S.W.2d 198, 203 (Tex. Crim. App. 1978) (opinion on rehearing) (instruction on provocation should include requirements of intent, an act by the defendant reasonably calculated to bring on the difficulty, and that the act actually did bring on the difficulty).

Traditionally, jury instructions properly told the jury that provocation required an intent to use the provoked person's response as a pretext. *Lewellen v. State*, 286 S.W. 224, 226 (Tex. Crim. App. 1926) (opinion on motion for rehearing) ("jury should be told . . . that they must believe that the accused, with intent to bring on the difficulty or cause an attack which he might use as a pretext for killing or injuring the deceased"). This requirement continues to be the case. *Menchaca v. State*, 697 S.W.2d 857, 859 (Tex. App.—San Antonio 1985, no pet.) ("The charge failed to include all of the essential elements of the doctrine of provoking the difficulty, because it did not require the finding of an intent to provoke," citing *Dirck*).

In *Smith v. State*, 965 S.W.2d 509 (Tex. Crim. App. 1998), the court summarized the law:

> The rule of law is that if the defendant provoked another to make an attack on him, so that the defendant would have a pretext for killing the other under the guise of self-defense, the defendant forfeits his right of self-defense. Although we address the issue in terms of intent to kill the victim, the law equally applies to a forfeiture of right to self-defense of any degree of harm the defendant intends to inflict upon the victim. For instance, if the defendant employs provocation with intent to assault the victim, and provokes an attack and makes an assault, then self-defense is lost as to the assault. The common law was that if the defendant merely intended an assault, and ultimately must have killed the victim in self-defense, then the killing was "manslaughter" or "murder without malice." We do not today address this doctrine, also known as "imperfect self-defense."

Smith, 965 S.W.2d at 512–13 (citations omitted).

Smith suggests that in a prosecution for an offense involving only nondeadly force, the instruction should require for provocation an intent to use the occasion to inflict any harm on the complainant.

In prosecutions for an offense involving deadly force, however, provocation bars conviction for the charged offense only if it was done with intent to use the occasion to inflict death or serious bodily injury on the complainant.

In those prosecutions for an offense involving deadly force, however, provocation involving only an intent to use the occasion as a pretext for causing harm less than death or serious bodily injury might give rise to an "imperfect" defense. The defense would be imperfect in the sense that it would not exonerate the defendant but reduce the seriousness of the offense for which he could be convicted. Under traditional homicide law, the defendant would be convicted of manslaughter rather than murder. *Smith* carefully avoided comment on whether 1974 Penal Code homicide law contains any version of this traditional "imperfect self-defense" law.

The Committee concluded that, under *Smith*, in an instruction on perfect self-defense in a prosecution for murder or some other offense involving deadly force,

provocation should be defined as requiring an intent to use the occasion as a pretext for either killing the complainant or causing the complainant serious bodily injury. An instruction on perfect self-defense in other cases should require only an intent to use the occasion as a pretext for doing some harm to the complainant.

§ B14.7.8 Verbal Provocation as Insufficient Justification

As noted earlier, the Committee considered but rejected the proposition that Texas Penal Code section 9.31(b)(1) means that provocation bars self-defense only if that provocation goes beyond mere verbal provocation. This appears to have been pre-1974 law, but the Committee was convinced the 1974 revision abandoned that position.

If the law is otherwise, this proposition might be best accommodated by including in the instruction the following:

> Force against another is not justified in response to verbal provocation alone. Therefore, if the evidence shows only that the defendant verbally provoked the use or attempted use of force against him, this alone does not constitute provocation by the defendant sufficient to render self-defense inapplicable.

§ B14.7.9 Abandonment of Provoking Attack

Texas Penal Code section 9.31(b)(4) contains quite elaborate provisions for an attacker who provokes another to "regain" the right of self-defense. The Committee encountered significant difficulty translating this statement of general law into law reflecting the allocation of the burden of persuasion.

Instructions should not mention abandonment unless there is evidence before the jury raising abandonment. If the matter is raised, the instructions should make clear that the burden of persuasion is on the state: the state must prove, beyond a reasonable doubt, both that the defendant provoked the victim and that the defendant did not do anything that triggered the abandonment "rule."

Two matters are made relevant by the statute: (1) whether the defendant abandoned the encounter or communicated a desire to do so and (2) whether the provoked victim continued the responsive attack.

In some situations, the evidence may make clear that the victim continued the responsive attack past any action that could constitute an abandonment. The only issue for the jury is whether the defendant engaged in conduct that constituted an abandonment. Instructions making no reference to continuing the responsive attack are considerably simpler than ones addressing the continuing responsive attack. Consequently, the instruction at section B14.8 below provides one alternative for use where the evi-

dence raises issues concerning both abandonment and continuation of the attack and another where the evidence raises an issue regarding only whether the defendant abandoned the encounter.

§ B14.8 Instruction—Nondeadly Force and Provocation Issue

If you all agree the state has proved, beyond a reasonable doubt, each of the [*number*] elements listed above, you must next consider whether the defendant's use of force was made in self-defense.

Self-Defense

You have heard evidence that, when the defendant [*insert specific conduct constituting offense*], he believed his use of force was necessary to defend himself against [*name*]'s use [or attempted use] of unlawful force.

Relevant Statutes

A person's use of force against another that would otherwise constitute the crime of [*offense*] is not a criminal offense if the person reasonably believed the force used was immediately necessary to protect the person against the other's use [or attempted] use of unlawful force.

Provoking the Use or Attempted Use of Force

To prove that the defendant provoked the other, the state must show all of the following:

1. The defendant did some acts or used some words that caused the other person to attack the defendant; and

2. The acts or words by the defendant were reasonably calculated to provoke the attack; and

3. The defendant did the acts or used the words for the purpose and with the intent that the defendant would have a pretext for inflicting harm on the other person.

[Substitute the following for element 3 above if the prosecution is for an offense involving deadly force.]

3. The defendant did the acts or used the words for the purpose and with the intent that the defendant would have a pretext for killing the other person or inflicting serious bodily injury on him.

[Include the following if the facts present a question about whether the defendant made an approach to seek an explanation and neither establish that the defendant was illegally armed nor raise a jury issue on that matter. Do not use if the jury could only conclude that the defendant was illegally armed.]

A person has a right to approach another person for the purpose of seeking an explanation from or a discussion with that other person concerning their differences. If the person fears an unlawful attack from the other, the person has a right to arm himself for purposes of protecting himself from the other person. Such action in seeking out the other, even while armed, does not constitute provocation as would deprive the person of the right to defend himself. It does not in any other way affect the person's right to use force in self-defense.

[Include the following if the facts raise a jury issue about whether the defendant approached the complainant to seek a discussion of differences while armed in violation of the Penal Code.]

However, a person who seeks an explanation from or a discussion with another person concerning differences between them cannot use force in self-defense while either—

1. the person is carrying a weapon in violation of section 46.02 of the Texas Penal Code; or

2. the person is possessing or transporting a weapon in violation of section 46.05 of the Texas Penal Code.

Section 46.02 of the Texas Penal Code prohibits a person from intentionally, knowingly, or recklessly carrying on or about the person a handgun, illegal knife, or club if the person is neither—

1. on the person's own premises or premises under the person's control; or

2. inside of or directly en route to a motor vehicle or watercraft that is owned by the person or under the person's control.

Section 46.02 of the Texas Penal Code prohibits a person from intentionally, knowingly, or recklessly carrying on or about the person a handgun in a motor vehicle or watercraft that is owned by the person or under the person's control if the handgun is in plain view.

Section 46.05 of the Texas Penal Code prohibits a person from possessing or transporting a [*specify weapon*].

You must consider whether the state has proved, beyond a reasonable doubt, that the defendant approached another person for the purpose of seeking an explanation from or a discussion with that other person concerning their differences while in violation of the Penal Code. If the state has proved this, you should not apply a general rule that approaching another person, even while armed, for the purpose of seeking an explanation from or a discussion with that other person concerning their differences does not constitute provocation as would deprive the person of the right to defend himself.

You must still determine whether the state has proved, beyond a reasonable doubt, that the defendant provoked the other person. In making this determination, however, you are not to assume that the defendant's approach to the other person is necessarily not provocation.

Burden of Proof

The defendant is not required to prove self-defense. Rather, the state must prove, beyond a reasonable doubt, that self-defense does not apply to the defendant's conduct.

Definition

Reasonable Belief

"Reasonable belief" means a belief that an ordinary and prudent person would have held in the same circumstances as the defendant.

Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the state has proved that the defendant's conduct was not justified by self-defense.

To decide the issue of self-defense, you must determine whether the state has proved, beyond a reasonable doubt, one of the following:

1. The defendant did not believe his conduct was immediately necessary to protect himself against [*name*]'s use [or attempted use] of unlawful force; or

2. The defendant's belief was not reasonable; or

3. The defendant provoked [*name*]'s use [or attempted use] of unlawful force.

[Substitute the following for element 3 above if the evidence raises abandonment or communication of a desire to abandon the attack.]

3. The defendant—
   a. provoked [*name*]'s use [or attempted use] of unlawful force; and
   b. did not—
      i. abandon the encounter with [*name*]; or
      ii. reasonably believe he could not safely abandon the encounter and communicate his desire to abandon the encounter with [*name*].

[Substitute the following for element 3 above if the evidence raises abandonment or communication of a desire to abandon the attack and a continuing response attack.]

3. Both—
   a. the defendant provoked [*name*]'s use [or attempted use] of unlawful force; and
   b. either—
      i. the defendant did not abandon the encounter or reasonably believe he could not safely abandon the encounter and communicate his desire to abandon the encounter; or
      ii. [although the defendant may have abandoned the encounter or communicated his desire to do so,] the other person did not continue or attempt to continue to use unlawful force against the defendant after the defendant's abandonment or communication of the desire to abandon the encounter.

You must all agree that the state has proved, beyond a reasonable doubt, either element 1, 2, or 3 listed above. You need not agree on which of these elements the state has proved.

If you find that the state has failed to prove, beyond a reasonable doubt, either element 1, 2, or 3 listed above, you must find the defendant "not guilty."

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of [*insert specific offense*], and you all agree the state

has proved, beyond a reasonable doubt, either element 1, 2, or 3 listed above, you must find the defendant "guilty."

[See chapter 2 for verdict instruction.]

COMMENT

Right to Arm Oneself. In *Young v. State*, 530 S.W.2d 120 (Tex. Crim. App. 1975), before Texas Penal Code section 9.31(b)(5) was added, the court of criminal appeals held that despite the lack of any specific basis in the 1974 Penal Code, the traditional right to arm oneself continues to be a part of self-defense law. A defendant is, in proper circumstances, entitled to a jury instruction on the issue. *Young* was followed in *Banks v. State*, 656 S.W.2d 446 (Tex. Crim. App. 1983); *Gassett v. State*, 587 S.W.2d 695 (Tex. Crim. App. 1979); and *Williams v. State*, 580 S.W.2d 361 (Tex. Crim. App. 1979).

In 1993, the legislature added section 9.31(b)(5), and the provision was amended in 1995. Section 9.31(b)(5) creates a qualification to an unstated general rule that corresponds generally with the traditional right to arm oneself.

Young was reaffirmed—or at least not disapproved—in *Walters v. State*, 247 S.W.3d 204 (Tex. Crim. App. 2007).

If a defendant requests an instruction on provoking the difficulty, this does not mean the defendant is not also entitled to an instruction on arming oneself. Nor does it mean the defendant cannot on appeal complain of the trial court's failure to instruct on both provoking the difficulty and the right to arm oneself. *Banks*, 656 S.W.2d at 447.

When no issue of self-defense is raised, of course, a defendant is not entitled to an instruction on the right to arm himself and seek out the victim. *Cerda v. State*, 557 S.W.2d 954, 958 (Tex. Crim. App. 1977).

Even if self-defense is submitted, a defendant is not entitled to an instruction on arming oneself unless the jury is told the defendant may not be entitled to self-defense because he provoked the attack while armed. *Sheppard v. State*, 545 S.W.2d 816, 820 (Tex. Crim. App. 1977). This is despite the structure of section 9.03(b), which misleadingly suggests that the provision for seeking an explanation while armed, section 9.31(b)(5), is independent of the provision for provoking the difficulty, section 9.31(b)(4).

Arming Oneself in Violation of Penal Code Section 46.02 or 46.05. The complicated structure of Texas Penal Code section 9.31 makes somewhat unclear the precise effect of the provisions in section 9.31(b)(5), applying if the defendant was carrying, transporting, or possessing a weapon in violation of either section 46.02 or 46.05.

One possible reading of the statute is that if this is the issue, self-defense is for this reason alone inapplicable. Such an approach could be implemented by telling a jury that it should conclude that the defendant did not act in self-defense if the state proves the defendant sought an explanation from the complainant while the defendant was acting in violation of either Penal Code section.

The Committee concluded, however, that this was not the legislature's intent. Rather, it concluded that section 9.31(b)(5), if triggered, renders inapplicable the "rule" that seeking an explanation—even while armed—is not provocation that would render self-defense inapplicable. The state can still undertake to prove self-defense inapplicable because the defendant provoked the complainant. Further, the instructions should make clear to the jury that whether the state has proved provocation is to be decided without applying a "rule" that seeking an explanation of differences is not itself provocation.

The instruction offers a qualification to the peaceful-approach rule that attempts to convey these quite complex directions for analysis to the jury.

If the evidence permits only a conclusion that the defendant did approach the victim while in violation of the Penal Code, the instruction on peaceful approach should not be given. The jury should, however, be instructed to address whether the state has proved provocation.

If the evidence raises a jury question about whether the defendant was in violation of the Penal Code, the instructions attempt to put that issue to the jury and convey that the jury's answer determines whether in its provocation analysis the jury should use the peaceful-approach rule.

V. Self-Defense against Action by Peace Officer

§ B14.9 Self-Defense against Action by Peace Officer

As a general rule, force used to resist an arrest or search being made by a peace officer is a criminal offense despite general self-defense rules. Tex. Penal Code § 9.31(b)(2). There is an exception to this general rule, however, if the officer uses greater force than necessary. Tex. Penal Code § 9.31(c). Explaining this exception to self-defense, and the statutory exception to the exception, in terms that make clear the burden of proof is difficult.

§ B14.9.1 Need for Instruction

If the situation raises self-defense and the state relies on the "peace officer" exception, the state must prove that the exception does not apply.

If the defendant seeks an instruction on self-defense and the evidence would require the jury to find, beyond a reasonable doubt, that the exception applies, no instruction on self-defense should be given.

If the evidence would permit—but does not require—the jury to find that the exception applies, a self-defense instruction should be given. This should require the state to prove either that self-defense generally does not apply or that the peace officer exception does apply.

§ B14.9.2 Culpable Mental State

Self-defense is unavailable only if the defendant was aware of certain facts. According to the explicit terms of Texas Penal Code section 9.31(b)(2), self-defense becomes unavailable only if the defendant was aware that the person against whom he used force was a peace officer (or a person acting in a peace officer's presence and at the officer's direction). The statute leaves less clear whether in order to render the defense unavailable the state must prove the defendant knew the peace officer was making an arrest or search.

The Committee concluded that to render self-defense unavailable, the state must show that the defendant knew only that the person was a peace officer.

§ B14.9.3 Placement of Section 9.31(b)(2) Provision in Instructions

When the instructions must address at least Texas Penal Code section 9.31(b)(2), where should they do so? Should the jury be asked to consider this before or after it considers whether, apart from section 9.31(b)(2), self-defense applies?

The instruction at section B14.10 below is based on the assumption that the instructions should require the jury to consider first whether self-defense is inapplicable because the state has not met its burden of proof to show on general grounds that it does not apply. Only then should the jury be encouraged to consider the more specific question of whether it is inapplicable because of the peace officer exception. This is the most appropriate analytical approach to the situation, and the instructions should encourage juries to take this approach.

§ B14.9.4 Section 9.31(c) Exception to Section 9.31(b)(2) Exception

Two provisions of Texas Penal Code section 9.31 may apply to situations in which there is evidence that the victim was a law enforcement officer: section 9.31(b)(2) (rendering self-defense unavailable in certain situations in which the defendant acted to resist an arrest or search) and section 9.31(c) (purporting to make force "to resist an arrest or search" justifiable in certain situations, apparently as an exception to the general rule set out in section 9.31(b)(2)).

Generally, at least, there will be no occasion to instruct a jury on section 9.31(c) unless the jury is instructed on section 9.31(b)(2). The question, then, is how to supplement or modify a section 9.31(b)(2) instruction when there is a need to also instruct the jury on section 9.31(c).

Both provisions purport to define when force is or is not justified "to resist an arrest or search." That is at best misleading and probably incorrect. Section 9.31(c)(2) limits the justification to that use of force the defendant reasonably believes is necessary to defend himself *against the officer's excessive force.* Carefully read, it does not address whether force to resist the arrest or search is justified. If section 9.31(c) applies, the defendant is not using the force to resist the arrest or search but rather to resist the excessive force being used.

It might turn out that a defendant has the right to use force to resist an arrest or search under section 9.31(c). But if this is so, it is only because under the facts of the case the defendant reasonably believes that resisting the arrest or search is necessary to prevent the excessive force.

The instruction at section B14.10 below assumes the best way to present the substance of these two provisions is to essentially tell juries that (1) force is never justified to resist an arrest or search but (2) force is sometimes justified to resist excessive force despite that excessive force's being used in an effort to make an arrest or search.

This distinction can be explained by emphasizing that the rule of section 9.31(b)(2) applies only when the facts show that the defendant used the force to resist an arrest or search. Section 9.31(c) addresses a type of situation in which there is a particular kind of dispute whether this is the case. The defendant argues that it is not the case because he used the force not to resist the arrest or search but to resist the excessive force.

If the situation raises self-defense and the peace officer exception but the defendant relies on the provision for resisting excessive force, the state appears to have the burden of proof. A defendant is entitled to an instruction informing the jury of this additional provision and the state's burden of proving it inapplicable if the defendant identifies evidence from which a reasonable jury could find that the state failed to prove the provision inapplicable.

The instruction attempts to so present the matter, and to do so in terms of what in such situations the state must prove to prevail by proving self-defense inapplicable. It tells the jury that in such situations, the state, to prove that self-defense does not apply because the defendant used force to resist an arrest or search, must disprove his claim that he used the force to defend against excessive force being used to make an arrest or search.

This approach complicates the instructions. But most likely it does not make them any more complicated than would any other approach that adequately explains the applicable law in terms of what, under various situations, the state must prove.

§ B14.10 Instruction—Nondeadly Force Used against Peace Officer

[Include the following if the facts raise an issue about whether self-defense is inapplicable because the defendant was resisting an arrest or search.]

Self-Defense in Arrest or Search Situations

If you have found under the instructions above that both—

1. the state has proved the elements of the offense beyond a reasonable doubt; and

2. the state has failed to prove that self-defense does not apply for the reasons addressed in the instructions above,

you must next consider whether self-defense is inapplicable for another reason.

A person may not use force against another to resist an arrest or search that the person knows is being made by a peace officer [or a person acting in a peace officer's presence and at the officer's direction]. This is the case whether or not the arrest or search is lawful.

To resolve this matter, you must determine whether the state has proved, beyond a reasonable doubt, all of the following:

1. [*Name*] was a peace officer [or a person acting in a peace officer's presence and at the officer's direction] making an arrest or search;

2. The defendant knew this; and

3. The defendant engaged in the conduct constituting the offense to resist the arrest or search.

If you find that the state has failed to prove, beyond a reasonable doubt, all three elements listed above, you must find the defendant "not guilty."

If you find that the state has proved, beyond a reasonable doubt, all three elements listed above, you must find the defendant "guilty."

[Include the following if the facts raise issues about both whether self-defense is inapplicable because the defendant was resisting an arrest or search and whether the section 9.31(c) exception applies.]

The defendant contends that the state has not proved element 3 listed above because the defendant used the force not to resist the arrest or search itself but rather to resist what the defendant believed was the use of unnecessary force in making the arrest or search.

A person may resist unnecessary force used in making an arrest or search if—

1. a peace officer making an arrest or search uses or attempts to use greater force than necessary;

2. this use of force occurs before the person offers any resistance; and

3. the person uses only that force the person reasonably believes is immediately necessary to protect himself against the peace officer's use or attempted use of greater force than is necessary.

Therefore, to prove element 3 listed above—that the defendant engaged in the conduct constituting the offense to resist the arrest or search—the state must prove, beyond a reasonable doubt, at least one of the following:

1. [*Name*], in making the arrest or search, did not use or attempt to use greater force than necessary;

2. The defendant offered resistance before [*name*] used or attempted to use greater force than necessary;

3. The defendant did not use the force for the purpose of resisting what he believed was greater force than necessary; or

4. The defendant used more force than the defendant reasonably believed was immediately necessary to protect himself against [*name*]'s use or attempted use of greater force than was necessary.

VI. Self-Defense Involving Deadly Force

§ B14.11 Self-Defense Involving Deadly Force

Under Texas Penal Code section 9.32 ("Deadly Force in Defense of Person"), self-defense is applicable to a defendant whose actions consisted of the use of deadly force if the requirements of section 9.31 are met and the defendant reasonably believed that deadly force was immediately necessary to either (1) protect the defendant against another's use or attempted use of unlawful deadly force or (2) prevent another's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery. Tex. Penal Code § 9.32(a).

Thus, in a prosecution in which the use of deadly force is proved, a defendant's burden of raising the issue so as to entitle the defendant to a jury instruction is somewhat increased.

The jury instruction must also tell the jury of additional ways in which the state can meet its burden of proof rendering the defense inapplicable.

§ B14.12 Force Used to Prevent Commission of Specified Crimes

Texas Penal Code section 9.32, despite its title, to some extent goes beyond what is generally considered self-defense. Insofar as it permits the use of deadly force to prevent another person from committing certain crimes, it serves as a right to use force for prevention of crimes.

Some jurisdictions treat this matter separately. Section 3.07 of the Model Penal Code, titled "Use of Force in Law Enforcement," permits the use of deadly force "when the actor believes that such force is immediately necessary to prevent such other person from . . . committing or consummating the commission of a crime involving or threatening bodily injury, damage to or loss of property or a breach of the peace." Model Penal Code § 3.07(5)(a) (Proposed Official Draft 1962). It adds that deadly force is not permitted unless—

> the actor believes that there is a substantial risk that the person whom he seeks to prevent from committing a crime will cause death or serious bodily injury to another unless the commission or the consummation of the crime is prevented and that the use of such force presents no substantial risk of injury to innocent persons . . . .

Model Penal Code § 3.07(5)(a)(ii)(A).

The State Bar Committee's 1970 proposed revision contained such a provision. This provision was not, however, enacted. Instead, a modified version was incorporated into the right to use deadly force in self-defense by inserting it in section 9.32(a)(2)(B).

At first glance, self-defense under section 9.32(a)(2)(B) appears not to require the defendant to believe the force used is in any way necessary to protect the defendant himself from harm. Section 9.32(a)(2)(A) (requiring a reasonable belief that the force used is necessary to protect the defendant from the other's use of unlawful deadly force) and section 9.32(a)(2)(B) are alternatives.

Both alternatives, however, under section 9.32(a)(1) require that the defendant would be justified in using force under section 9.31. Section 9.31 requires that the defendant reasonably believe the force he used was necessary to protect himself against the other person's use of unlawful force.

Apparently, then, the substance of section 9.32(a)(2)(B) is that force is justified if—

1. the actor reasonably believes the force he used is immediately necessary to protect himself against the other's use or attempted use of unlawful force; and

2. the actor reasonably believes the force he used was necessary to prevent the other's commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery.

Section 9.32, then, does not give a defendant a right to use deadly force to prevent the victim's robbery of a third party unless the defendant himself somehow also believes the force is necessary to protect himself against the victim's use or attempted use of unlawful force.

As a practical matter, what this means is apparently that self-defense is permitted on the basis that the defendant reasonably believed that the injured person's intended actions not only constituted unlawful (but not necessarily deadly) force against the defendant but also one of the enumerated offenses.

See chapter B15 in this volume for an instruction based on section 9.32(a)(2)(A).

§ B14.13 Instruction—Self-Defense Involving Deadly Force

If you all agree the state has proved, beyond a reasonable doubt, each of the [*number*] elements listed above, you must next consider whether the defendant's use of force was made in self-defense.

Self-Defense

You have heard evidence that, when the defendant [*insert specific conduct constituting offense*], he believed his use of force was necessary to defend himself against [*name*]'s use [or attempted use] of unlawful deadly force.

Relevant Statutes

A person's use of deadly force against another that would otherwise constitute the crime of [*offense*] is not a criminal offense if the person reasonably believed the force used was immediately necessary to protect the person against the other's use [or attempted use] of unlawful deadly force.

Self-defense does not cover conduct in response to verbal provocation alone. The defendant must have reasonably believed the other person had done more than verbally provoke the defendant.

Burden of Proof

The defendant is not required to prove self-defense. Rather, the state must prove, beyond a reasonable doubt, that self-defense does not apply to the defendant's conduct.

Definitions

Reasonable Belief

"Reasonable belief" means a belief that an ordinary and prudent person would have held in the same circumstances as the defendant.

Deadly Force

"Deadly force" means force that is intended or known by the person using it to cause death or serious bodily injury or force that in the manner of its use or intended use is capable of causing death or serious bodily injury.

Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the state has proved that the defendant's conduct was not justified by self-defense.

To decide the issue of self-defense, you must determine whether the state has proved, beyond a reasonable doubt, one of the following:

1. The defendant did not believe his conduct was immediately necessary to protect himself against [*name*]'s use [or attempted use] of unlawful deadly force; or

2. The defendant's belief was not reasonable.

You must all agree that the state has proved, beyond a reasonable doubt, either element 1 or 2 listed above. You need not agree on which of these elements the state has proved.

If you find that the state has failed to prove, beyond a reasonable doubt, either element 1 or 2 listed above, you must find the defendant "not guilty."

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of [*insert specific offense*], and you all agree the state has proved, beyond a reasonable doubt, either element 1 or 2 listed above, you must find the defendant "guilty."

[See chapter 2 for verdict instruction.]

§ B14.14 Instruction—Self-Defense Involving Deadly Force and Commission of Felony by Complainant

If you all agree the state has proved, beyond a reasonable doubt, each of the [*number*] elements listed above, you must next consider whether the defendant's use of force was made in self-defense.

Self-Defense

You have heard evidence that, when the defendant [*insert specific conduct constituting offense*], he believed his use of force was necessary to defend himself and to prevent [*name*]'s imminent commission of [aggravated kidnapping/murder/sexual assault/aggravated sexual assault/robbery/aggravated robbery].

Relevant Statutes

A person's use of deadly force against another that would otherwise constitute the crime of [*offense*] is not a criminal offense if the person reasonably believed the force used was immediately necessary to both—

1. protect the person against the other's use [or attempted use] of unlawful deadly force; and

2. prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery.

Self-defense does not cover conduct in response to verbal provocation alone. The defendant must have reasonably believed the other person had done more than verbally provoke the defendant.

Burden of Proof

The defendant is not required to prove self-defense. Rather, the state must prove, beyond a reasonable doubt, that self-defense does not apply to the defendant's conduct.

Definitions

Reasonable Belief

"Reasonable belief" means a belief that an ordinary and prudent person would have held in the same circumstances as the defendant.

Deadly Force

"Deadly force" means force that is intended or known by the person using it to cause death or serious bodily injury or force that in the manner of its use or intended use is capable of causing death or serious bodily injury.

Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the state has proved that the defendant's conduct was not justified by self-defense.

To decide the issue of self-defense, you must determine whether the state has proved, beyond a reasonable doubt, one of the following:

1. The defendant's use of force was not necessary to protect the defendant against [*name*]'s use [or attempted use] of unlawful deadly force; or

2. The defendant's use of force was not necessary to prevent [*name*]'s imminent commission of [aggravated kidnapping/murder/sexual assault/aggravated sexual assault/robbery/aggravated robbery].

You must all agree that the state has proved, beyond a reasonable doubt, either element 1 or 2 listed above. You need not agree on which of these elements the state has proved.

If you find that the state has failed to prove, beyond a reasonable doubt, either element 1 or 2 listed above, you must find the defendant "not guilty."

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of [*insert specific offense*], and you all agree the state has proved, beyond a reasonable doubt, either element 1 or 2 listed above, you must find the defendant "guilty."

[See chapter 2 for verdict instruction.]

§ B15.1 Statutory References

The defense of self-defense is provided for in Tex. Penal Code § 9.31.

The justification for the use of deadly force in defense of a person is provided for in Tex. Penal Code § 9.32.

The definition of "reasonable belief" is based on Tex. Penal Code § 1.07(a)(42).

The definition of "deadly force" is based on Tex. Penal Code § 9.01(3).

§ B15.2 Deadly Force in Self-Defense Generally

Under Texas Penal Code section 9.32(a) ("Deadly Force in Defense of Person"), self-defense is applicable to a defendant whose actions consisted of the use of deadly force if the requirements of section 9.31 are met and the defendant reasonably believed that deadly force was immediately necessary to either (1) protect the defendant against another's use or attempted use of unlawful deadly force or (2) prevent another's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery. Tex. Penal Code § 9.32(a).

Thus, in a prosecution in which the use of deadly force is proved, a defendant's burden of raising the issue so as to entitle the defendant to a jury instruction is somewhat increased.

The jury instruction must also tell the jury of additional ways in which the state can meet its burden of proof rendering the defense inapplicable.

The Committee decided that, for clarity, section 9.32(a)(2)(B), focusing on prevention of specified felonies, should have a separate instruction distinguishable from self-defense. See section B14.13 in this volume for an instruction based on section 9.32(a)(2)(B).

§ B15.3 Instruction—Self-Defense Involving Deadly Force to Protect against Deadly Force by Another

If you all agree the state has proved, beyond a reasonable doubt, each of the [*number*] elements listed above, you must next consider whether the defendant's use of force was made in self-defense.

Self-Defense

You have heard evidence that, when the defendant [*insert specific conduct constituting offense*], he believed his use of force was necessary to defend himself against [*name*]'s use [or attempted use] of unlawful deadly force.

Relevant Statutes

A person's use of deadly force against another that would otherwise constitute the crime of [*offense*] is not a criminal offense if the person reasonably believed the force used was immediately necessary to protect the person against the other's use [or attempted use] of unlawful deadly force.

Self-defense does not cover conduct in response to verbal provocation alone. The defendant must have reasonably believed the other person had done more than verbally provoke the defendant.

Burden of Proof

The defendant is not required to prove self-defense. Rather, the state must prove, beyond a reasonable doubt, that self-defense does not apply to the defendant's conduct.

Definitions

Reasonable Belief

"Reasonable belief" means a belief that an ordinary and prudent person would have held in the same circumstances as the defendant.

Deadly Force

"Deadly force" means force that is intended or known by the person using it to cause death or serious bodily injury or force that in the manner of its use or intended use is capable of causing death or serious bodily injury.

Failure to Retreat

A person who has a right to be present at a location where the person uses deadly force against another is not required to retreat before using deadly force in self-defense if both—

1. the person with the right to be present did not provoke the person against whom the deadly force is used; and

2. the person is not engaged in criminal activity at the time the deadly force is used.

Therefore, in deciding whether the state has proved that the defendant did not reasonably believe his use of deadly force was necessary, you must not consider any failure of the defendant to retreat that might be shown by the evidence if you find both—

1. the defendant did not provoke [*name*], the person against whom the defendant used deadly force; and

2. the defendant was not engaged in criminal activity at the time he used the deadly force.

If you do not find both 1 and 2, you may consider any failure of the defendant to retreat that might be shown by the evidence in deciding whether the defendant reasonably believed his use of deadly force was necessary.

Presumption

Under certain circumstances, the law creates a presumption that the defendant's belief—that the deadly force he used was immediately necessary—was reasonable. A presumption is a conclusion the law requires you to reach if certain other facts exist.

Therefore, you must find the defendant's belief—that the deadly force he used was immediately necessary—was reasonable unless you find the state has proved, beyond a reasonable doubt, at least one of the following:

[Include only those elements supported by the evidence.]

1. The defendant neither knew nor had reason to believe that [*name*]—

   a. unlawfully and with force entered, or was attempting to enter unlawfully and with force, the defendant's occupied habitation, vehicle, or place of business or employment; or

b. unlawfully and with force removed, or was attempting to remove unlawfully and with force, the defendant from the defendant's habitation, vehicle, or place of business or employment; or

c. was committing or attempting to commit aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery; or

2. The defendant provoked [*name*]; or

3. The defendant, at the time the deadly force was used, was engaged in criminal activity other than a class C misdemeanor that is a violation of a law or ordinance regulating traffic.

If you find the state has proved element 1, 2, or 3 listed above, the presumption does not apply and you are not required to find that the defendant's belief was reasonable.

Whether or not the presumption applies, the state must prove, beyond a reasonable doubt, that self-defense does not apply to this case.

Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the state has proved that the defendant's conduct was not justified by self-defense.

To decide the issue of self-defense, you must determine whether the state has proved, beyond a reasonable doubt, one of the following:

1. The defendant did not believe his conduct was immediately necessary to protect himself against [*name*]'s use [or attempted use] of unlawful deadly force; or

2. The defendant's belief was not reasonable.

You must all agree that the state has proved, beyond a reasonable doubt, either element 1 or 2 listed above. You need not agree on which of these elements the state has proved.

If you find that the state has failed to prove, beyond a reasonable doubt, either element 1 or 2 listed above, you must find the defendant "not guilty."

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of [*insert specific offense*], and you all agree the state has proved, beyond a reasonable doubt, either element 1 or 2 listed above, you

must find the defendant "guilty."

[See chapter 2 for verdict instruction.]

§ B16.1 Statutory References

The defense of self-defense is provided for in Tex. Penal Code § 9.31.

The justification for the use of deadly force in defense of a person is provided for in Tex. Penal Code § 9.32.

The definition of "reasonable belief" is based on Tex. Penal Code § 1.07(a)(42).

The definition of "deadly force" is based on Tex. Penal Code § 9.01(3).

§ B16.2 Self-Defense against Action by Peace Officer Generally

As a general rule, force used to resist an arrest or search being made by a peace officer is not justified despite general self-defense rules. Tex. Penal Code § 9.31(b)(2). There is an exception to this general rule, however, if the officer uses greater force than necessary. Tex. Penal Code § 9.31(c). Explaining this exception to self-defense, and the statutory exception to the exception, in terms that make clear the burden of proof is difficult.

§ B16.2.1 Need for Instruction

If the situation raises self-defense as a justification for the use of force and the state relies on the exception that the person using force was resisting a search or arrest, the state must prove certain facts.

§ B16.2.2 Culpable Mental State

Self-defense is unavailable only if the defendant was aware of certain facts. According to the explicit terms of Texas Penal Code section 9.31(b)(2), self-defense becomes unavailable only if the defendant was aware that the person against whom he used force was a peace officer (or a person acting in a peace officer's presence and at the officer's direction). The statute leaves less clear whether in order to render the defense unavailable the state must prove the defendant knew the peace officer was making an arrest or search.

The Committee concluded that to render self-defense unavailable, the state must show that the defendant knew that the person was a peace officer but need not show that the defendant knew an arrest or search was being made. Thus, the instruction at section B16.3 below should be used if there is no allegation of excessive force. The instruction at section B16.4 should be used if there is an allegation of excessive force.

§ B16.2.3 Section 9.31(c) Exception to Section 9.31(b)(2) Exception

Two provisions of Texas Penal Code section 9.31 may apply to situations in which there is evidence that the victim was a law enforcement officer: section 9.31(b)(2) (rendering self-defense unavailable in certain situations in which the defendant acted to resist an arrest or search) and section 9.31(c) (purporting to make force "to resist an arrest or search" justifiable in certain situations, apparently as an exception to the general rule set out in section 9.31(b)(2)).

Generally, at least, there will be no occasion to instruct a jury on section 9.31(c) unless the jury is instructed on section 9.31(b)(2). The question, then, is how to sup-

plement or modify a section 9.31(b)(2) instruction when there is a need to also instruct the jury on section 9.31(c).

Both provisions purport to define when force is or is not justified "to resist an arrest or search." That is at best misleading and probably incorrect. Section 9.31(c)(2) limits the justification to that use of force the defendant reasonably believes is necessary to defend himself *against the officer's excessive force.* Carefully read, it does not address whether force to resist the arrest or search is justified. If section 9.31(c) applies, the defendant is not using the force to resist the arrest or search but rather to resist the excessive force being used.

It might turn out that a defendant has the right to use force to resist an arrest or search under section 9.31(c). But if this is so, it is only because under the facts of the case the defendant reasonably believes that resisting the arrest or search is necessary to prevent the excessive force.

If the situation raises self-defense and the peace officer exception but the defendant relies on the provision for resisting excessive force, the state appears to have the burden of proof. A defendant is entitled to an instruction informing the jury of this additional provision and the state's burden of proving it inapplicable if the defendant identifies evidence from which a reasonable jury could find that the state failed to prove the provision inapplicable.

§ B16.3 Instruction—Self-Defense against Action by Peace Officer—No Allegation of Excessive Force

[Include the following if the evidence raises an issue about whether the defendant used the force constituting the offense to resist an arrest or search being made by someone the defendant knew was a peace officer but no issue is raised about whether excessive force by the officer was involved.]

If you all agree the state has proved, beyond a reasonable doubt, each of the [*number*] elements listed above, you must next consider whether the defendant's use of force was made in self-defense.

Self-Defense

You have heard evidence that, when the defendant [*insert specific conduct constituting offense*], he believed his use of force was necessary to defend himself against [*name*]'s use [or attempted use] of unlawful force.

Relevant Statutes

A person's use of force against another that would otherwise constitute the crime of [*offense*] is not a criminal offense if the person reasonably believed the force used was immediately necessary to protect the person against the other's use [or attempted use] of unlawful force.

This does not apply, and a person's use of force is a criminal offense, if the person used the force to resist an arrest or search being made by someone known by the defendant to be a peace officer [or a person acting in a peace officer's presence and at the officer's direction]. This is the case even if the arrest or search was unlawful.

Self-defense does not cover conduct in response to verbal provocation alone. The defendant must have reasonably believed the other person had done more than verbally provoke the defendant.

Burden of Proof

The defendant is not required to prove self-defense. Rather, the state must prove, beyond a reasonable doubt, that self-defense does not apply to the defendant's conduct.

Definitions

Peace Officer

A [*insert appropriate position, e.g.*, police officer of the city of Dallas, Texas] is a peace officer.

Reasonable Belief

"Reasonable belief" means a belief that an ordinary and prudent person would have held in the same circumstances as the defendant.

Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the state has proved that the defendant's conduct was not justified by self-defense.

To decide the issue of self-defense, you must determine whether the state has proved, beyond a reasonable doubt, one of the following:

1. The defendant did not believe his use of force was immediately necessary to protect himself against [*name of peace officer*]'s use [or attempted use] of unlawful force; or

2. The defendant's belief was not reasonable; or

3. The defendant's use of force was to resist an arrest or search being made by [*name of peace officer*] and the defendant knew [*name of peace officer*] was a peace officer.

You must all agree that the state has proved, beyond a reasonable doubt, either element 1, 2, or 3 listed above. You need not agree on which of these elements the state has proved.

If you find that the state has failed to prove, beyond a reasonable doubt, either element 1, 2, or 3 listed above, you must find the defendant "not guilty."

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of [*insert specific offense*], and you all agree the state has proved, beyond a reasonable doubt, either element 1, 2, or 3 listed above, you must find the defendant "guilty."

[See chapter 2 for verdict instruction.]

§ B16.4 Instruction—Self-Defense against Action by Peace Officer—Allegation of Excessive Force

[Include the following if the evidence raises issues about whether the defendant used the force constituting the offense to resist an arrest or search being made by someone the defendant knew was a peace officer and about whether excessive force was involved in making the arrest or search.]

If you all agree the state has proved, beyond a reasonable doubt, each of the [*number*] elements listed above, you must next consider whether the defendant's use of force was made in self-defense.

Self-Defense

You have heard evidence that, when the defendant [*insert specific conduct constituting offense*], he believed his use of force was necessary to defend himself against [*name*]'s use [or attempted use] of unlawful force.

Relevant Statutes

A person's use of force against another that would otherwise constitute the crime of [*offense*] is not a criminal offense if the person reasonably believed the force used was immediately necessary to protect the person against the other's use [or attempted use] of unlawful force.

This does not apply, and a person's use of force is a criminal offense, if the person used the force to resist an arrest or search being made by someone known by the defendant to be a peace officer [or a person acting in a peace officer's presence and at the officer's direction]. This is the case even if the arrest or search was unlawful.

However, use of force by a person against another known to be a peace officer and to resist an arrest or search being made by the peace officer is not a criminal offense if both—

1. before the person offered any resistance, the peace officer used or attempted to use greater force than was necessary to make the arrest or search; and

2. the person reasonably believed the force he used was immediately necessary to protect himself against the peace officer's use or attempted use of greater force than was necessary.

Self-defense does not cover conduct in response to verbal provocation alone. The defendant must have reasonably believed the other person had done more than verbally provoke the defendant.

Burden of Proof

The defendant is not required to prove self-defense. Rather, the state must prove, beyond a reasonable doubt, that self-defense does not apply to the defendant's conduct.

Definitions

Peace Officer

A [*insert appropriate position, e.g.*, police officer of the city of Dallas, Texas] is a peace officer.

Reasonable Belief

"Reasonable belief" means a belief that an ordinary and prudent person would have held in the same circumstances as the defendant.

Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the state has proved that the defendant's conduct was not justified by self-defense.

To decide the issue of self-defense, you must determine whether the state has proved, beyond a reasonable doubt, both of the following:

1. The defendant's use of force was to resist an arrest or search being made by [*name of peace officer*], whom the defendant knew was a peace officer; and

2. Either—

   a. [*Name of peace officer*] did not, before the defendant offered any resistance, use or attempt to use greater force than necessary to make the arrest or search; or

   b. the defendant did not reasonably believe the force he used was immediately necessary to protect himself against [*name of peace officer*]'s use or attempted use of greater force than was necessary to make the arrest or search.

You must all agree that the state has proved, beyond a reasonable doubt, both elements 1 and 2 listed above. You need not agree on which part of element 2 the state has proved.

If you find that the state has failed to prove, beyond a reasonable doubt, both of the two elements listed above, you must find the defendant "not guilty."

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of [*insert specific offense*], and you all agree the state has proved, beyond a reasonable doubt, both elements 1 and 2 listed above, you must find the defendant "guilty."

[See chapter 2 for verdict instruction.]

§ B17.1 Statutory References

The defense of defense of others is provided for in Tex. Penal Code § 9.33.

The definition of "reasonable belief" is based on Tex. Penal Code § 1.07(a)(42).

§ B17.2 Defense of Others Generally

§ B17.2.1 Current Practice

Current practice appears to be to first instruct juries on the abstract law as set out in Texas Penal Code section 9.33 in much the same language as is used in the statute. Juries are then instructed on the abstract law of self-defense.

Application paragraphs, however, do not appear to follow the abstract law. Generally, they do not attempt to work in the requirement of section 9.33(1). Rather, they simplify the question to whether the defendant reasonably believed his use of force was "immediately necessary" to protect the person attacked by the complainant. A number of "model" instructions illustrate this:

> [I]f . . . you further find from the evidence, or you have a reasonable doubt thereof, that at that time another person was under attack or attempted attack from the complainant, _____, and that the defendant reasonably believed, as viewed from his standpoint, that such force as he used, if any, was immediately necessary to protect another against such attack or attempted attack, and so believing, he _____ (insert facts of self-defense issue raised by evidence), then you will acquit the defendant and say by your verdict "not guilty."

Paul J. McClung et al., 1 *Texas Criminal Jury Charges* § 3:1910 (Rev. 12 2012).

> [I]f . . . you further find from the evidence, or have a reasonable doubt thereof, that the defendant reasonably believed [as viewed from his standpoint alone] that deadly force when and to the degree used, if it was, was immediately necessary to protect E.F. against the use or attempted use of unlawful deadly force [* *insert*] by the said C.D., [*or* to prevent the imminent commission by the said C.D. of aggravated kidnapping, murder, rape, aggravated rape, robbery, *or* aggravated robbery upon E.F.]; and that at such time a reasonable person in E.F.'s situation would not have retreated, you will acquit the defendant and say by your verdict "not guilty."

8 Michael J. McCormick et al., *Texas Practice Series: Criminal Forms and Trial Manual* § 106.20 (11th ed. 2005).

> [I]f you find from the evidence beyond a reasonable doubt that the defendant, (DEFENDANT), did _____, as alleged in the indictment, but you further find from the evidence, or you have a reasonable doubt thereof, that, viewed from the standpoint of the defendant at the time, from the words, or conduct, or both, of (COMPLAINANT), it reasonably appeared to the defendant that the life or person of (THIRD PERSON) was in danger and there was created in the defendant's mind a reasonable expectation or fear of (THIRD PERSON)'s bodily injury from the use of unlawful force at

> the hands of (COMPLAINANT) and that acting under such apprehension and reasonably believing that the use of force, by his intervention, on his part was immediately necessary to protect (THIRD PERSON) against (COMPLAINANT)'s use or attempted use of unlawful force, if any, he to (COMPLAINANT) by _____, then you will find the defendant "Not Guilty"; or if you should have a reasonable doubt as to whether or not the defendant was so acting in defense of (THIRD PERSON) on said occasion, then you should give the defendant the benefit of that doubt and acquit him.

Harris County Jury Charge Bank, **www.justex.net/courts/criminal/JuryChargeBank** (then follow "Miscellaneous Instructions," "Defensive Issues," and "DEF. 3RD PER. (PRIOR).doc").

This simplification, as a general policy, seems undesirable. The application unit should provide for application of the law set out in the abstract unit.

The essence of section 9.33(1) seems to be that the defendant must reasonably perceive the situation as one in which—if the defendant were in the threatened person's place—the defendant would be entitled under self-defense law to use the force he actually used to defend himself.

It is not clear what section 9.33(2) adds to this. Perhaps this provision is meant to add that the defendant must reasonably have believed the attacked person would not be able to successfully defend himself. In other words, it may limit third-party intervention to situations in which reasonable appearances suggest the attacked person will be unable to successfully defend himself.

§ B17.2.2 Approach of Instruction

The instruction at section B17.3 below breaks the defense down into three elements rather than use the statutory structure of two parts or elements. This was done to identify and focus on what (despite the statutory framework and terminology) is clearly the major aspect of the defense—the defendant's perception that someone else was being unlawfully attacked by the complainant.

The defendant's belief concerning the existence of an unlawful attack is clearly a part of the defense under Texas Penal Code section 9.33. Unfortunately, the complex statutory language somewhat obscures this element.

The instruction essentially incorporates self-defense law by reference and sets out a modified statement of that law for this incorporation. Theoretically, the instruction might better perform this incorporation for the jury and set out more specifically what the state might prove to establish that the defense is inapplicable under the second aspect. In the instruction, this second aspect indicates the state can prevail by proving that—

2. under the circumstances as the defendant reasonably believed them to be, the third individual would not have been entitled to defend himself against this unlawful force; or

This, however, seems too difficult to do without incredibly complicating the instructions.

§ B17.2.3 Retreat

Under prior law, when the instruction implicated the duty to retreat, the instruction had to make clear that the question was whether, under the circumstances as the defendant perceived them to be, the attacked person had a duty to retreat. A trial court erred by giving an instruction telling the jury to address whether the defendant had a duty to retreat. *Hughes v. State*, 719 S.W.2d 560, 564 (Tex. Crim. App. 1986).

§ B17.3 Instruction—Nondeadly Force in Defense of Another

If you all agree the state has proved, beyond a reasonable doubt, each of the [*number*] elements listed above, you must next consider whether the defendant's use of force was made in defense of another person.

Defense of Another Person

You have heard evidence that, when the defendant [*insert specific conduct constituting offense*], he believed his use of force was necessary to defend [*name of third person*] from [what the defendant believed was] [*name*]'s use [or attempted use] of unlawful force against [*name of third person*].

Relevant Statutes

A person's use of force against another that would otherwise constitute the crime of [*offense*] is not a criminal offense if—

[Select one of the following.]

1. the person reasonably believed another was using or attempting to use unlawful force against a third individual;

2. under the circumstances as the person reasonably believed them to be, the third individual would be entitled to defend himself against this unlawful force; and

3. the person reasonably believed that his own use of force against the other was immediately necessary to protect the third individual from the unlawful force.

[or]

[The following formulation is closer to the precise structure and language of the statute. It does, however, reverse the order of the provisions to begin with the focus of the inquiry—the perceived attack on the third individual.]

1. the person reasonably believed that his use of force was immediately necessary to protect a third individual from unlawful force or deadly force; and

2. under the circumstances as the person reasonably believed them to be, the person would be permitted to use force or deadly force to protect

himself against the unlawful force or unlawful deadly force he reasonably believed to be threatening the third individual he sought to protect.

[or]

[The following formulation is closest to the precise structure and language of the statute.]

1. under the circumstances as the person reasonably believed them to be, the person would be permitted to use force or deadly force to protect himself against the unlawful force or unlawful deadly force he reasonably believed to be threatening the third person he sought to protect; and

2. the person reasonably believed that his intervention was immediately necessary to protect the third person.

[Continue with the following.]

Whether a person is permitted to use force or deadly force to protect himself against unlawful force is determined by the law of self-defense.

[Insert all applicable aspects of self-defense law, e.g.:

Under the law of self-defense, a person is entitled to use force to defend himself if the person reasonably believes—

1. another was using or attempting to use unlawful force against the person; and

2. the person's conduct was immediately necessary to protect himself against that force.]

Burden of Proof

The defendant is not required to prove that defense of another applies to this case. Rather, the state must prove, beyond a reasonable doubt, that defense of another does not apply to the defendant's conduct.

Definition

Reasonable Belief

"Reasonable belief" means a belief that an ordinary and prudent person would have held in the same circumstances as the defendant.

Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the state has proved that the defendant's conduct was not justified by defense of another.

To decide the issue of defense of another, you must determine whether the state has proved, beyond a reasonable doubt, one of the following:

[Select one of the following.]

1. The defendant did not reasonably believe [*name*] was using or attempting to use unlawful force against [*name of third person*]; or

2. Under the circumstances as the defendant reasonably believed them to be, [*name of third person*] would not have been entitled to defend himself against this unlawful force; or

3. The defendant did not reasonably believe that his use of force against the other was immediately necessary to protect [*name*] from the unlawful force.

[or]

1. The defendant did not believe his conduct was immediately necessary to protect [*name of third person*] against [*name*]'s use [or attempted use] of unlawful force; or

2. The defendant's belief was not reasonable; or

3. Under the circumstances as the defendant reasonably believed them to be, the defendant would not have been permitted to use force or deadly force to protect himself against the unlawful force or unlawful deadly force with which the defendant reasonably believed [*name*] was threatening [*name of third person*].

[Continue with the following.]

You must all agree that the state has proved, beyond a reasonable doubt, either element 1, 2, or 3 listed above. You need not agree on which of these elements the state has proved.

If you find that the state has failed to prove, beyond a reasonable doubt, either element 1, 2, or 3 listed above, you must find the defendant "not guilty."

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of [*insert specific offense*], and you all agree the state has proved, beyond a reasonable doubt, either element 1, 2, or 3 listed above, you must find the defendant "guilty."

[See chapter 2 for verdict instruction.]

§ B18.1 Statutory References

The justification for the use of deadly force to prevent a felony is provided for in Tex. Penal Code § 9.32.

The definition of "reasonable belief" is based on Tex. Penal Code § 1.07(a)(42).

§ B18.2 Deadly Force to Prevent Felony Generally

Under Texas Penal Code section 9.32, self-defense is applicable to a defendant whose actions consist of the use of deadly force if both (1) the person "would be justified in using force against the other under Section 9.31"; and (2) "when and to the degree the actor reasonably believes the deadly force is immediately necessary . . . to prevent another's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery." Tex. Penal Code § 9.32(a).

As generally applied, this provision functions as a defense based on a desire to prevent commission of one or more of the specified felonies. It is widely regarded as containing no requirement that the defendant fear harm to himself, although it is often applied in situations in which the facts show such harm.

Thus it serves what some jurisdictions make the separate defense of prevention of crime. Section 3.07 of the Model Penal Code, titled "Use of Force in Law Enforcement," permits the use of deadly force "when the actor believes that such force is immediately necessary to prevent such other person from . . . committing or consummating the commission of a crime involving or threatening bodily injury, damage to or loss of property or a breach of the peace." Model Penal Code § 3.07(5)(a) (Proposed Official Draft 1962). It adds that deadly force is not permitted unless—

> the actor believes that there is a substantial risk that the person whom he seeks to prevent from committing a crime will cause death or serious bodily injury to another unless the commission or the consummation of the crime is prevented and that the use of such force presents no substantial risk of injury to innocent persons . . . .

Model Penal Code § 3.07(5)(a). The State Bar Committee's 1970 proposed revision contained such a provision, which was not, however, enacted. Instead, a modified version was incorporated into the right to use deadly force in self-defense by inserting it in Texas Penal Code section 9.32(a)(2)(B).

The Committee considered at length how to appropriately phrase an instruction on this matter. Section 9.32(a)(2)(B)'s literal terms require that the defendant have been justified "in using force against the other under Section 9.31." Section 9.31(a) requires, among other matters, that the defendant reasonably believe the force used is necessary "to protect the actor." Thus section 9.32(a)(2)(B) can be read as requiring that the defendant reasonably fear harm to himself from the felony he claims to have acted to prevent.

In practice, the requirement that the defendant have been justified in using force against the complainant "under Section 9.31" is often included (in some form) in the abstract statement of the applicable law but omitted from the application portion of the instructions. Therefore, the application portion sets out a defense that basically

requires only a reasonable belief on the part of the defendant that the deadly force used was necessary to prevent the imminent commission of one of the specified felonies.

The 1975 Texas Criminal Pattern Jury Charges, however, would have juries acquit in these situations if the proof failed to show "that [the defendant] did not reasonably believe that the use of force and the degree of force used were immediately necessary to protect [the defendant] against [the victim's] use or attempted use of deadly force." Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Criminal Pattern Jury Charges* 49 n.10 (1975).

The Committee concluded, although not without concern, that the legislature intended to create a defense focusing on the defendant's perception that a felony needed to be prevented, whether or not that threatened felony posed an immediate risk of harm to the defendant himself. This has been widespread and unchallenged practice. The instruction at section B18.3 below is drafted on the assumption that this was the legislative intent.

The instruction does not explicitly require the jury to address whether the defendant was justified in using force against the victim "under Section 9.31," as is technically required by section 9.32(a)(1). In the Committee's view, the legislature regarded the imminently threatened felony by the victim of the defendant's use of deadly force as necessarily sufficient to meet this requirement. Thus juries need not address on a case-by-case basis whether, on the specific facts, a defendant otherwise within the defense also reasonably believed he himself was threatened by the situation.

In the interest of minimizing confusion, the Committee recommended that the law contained in section 9.31(a)(2)(B) be labeled "deadly force to prevent a felony" rather than "self-defense."

§ B18.3 Instruction—Deadly Force to Prevent Felony

If you all agree the state has proved, beyond a reasonable doubt, each of the [*number*] elements listed above, you must next consider whether the defense of prevention of a felony applies.

Prevention of a Felony

You have heard evidence that, when the defendant [*insert specific conduct constituting offense*], he believed his use of force was necessary to prevent [*name*]'s imminent commission of [aggravated kidnapping/murder/sexual assault/aggravated sexual assault/robbery/aggravated robbery].

Relevant Statutes

A person's use of deadly force against another that would otherwise constitute the crime of [*offense*] is not a criminal offense if the person reasonably believed the force used was immediately necessary to prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery.

[Include the following if applicable.]

The use of force against another is not justified in response to verbal provocation alone. The defendant must have reasonably believed the other person had done more than verbally provoke the defendant.

Burden of Proof

The defendant is not required to prove prevention of a felony. Rather, the state must prove, beyond a reasonable doubt, that prevention of a felony does not apply to the defendant's conduct.

Definitions

Reasonable Belief

"Reasonable belief" means a belief that an ordinary and prudent person would have held in the same circumstances as the defendant.

[Include definition(s) of the felony or felonies the evidence tends to show the defendant acted to prevent, such as the following.]

Robbery

A person commits robbery if, in the course of committing theft and with intent to obtain or maintain control of the property, the person either—

1. intentionally, knowingly, or recklessly causes bodily injury to another; or

2. intentionally or knowingly places another in fear of imminent bodily injury or death.

Failure to Retreat

A person who has a right to be present at a location where the person uses deadly force against another is not required to retreat before using deadly force to prevent a felony if both—

1. the person with the right to be present did not provoke the person against whom the deadly force is used; and

2. the person is not engaged in criminal activity at the time the deadly force is used.

Therefore, in deciding whether the state has proved that the defendant did not reasonably believe his use of deadly force was necessary, you must not consider any failure of the defendant to retreat that might be shown by the evidence if you find both—

1. the defendant did not provoke [*name*], the person against whom the defendant used deadly force; and

2. the defendant was not engaged in criminal activity at the time he used the deadly force.

If you do not find both 1 and 2, you may consider any failure of the defendant to retreat that might be shown by the evidence in deciding whether the defendant reasonably believed his use of deadly force was necessary.

Presumption

Under certain circumstances, the law creates a presumption that the defendant's belief—that the deadly force he used was immediately necessary—was reasonable. A presumption is a conclusion the law requires you to reach if certain other facts exist.

Therefore, you must find the defendant's belief—that the deadly force he used was immediately necessary—was reasonable unless you find the state has proved, beyond a reasonable doubt, at least one of the following:

[Include only those elements supported by the evidence.]

1. The defendant neither knew nor had reason to believe that [*name*]—

   a. unlawfully and with force entered, or was attempting to enter unlawfully and with force, the defendant's occupied habitation, vehicle, or place of business or employment; or

   b. unlawfully and with force removed, or was attempting to remove unlawfully and with force, the defendant from the defendant's habitation, vehicle, or place of business or employment; or

   c. was committing or attempting to commit aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery; or

2. The defendant provoked [*name*]; or

3. The defendant, at the time the deadly force was used, was engaged in criminal activity other than a class C misdemeanor that is a violation of a law or ordinance regulating traffic.

If you find the state has proved element 1, 2, or 3 listed above, the presumption does not apply and you are not required to find that the defendant's belief was reasonable.

Whether or not the presumption applies, the state must prove, beyond a reasonable doubt, that deadly force to prevent a felony does not apply to this case.

Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the state has proved that the defendant's conduct was not justified by prevention of a felony.

To decide the issue of prevention of felony, you must determine whether the state has proved, beyond a reasonable doubt, one of the following:

1. The defendant did not believe his conduct was immediately necessary to prevent [*name*]'s imminent commission of [aggravated kidnapping/

murder/sexual assault/aggravated sexual assault/robbery/aggravated robbery]; or

2. The defendant's belief was not reasonable.

You must all agree that the state has proved, beyond a reasonable doubt, either element 1 or 2 listed above. You need not agree on which of these elements the state has proved.

If you find that the state has failed to prove, beyond a reasonable doubt, either element 1 or 2 listed above, you must find the defendant "not guilty."

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of [*insert specific offense*], and you all agree the state has proved, beyond a reasonable doubt, either element 1 or 2 listed above, you must find the defendant "guilty."

[See chapter 2 for verdict instruction.]

§ B19.1 Statutory References

The defense of protection of one's own property is provided for in Tex. Penal Code §§ 9.41, 9.42.

The defense of protection of the property of a third person is provided for in Tex. Penal Code § 9.43.

The definition of "reasonable belief" is based on Tex. Penal Code § 1.07(a)(42).

The definition of "deadly force" is based on Tex. Penal Code § 9.01(3).

§ B19.2 Defense of Property Generally

Often facts will create somewhat overlapping issues concerning self-defense (or defense of others) and defense of property. When this is the case, the defendant is entitled to instructions on all applicable defenses.

§ B19.2.1 Distinguishing "One's Own Property" and "Third Person's Property"

Texas Penal Code section 9.41 applies to what the section's title describes as "one's own property," while section 9.43 applies to what the title describes as "third person's property" or, as provided in the body of the statute, "property of a third person."

Apparently, however, title to property does not control. Section 9.41(a) seems to apply if the defendant was in lawful possession of the property, regardless of title. Section 9.41(b) applies if the defendant was recently in lawful possession of the property and was unlawfully dispossessed of the property. This means that section 9.43 applies only if the third-person titleholder did not give the defendant possession.

§ B19.2.2 Requirement of "Lawful Possession"

Texas Penal Code section 9.41 applies to a person "in lawful possession" of land or personal property.

The court in *Breakiron v. State*, 79 S.W.3d 103 (Tex. App.—Texarkana 2002, no pet.), rejected the argument that a person who is the (or an) "owner" of property under Penal Code section 1.07(35) is in lawful possession of it. Thus a defendant cannot rely on the defense if the facts show no more than that the defendant had "a greater right to possession of the property" than the complainant. "Whether someone has lawful possession of property," the court observed, "will depend on the nature of the property, the circumstances under which it is held, and the law applicable to such property and such circumstances." *Breakiron*, 79 S.W.3d at 106.

In *Breakiron*, the property was drugs. The court applied section 481.002(24) of the Controlled Substances Act: "'Lawful possession' means the possession of a controlled substance that has been obtained in accordance with state or federal law." Tex. Health & Safety Code § 481.002(24). No jury instruction was required when the defendant made no claim that the drugs at issue had been obtained in a lawful manner. *Breakiron*, 79 S.W.3d at 106.

In view of the lack of more definitive case law on the meaning of "lawful possession," the Committee concluded that the term should not be defined. Jurors should be left to apply the common meaning of the term.

§ B19.2.3 Defense of "Habitation" or "Dwelling"

Before the 1974 revision of the Texas Penal Code, Texas law recognized a defense to prosecution based on defense of one's home. This was a right to defend the habitation independent of the right of self-defense and the right to defend property. Apparently it was based on article 1224 of the 1925 Penal Code, making homicide justifiable in general against "unlawful and violent attack[s]" other than those covered by specific statutory provisions. This defense did require, in the words of article 1224, that "all other means must be resorted to for the prevention of the injury." Tex. Penal Code art. 1224 (1925), *repealed by* Acts 1973, 63d Leg., R.S., ch. 399, § 1 (S.B. 34), eff. Jan. 1, 1974. *See Sledge v. State*, 507 S.W.2d 726, 728–29 (Tex. Crim. App. 1974) ("[I]t is well settled that a defendant has a right to defend against an unwarranted intrusion of his home, and that when this issue is raised, the trial court should charge on his right to defend against this kind of attack.").

In *Myers v. State*, 266 S.W.2d 380 (Tex. Crim. App. 1954), for example, the jury was instructed on self-defense and defense of property. Nevertheless, the instruction was erroneous. The court explained:

> [N]owhere in the charge was the jury instructed that in the absence of any apprehension of death or serious bodily injury, appellant had the right to shoot the deceased if in doing so she used no more force than appeared to her to be necessary to prevent his entering her home, and she having resorted to all other reasonable means to prevent such entry against her will.

Myers, 266 S.W.2d at 381.

After the 1974 revision of the Penal Code, there was no longer any statutory basis for an instruction on defense of the habitation or home. Texas courts have agreed that now any defensive instruction must be based on Penal Code section 9.41. *See Rogers v. State*, 653 S.W.2d 122, 124–25 (Tex. App.—Houston [1st Dist.] 1983, pet. ref'd). *See also Molitor v. State*, 827 S.W.2d 512, 522 (Tex. App.—Austin 1992), *appeal abated*, 862 S.W.2d 615 (Tex. Crim. App. 1993) (on death of appellant); *Leal v. State*, 690 S.W.2d 82, 83 (Tex. App.—Houston [14th Dist.] 1985, pet. ref'd). If deadly force is at issue, section 9.42 is implicated, and it incorporates by reference section 9.41.

Sections 9.41 and 9.42 make no specific reference to or provision for habitations or dwellings. Both statutes refer to protection of either "tangible, movable property" or "land." Thus any right to defend the habitation under current law must be part of the right to defend "land."

"Land" is not defined in the Penal Code. In *Tarlton v. State*, 93 S.W.3d 168, 174 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd), the court addressed the term as used in a criminal offense contained in the Texas Water Code. Since the term is not statutorily defined, it reasoned, the term should be given its "plain meaning." *Tarlton*,

93 S.W.3d at 174. "The plain meaning of 'land' is 'the solid part of the surface of the earth.'" *Tarlton*, 93 S.W.3d at 174 (quoting *Webster's Third New International Dictionary* 1268 (1993)).

If this plain meaning is applied to "land" as used in sections 9.41 and 9.42, those sections give no protection to the habitation beyond what is given to the land on which the habitation rests. There could be some question whether the sections apply to a habitation that does not rest literally on land, such as an upper-floor apartment.

Criminal trespass, in contrast, applies to one who (under certain circumstances) "enters or remains on or in property" or "enters or remains in a building of another." Tex. Penal Code § 30.05(a).

The picture is somewhat clouded by the 2007 amendment to section 9.31, creating a presumption in favor of a defendant charged with a crime consisting of force used against another. A major factor in determining whether the presumption applies is whether the defendant knew or had reason to know that the complainant unlawfully and with force had entered, or was attempting to enter, the defendant's "occupied habitation, vehicle, or place of business or employment." Tex. Penal Code § 9.31(a)(1)(A).

The precise effect of the section 9.31 presumption is somewhat unclear. Whatever that effect, it is only on defendants' ability to invoke the right of self-defense. The presumption clearly adds nothing to the right of a person who does not fear for his own safety to use force to prevent entry into his occupied dwelling. As a result, that presumption has no place in a jury instruction on defense of "land," even if on the facts of the case that land was an occupied habitation.

The Committee concluded that the legislature must have intended the term "land" as used in sections 9.41 and 9.42 to include the interior of habitations. Thus those sections apply to a defendant who claims he used force to prevent or terminate an unlawful entry into his habitation, whether or not the intruder was on or sought to be on any "solid part of the surface of the earth." The Committee found no authority, however, for instructing juries in terms that made this apparent legislative intent clear.

The Committee also concluded that the limited terms of section 9.42 made clear a legislative intent to limit the right to use deadly force in this situation. Unlike the case under pre-1974 law, one in possession of his habitation is not entitled to use deadly force to prevent only a simple unlawful entry into that habitation, even if the entry cannot be prevented by nondeadly force.

In many situations, however, an intruder's actions will trigger the right to use deadly force under section 9.42(2)(A) because the defendant will have grounds to believe the intruder is about to commit one of the enumerated offenses. If an intruder intends to commit even misdemeanor theft (in the daytime), the fact that this requires entry of protected premises will give rise to reason to fear that burglary is involved.

§ B19.3 Nondeadly Force in Defense of One's Own Personal Property—Property in One's Possession and Recovering Property

Texas Penal Code section 9.41 provides for separate treatment of two situations. If the facts show that the defendant had possession of the property and was using force to prevent interference with that possession, section 9.41(a) applies. If the defendant lost possession and was attempting to regain it, section 9.41(b) applies. These are such different situations that they should be covered by different instructions. Use the instruction at section B19.4 below for the first instruction and the instruction at section B19.5 for the second.

§ B19.4 Instruction—Nondeadly Force in Defense of One's Own Personal Property—Preventing Interference with Property in One's Possession

If you all agree the state has proved, beyond a reasonable doubt, each of the [*number*] elements listed above, you must next consider whether the defendant's use of force was made in defense of property.

Defense of One's Own Property

You have heard evidence that, when the defendant [*insert specific conduct constituting offense*], he believed his use of force was necessary to defend property in his possession from what the defendant believed was an unlawful interference.

Relevant Statutes

A person's use of force against another that would otherwise constitute the crime of [*offense*] is not a criminal offense if the person reasonably believed—

1. the person was in lawful possession of tangible, movable property;
2. another person was unlawfully interfering with that property; and
3. the force used was immediately necessary to prevent or terminate the other's unlawful interference with that property.

Burden of Proof

The defendant is not required to prove that defense of property applies to this case. Rather, the state must prove, beyond a reasonable doubt, that defense of property does not apply to the defendant's conduct.

Definition

Reasonable Belief

"Reasonable belief" means a belief that an ordinary and prudent person would have held in the same circumstances as the defendant.

Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the state has proved that the defendant's conduct was not justified by defense of property.

To decide the issue of defense of property, you must determine whether the state has proved, beyond a reasonable doubt, that the defendant did not reasonably believe at least one of the following:

1. The defendant was in lawful possession of tangible, movable property, specifically [*specify property*]; or

2. [*Name*] was unlawfully interfering with that property; or

3. The force used was immediately necessary to prevent or terminate [*name*]'s unlawful interference with that property.

You must all agree that the state has proved, beyond a reasonable doubt, either element 1, 2, or 3 listed above. You need not agree on which of these elements the state has proved.

If you find that the state has failed to prove, beyond a reasonable doubt, either element 1, 2, or 3 listed above, you must find the defendant "not guilty."

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of [*insert specific offense*], and you all agree the state has proved, beyond a reasonable doubt, either element 1, 2, or 3 listed above, you must find the defendant "guilty."

[See chapter 2 for verdict instruction.]

§ B19.5 Instruction—Nondeadly Force in Defense of One's Own Personal Property—Recovering Property

If you all agree the state has proved, beyond a reasonable doubt, each of the [*number*] elements listed above, you must next consider whether the defendant's use of force was made in defense of property.

Defense of One's Own Property

You have heard evidence that, when the defendant [*insert specific conduct constituting offense*], he believed his use of force was necessary to recover property of which he had been unlawfully dispossessed.

Relevant Statutes

A person's use of force against another that would otherwise constitute the crime of [*offense*] is not a criminal offense if—

1. the person reasonably believed he had been unlawfully dispossessed of tangible, movable property by another;

2. the person reasonably believed the force used was immediately necessary to recover the property;

3. the person used the force immediately or in fresh pursuit after the dispossession; and

4. either—

   a. the person reasonably believed the other person had no claim of right when the other person dispossessed the person of the property; or

   b. the other person accomplished the dispossession by using force, threat, or fraud against the person.

Burden of Proof

The defendant is not required to prove that defense of property applies to this case. Rather, the state must prove, beyond a reasonable doubt, that defense of property does not apply to the defendant's conduct.

Definition

Reasonable Belief

"Reasonable belief" means a belief that an ordinary and prudent person would have held in the same circumstances as the defendant.

Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the state has proved that the defendant's conduct was not justified by defense of property.

To decide the issue of defense of property, you must determine whether the state has proved, beyond a reasonable doubt, at least one of the following:

1. The defendant did not reasonably believe he had been unlawfully dispossessed of tangible, movable property, specifically [*specify property*], by [*name*]; or

2. The defendant did not reasonably believe the force used was immediately necessary to recover the property; or

3. The defendant did not use the force immediately or in fresh pursuit after the dispossession; or

4. Either—

   a. the defendant did not reasonably believe [*name*] had no claim of right when [*name*] dispossessed the defendant of the property; or

   b. [*Name*] did not accomplish the dispossession by using force, threat, or fraud against the defendant.

You must all agree that the state has proved, beyond a reasonable doubt, either element 1, 2, 3, or 4 listed above. You need not agree on which of these elements the state has proved.

If you find that the state has failed to prove, beyond a reasonable doubt, either element 1, 2, 3, or 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 elements of the offense of [*insert specific offense*], and you all agree the state

has proved, beyond a reasonable doubt, either element 1, 2, 3, or 4 listed above, you must find the defendant "guilty."

[See chapter 2 for verdict instruction.]

§ B19.6 Nondeadly Force in Defense of Land Generally

Under Texas Penal Code section 9.41(a), the right to defend "one's own" land is a right to defend it against another's "trespass." Trespass is not defined in the Penal Code, except insofar as it might incorporate "criminal trespass" as defined in section 30.05.

Given that section 9.31 does not use the term *criminal trespass*, it may be intended to mean trespass as it is defined for civil law purposes:

> Trespass to real property occurs when a person enters another's land without consent. . . . Concerning the intent element of the tort, . . . the only relevant intent is that of the actor to enter the property. The actor's subjective intent or awareness of the property's ownership is irrelevant. *[S]ee, e.g., McDaniel Bros. v. Wilson*, 70 S.W.2d 618, 621 (Tex. Civ. App.—Beaumont 1934, writ ref'd) (holding that "every unauthorized entry upon land of another is a trespass" even if no damage is done and "the intent or motive prompting the trespass is immaterial").

Wilen v. Falkenstein, 191 S.W.3d 791, 797–98 (Tex. App.—Fort Worth 2006, pet. denied) (some citations omitted).

"Land" is not defined. "The plain meaning of 'land' is 'the solid part of the surface of the earth.'" *Tarlton v. State*, 93 S.W.3d 168, 174 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd) (quoting *Webster's Third New International Dictionary* 1268 (1993)). Nevertheless, Texas courts have assumed—without careful consideration—that section 9.41(a) creates a right to defend the habitation. *E.g., Rogers v. State*, 653 S.W.2d 122, 124 (Tex. App.—Houston [1st Dist.] 1983, pet. ref'd) ("[T]he right to a charge on defense of habitation is governed by Penal Code § 9.41 and § 9.42."). A defendant charged with assault was entitled to this instruction when evidence showed that he asked the complainant, a guest in his apartment, to leave, and when she refused, he pushed her out of the door. *Manzke v. State*, No. 05-02-00356-CR, 2003 WL 1870560, at *2 (Tex. App.—Dallas Apr. 14, 2003, no pet.) (not designated for publication).

§ B19.7 Instruction—Nondeadly Force in Defense of Land

If you all agree the state has proved, beyond a reasonable doubt, each of the [*number*] elements listed above, you must next consider whether the defendant's use of force was made in defense of land.

Defense of One's Own Land

You have heard evidence that, when the defendant [*insert specific conduct constituting offense*], he believed his use of force was necessary to defend land in his possession from what the defendant believed was a trespass on that land.

Relevant Statutes

A person's use of force against another that would otherwise constitute the crime of [*offense*] is not a criminal offense if the person reasonably believed—

1. the person was in lawful possession of the land;
2. another person trespassed on that land; and
3. the force used was immediately necessary to prevent or terminate the other's unlawful trespass.

Burden of Proof

The defendant is not required to prove that defense of land applies to this case. Rather, the state must prove, beyond a reasonable doubt, that defense of land does not apply to the defendant's conduct.

Definition

Reasonable Belief

"Reasonable belief" means a belief that an ordinary and prudent person would have held in the same circumstances as the defendant.

Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the state has proved that the defendant's conduct was not justified by defense of land.

To decide the issue of defense of land, you must determine whether the state has proved, beyond a reasonable doubt, that the defendant did not reasonably believe at least one of the following:

1. The defendant lawfully possessed the land, specifically [*specify land*]; or

2. [*Name*] was trespassing on that land; or

3. The force used was immediately necessary to prevent or terminate [*name*]'s trespass.

You must all agree that the state has proved, beyond a reasonable doubt, either element 1, 2, or 3 listed above. You need not agree on which of these elements the state has proved.

If you find that the state has failed to prove, beyond a reasonable doubt, either element 1, 2, or 3 listed above, you must find the defendant "not guilty."

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of [*insert specific offense*], and you all agree the state has proved, beyond a reasonable doubt, either element 1, 2, or 3 listed above, you must find the defendant "guilty."

[See chapter 2 for verdict instruction.]

§ B19.8 Instruction—Deadly Force in Defense of One's Own Personal Property

If you all agree the state has proved, beyond a reasonable doubt, each of the [*number*] elements listed above, you must next consider whether the defendant's use of force was made in defense of property.

Defense of One's Own Personal Property

You have heard evidence that, when the defendant [*insert specific conduct constituting offense*], he believed his use of force was necessary to defend property in his possession from what the defendant believed was an unlawful interference.

Relevant Statutes

A person's use of deadly force against another that would otherwise constitute the crime of [*offense*] is not a criminal offense if the person reasonably believed—

1. the person was in lawful possession of tangible, movable property;
2. another person was unlawfully interfering with that property;
3. the force used was immediately necessary to prevent either—
   a. the other's imminent commission of arson, burglary, robbery, aggravated robbery, theft during the nighttime, or criminal mischief during the nighttime; or
   b. the other who is fleeing immediately after committing burglary, robbery, aggravated robbery, or theft during the nighttime from escaping with the property; and
4. either—
   a. the property could not have been protected or recovered by any other means; or
   b. the use of force other than deadly force to protect or recover the property would have exposed the person or another to a substantial risk of death or serious bodily injury.

Burden of Proof

The defendant is not required to prove that defense of property applies to this case. Rather, the state must prove, beyond a reasonable doubt, that defense of property does not apply to the defendant's conduct.

Definitions

Reasonable Belief

"Reasonable belief" means a belief that an ordinary and prudent person would have held in the same circumstances as the defendant.

Deadly Force

"Deadly force" means force that is intended or known by the person using it to cause death or serious bodily injury or force that in the manner of its use or intended use is capable of causing death or serious bodily injury.

Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the state has proved that the defendant's conduct was not justified by defense of property.

To decide the issue of defense of property, you must determine whether the state has proved, beyond a reasonable doubt, at least one of the following:

1. The defendant was not in lawful possession of tangible, movable property, specifically [*specify property*]; or

2. [*Name*] was not unlawfully interfering with that property; or

3. The defendant did not reasonably believe the force used was immediately necessary to prevent either—

    a. [*name*]'s imminent commission of arson, burglary, robbery, aggravated robbery, theft during the nighttime, or criminal mischief during the nighttime; or

    b. [*name*], who was fleeing immediately after committing burglary, robbery, aggravated robbery, or theft during the nighttime, from escaping with the property; or

4. The defendant did not reasonably believe either—

a. the property could not have been protected or recovered by any other means; or

b. the use of force other than deadly force to protect or recover the property would have exposed the defendant or another to a substantial risk of death or serious bodily injury.

You must all agree that the state has proved, beyond a reasonable doubt, either element 1, 2, 3, or 4 listed above. You need not agree on which of these elements the state has proved.

If you find that the state has failed to prove, beyond a reasonable doubt, either element 1, 2, 3, or 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 elements of the offense of [*insert specific offense*], and you all agree the state has proved, beyond a reasonable doubt, either element 1, 2, 3, or 4 listed above, you must find the defendant "guilty."

[See chapter 2 for verdict instruction.]

§ B19.9 Deadly Force in Defense of Land Generally

The structure of Texas Penal Code section 9.42 creates some difficulty in determining when evidence raises an issue concerning the defense of protection of land as applied to deadly force.

Conceptually, situations in which the evidence suggests the defendant may have been acting to prevent the complainant from escaping with criminally acquired property (and thus triggering section 9.42(2)(B)) do not seem to involve defense of the land on which the crime occurred. Rather, they involve deadly force used to protect the personal property with which the complainant may have been escaping.

On the other hand, section 9.42(2)(A) seems to create a right to use even deadly force to prevent the commission of certain offenses on or to land.

§ B19.10 Instruction—Deadly Force in Defense of Land

If you all agree the state has proved, beyond a reasonable doubt, each of the [*number*] elements listed above, you must next consider whether the defendant's use of force was made in defense of land.

Defense of One's Own Land

You have heard evidence that, when the defendant [*insert specific conduct constituting offense*], he believed his use of force was necessary to defend land in his possession from what the defendant believed was a trespass on that land.

Relevant Statutes

A person's use of deadly force against another that would otherwise constitute the crime of [*offense*] is not a criminal offense if the person reasonably believed—

1. the person was in lawful possession of land;

2. another person trespassed on that land;

3. the other was about to commit arson, burglary, robbery, aggravated robbery, theft during the nighttime, or criminal mischief during the nighttime;

4. the force used was immediately necessary to prevent the other's imminent commission of arson, burglary, robbery, aggravated robbery, theft during the nighttime, or criminal mischief during the nighttime; and

5. either—

   a. the land could not have been protected by any other means; or

   b. the use of force other than deadly force to protect the land would have exposed the person or another to a substantial risk of death or serious bodily injury.

Burden of Proof

The defendant is not required to prove that defense of land applies to this case. Rather, the state must prove, beyond a reasonable doubt, that defense of land does not apply to the defendant's conduct.

Definitions

Reasonable Belief

"Reasonable belief" means a belief that an ordinary and prudent person would have held in the same circumstances as the defendant.

Deadly Force

"Deadly force" means force that is intended or known by the person using it to cause death or serious bodily injury or force that in the manner of its use or intended use is capable of causing death or serious bodily injury.

Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the state has proved that the defendant's conduct was not justified by defense of land.

To decide the issue of defense of land, you must determine whether the state has proved, beyond a reasonable doubt, that the defendant did not reasonably believe at least one of the following:

1. The defendant was in lawful possession of the land, specifically [*specify land*]; or

2. [*Name*] was trespassing on that land; or

3. [*Name*] was about to commit arson, burglary, robbery, aggravated robbery, theft during the nighttime, or criminal mischief during the nighttime; or

4. The force used was immediately necessary to prevent [*name*]'s imminent commission of arson, burglary, robbery, aggravated robbery, theft during the nighttime, or criminal mischief during the nighttime; or

5. Either—

   a. the land could not have been protected by any other means; or

   b. the use of force other than deadly force to protect the land would have exposed the defendant or another to a substantial risk of death or serious bodily injury.

You must all agree that the state has proved, beyond a reasonable doubt, either element 1, 2, 3, 4, or 5 listed above. You need not agree on which of these elements the state has proved.

If you find that the state has failed to prove, beyond a reasonable doubt, either element 1, 2, 3, 4, or 5 listed above, you must find the defendant "not guilty."

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of [*insert specific offense*], and you all agree the state has proved, beyond a reasonable doubt, either element 1, 2, 3, 4, or 5 listed above, you must find the defendant "guilty."

[See chapter 2 for verdict instruction.]

§ B19.11 Instruction—Nondeadly Force in Defense of Third Person's Personal Property

If you all agree the state has proved, beyond a reasonable doubt, each of the [*number*] elements listed above, you must next consider whether the defendant's use of force was made in defense of property.

Defense of Property of a Third Person

You have heard evidence that, when the defendant [*insert specific conduct constituting offense*], he believed his use of force was necessary to defend property of a third person from what the defendant believed was an unlawful interference.

Relevant Statutes

A person's use of force against another that would otherwise constitute the crime of [*offense*] is not a criminal offense if the person reasonably believed—

1. the other was unlawfully interfering with the tangible, movable property of a third individual;

2. the other's unlawful interference with that property constituted attempted or consummated theft of or criminal mischief to that property; and

3. either—

   a. the third individual requested his protection of the property; or

   b. the person had a legal duty to protect the third individual's property; or

   c. the third individual was the person's spouse, parent, or child, resided with the person, or was under the person's care.

Burden of Proof

The defendant is not required to prove that defense of property applies to this case. Rather, the state must prove, beyond a reasonable doubt, that defense of property does not apply to the defendant's conduct.

Definition

Reasonable Belief

"Reasonable belief" means a belief that an ordinary and prudent person would have held in the same circumstances as the defendant.

Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the state has proved that the defendant's conduct was not justified by defense of property.

To decide the issue of defense of property, you must determine whether the state has proved, beyond a reasonable doubt, at least one of the following:

1. [*Name*] was not unlawfully interfering with the tangible, movable property of a third individual, specifically [*specify property*]; or

2. [*Name*]'s unlawful interference with that property did not constitute attempted or consummated theft of or criminal mischief to that property; or

3. Either—

   a. the third individual did not request the defendant's protection of the property; or

   b. the defendant did not have a legal duty to protect the third individual's property; or

   c. the third individual was not the defendant's spouse, parent, or child, resided with the defendant, or was under the defendant's care.

You must all agree that the state has proved, beyond a reasonable doubt, either element 1, 2, or 3 listed above. You need not agree on which of these elements the state has proved.

If you find that the state has failed to prove, beyond a reasonable doubt, either element 1, 2, or 3 listed above, you must find the defendant "not guilty."

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of [*insert specific offense*], and you all agree the state has proved, beyond a reasonable doubt, either element 1, 2, or 3 listed above, you must find the defendant "guilty."

[See chapter 2 for verdict instruction.]

APPENDIX

Following are the tables of contents of the other volumes in the *Texas Criminal Pattern Jury Charges* series. These tables represent the 2011, 2012, and 2013 editions of these volumes, which were the current editions when this book was published. Other topics may be added in future editions.

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PART V. DEADLY CONDUCT

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STATUTES AND RULES CITED

[Decimal references are to section numbers.
"Quick Guide" references are to the guide preceding chapter B1.]

Texas Code of Criminal Procedure

Texas Health & Safety Code

Texas Penal Code

Texas Rules of Appellate Procedure

Miscellaneous

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[Decimal references are to section numbers.
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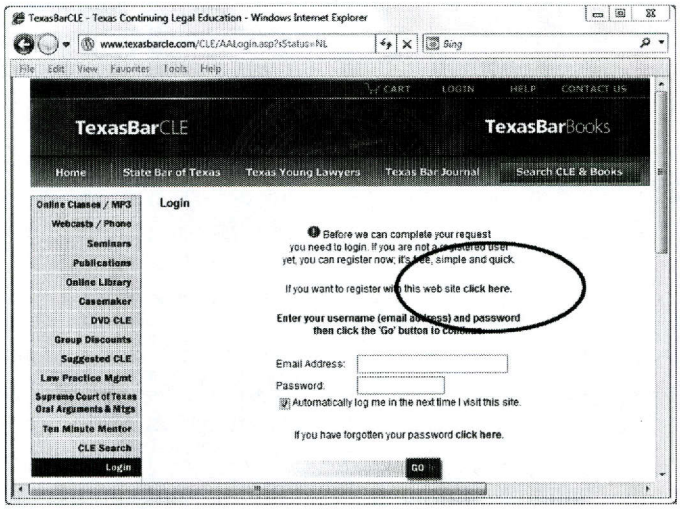

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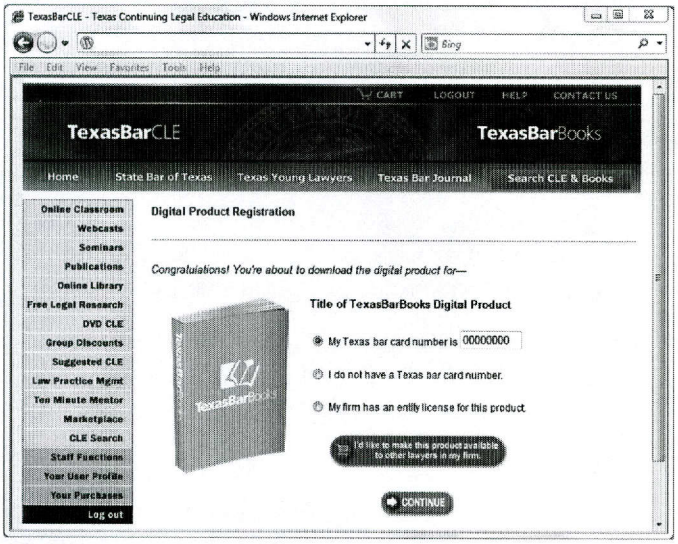

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— GEORGE E. DIX

George R. Killam, Jr. Chair of Criminal Law, University of Texas at Austin, and Vice-Chair, Pattern Jury Charges Committee—Criminal

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