

JURY INSTRUCTIONS

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CHAPTER 2

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Table Of Contents

I. INTRODUCTION..... 1

II. CONSTITUTIONAL AND STATUTORY AUTHORITY..... 1

 A. Tex. Const. Art. I, Sec. 15..... 1

 B. Article 36.13, Code of Criminal Procedure..... 1

 C. Article 36.14, Code of Criminal Procedure..... 1

 D. Article 36.15, Code of Criminal Procedure..... 1

III. TYPES OF JURY INSTRUCTIONS..... 1

 A. Informal Instructions..... 1

 B. Substantive Law Instructions..... 1

 C. Evidentiary Instructions..... 2

 D. Supplemental Instructions..... 2

IV. JURY COMPREHENSION OF INSTRUCTIONS..... 2

V. IMPROVING JURY COMPREHENSION..... 2

VI. CHARGE ON GUILT/INNOCENCE..... 3

 A. The Charge in General..... 3

 B. Framework for the Charge..... 4

 1. Caption and Salutation..... 4

 2. Commencement..... 4

 3. Statute Violated..... 4

 4. Definitions..... 4

 5. Law of Parties..... 4

 6. Application Paragraph..... 4

 7. Lesser-Include Offenses..... 5

 8. Alternative Counts..... 5

 9. Evidentiary Instructions..... 5

 10. Defenses..... 5

 11. Concluding Instructions..... 5

 12. Verdict Forms..... 5

 C. Definitions..... 5

 D. Culpable Mental State..... 5

 1. Nature of the Conduct..... 6

 2. Circumstances Surrounding the Conduct..... 6

 3. Result of the Conduct..... 6

 a. Capital Murder..... 6

 b. Murder..... 7

 c. Injury to Elderly Person..... 7

 d. Injury to a Child..... 7

 e. Obstruction of Justice..... 7

 f. Abandonment of a Child..... 7

 g. Aggravated Assault on Police Officer..... 7

 4. Transferred Intent..... 7

 E. Law of Parties..... 7

 1. When to Submit A Parties Instruction..... 7

 2. No Pleading Required..... 8

 3. Independent Impulse..... 8

 4. Limiting the Parties Instruction..... 8

 F. Application Paragraph..... 8

 1. Variance..... 9

 2. Conjunctive Allegations and Disjunctive Submission..... 9

 3. Comment on the Weight of the Evidence..... 9

4.	<u>Converse Instruction</u>	10
5.	<u>Obverse Instruction</u>	10
G.	Multiple Counts and Paragraphs	10
H.	Lesser Included Offenses	11
1.	<u>First Prong of the <i>Royster</i> Test</u>	11
2.	<u>The Second Prong of the <i>Royster</i> Test</u>	11
3.	<u>Evidence Necessary to Require A Submission</u>	12
4.	<u>Dangers when A Lesser Culpable Mental State is not In the Indictment</u>	12
5.	<u>General Lesser-Included Offense Cases</u>	13
6.	<u>Specific Lesser Included Offense Topics</u>	13
a.	Capital Murder.....	13
b.	Attempted Capital Murder	14
c.	Murder	14
d.	Aggravated Robbery.....	14
e.	Aggravated Kidnapping	14
f.	Aggravated Assault	14
g.	Assault	14
h.	Burglary of a Vehicle	14
i.	Burglary	14
j.	Aggravated Sexual Assault	15
k.	Indecency with a Child	15
l.	Injury to a Child	15
m.	Retaliation	15
7.	<u>Lesser-Included Offenses and Harmless Error</u>	15
I.	Defenses and Affirmative Defenses	15
1.	<u>Statutory Defenses</u>	16
a.	Insanity.....	16
b.	Mistake of Fact.....	17
c.	Mistake of Law.....	18
d.	Intoxication.....	18
e.	Duress.....	18
f.	Entrapment	19
g.	Self Defense.....	19
(1)	Raising the Issue	19
(a)	Non-testifying Defendant	19
(b)	Inconsistent Defenses.....	19
(2)	Reasonable Belief	19
(3)	Multiple Assailants	20
(4)	Provoking the Difficulty	20
(5)	Right to Arm.....	20
(6)	Right to Strike First.....	20
(7)	Right to Pursue and Continue Shooting.....	21
(8)	Apparent Danger.....	21
(9)	Retreat.....	21
h.	Defense Of Third Persons	21
i.	Necessity	21
2.	<u>Non-Statutory Defenses</u>	22
a.	Alibi.....	22
b.	Mistaken Identification	23
c.	Good Faith Purchase.....	23
d.	Excessive Force.....	23
e.	Accident	23
3.	<u>Submission of Defensive Issues</u>	24
a.	General Rule	24
b.	Exception To The Rule	24
c.	Application Paragraph.....	25
J.	Evidentiary Instructions	25

1.	<u>Confessions</u>	25
2.	<u>Accomplice Testimony</u>	26
a.	Accomplice As A Matter Of Law Or Fact.....	26
b.	Corroboration.....	27
c.	Statutory Exceptions.....	27
d.	Capital Cases.....	27
e.	Wording of the Accomplice-Witness Instruction.....	28
f.	Accomplice Witness Instruction and Harmless Error.....	28
3.	<u>Illegal Arrest and Search</u>	28
4.	<u>Extraneous Offenses</u>	29
5.	<u>Impeachment Evidence</u>	30
6.	<u>Relationship Of The Parties</u>	30
7.	<u>Presumptions</u>	31
8.	<u>Deadly Weapon</u>	31
9.	<u>Rules of Evidence</u>	31
10.	<u>D.N.A. Instruction</u>	32
11.	<u>Failure To Testify</u>	32
12.	<u>Expert Witnesses</u>	32
13.	<u>Character Witnesses</u>	32
14.	<u>Circumstantial Evidence</u>	33
15.	<u>Co-Conspirator Hearsay</u>	33
16.	<u>Common-law Marriage</u>	33
17.	<u>Penal Code Objectives</u>	33
18.	<u>Intoxilyzer</u>	34
19.	<u>Judicial Notice</u>	34
20.	<u>Impeachment Evidence</u>	34
K.	Reasonable Doubt and Presumption of Innocence.....	34
L.	Concluding Instructions.....	35
M.	Verdict Forms.....	36
N.	Request for Charge.....	36
O.	Supplemental Instructions.....	36
VII.	CHARGE ON PUNISHMENT	36
A.	Law Of Parole.....	36
B.	Affirmative Findings.....	36
1.	<u>Notice</u>	36
2.	<u>Finding</u>	37
3.	<u>Law of Parties</u>	37
C.	Conditions of Probation.....	37
D.	Failure To Testify.....	37
E.	Unadjudicated Extraneous Offenses.....	37
F.	Penry Charge.....	37
G.	Range Of Punishment.....	38
H.	Special Issues.....	38
1.	<u>Drug-free Zone</u>	38
2.	<u>Bias or Prejudice (hate crimes)</u>	38
3.	<u>Sudden Passion</u>	39
4.	<u>Release to a Safe Place</u>	39
5.	<u>Renunciation</u>	39
I.	Reasonable Doubt.....	39
VIII.	THE ALLEN CHARGE	39
IX.	PRESERVATION OF ERROR	39
A.	Three Ways To Object.....	39
B.	Apprising The Court of Error.....	39
C.	Invited Error.....	40

D. Timeliness.....	40
E. Presentation	40
F. Reasonable Time to Examine the Charge	40
X. JURY NOTES.....	40
XI. AMENDING JURY INSTRUCTIONS.....	40
XII. READING THE CHARGE.....	41
XIII. APPELLATE REVIEW – <i>ALMANZA V. STATE</i>.....	41
A. The Holding In Almanza.....	41
B. Proper Objection: "Some Harm"	41
C. No Objection: "Egregious Harm"	42
D. When <i>Almanza</i> Does Not Apply	42
1. <u>Non-testifying Defendant</u>	42
2. <u>Error may be waived</u>	42

JURY INSTRUCTIONS¹

I. INTRODUCTION

In our present jury trial system, laypersons rather than legal experts determine the guilt of persons accused of a crime by applying legal standards provided by a judge in the form of jury instructions. Fundamental fairness requires that the jury be supplied with basic jury instructions² to perform their duties. The jury's duties are to determine the facts of the case³, to learn the relevant legal standards, and to apply those standards to the facts of the case. The trial Judge is responsible for providing the jury with clear and legally correct instructions.

The purpose of this article is to provide the bench and the bar with a quick reference guide of the issues surrounding jury instructions.

II. CONSTITUTIONAL AND STATUTORY AUTHORITY

A. Tex. Const. Art. I, Sec. 15

"The right of trial by jury shall remain inviolate." This provision, however, also provides that the legislature may pass laws to regulate this right and maintain its efficiency. The result has been that a defendant does not have an absolute right to have a trial by jury in a manner that is unlimited in its scope or duration. Art. I §10 also provides a defendant with a constitutional right to a "speedy public trial by an impartial jury."

B. Article 36.13, Code of Criminal Procedure

This article provides the basic rule of law that the "jury is the exclusive judge of the facts" proved, but is governed by the law as received from the court.

C. Article 36.14, Code of Criminal Procedure

This article governs the charge of the court as to its content and form. It further provides that counsel shall be given a reasonable time to examine the charge before it is given to the jury so that objections may be made prior to its submission. The procedures for lodging proper objections are set forth within this article.

D. Article 36.15, Code of Criminal Procedure

Article 36.15 sets forth exactly how special charges are requested. These may be in the form of additional instructions or they may be utilized to call the court's attention to omission or errors in the original charge. These may either be submitted in writing or dictated by the court reporter.

III. TYPES OF JURY INSTRUCTIONS⁴

The types of instructions given by trial judges fall into three general categories: informal instructions, substantive instructions, and evidentiary instructions. If a jury has difficulty in reaching a verdict, a trial judge may provide supplemental instructions.

A. Informal Instructions

Informal instructions orient the jurors and explain trial procedure. Some jurisdictions use juror orientation handbook to make jurors aware of their function and the procedures followed in a criminal trial.⁵ Other jurisdictions may orally explain law and the jury's role at the beginning of voir dire or during trial.

The informational instructions may include an explanation of the trial process and other pertinent information to familiarize the jurors with their new surrounding, as well as definitions of common legal terms that are helpful to uninformed jurors.⁶ Informal instructions normally define the respective functions of the trial judge and the jury to make clear that the jury acts as the sole fact finder. Judges often warn jurors against being influenced by sympathy, prejudice, or punishment. Judges ordinarily caution jurors not to investigate or look for information beyond the evidence presented at trial. Finally, judges will generally admonish jurors not to listen to radio or television concerning the case or read newspaper articles on the case.

B. Substantive Law Instructions

Substantive law instructions are arguably the most important jury instructions and must be given in every criminal case.⁷ These instructions generally are given at the end of the trial – after both attorneys are afforded the opportunity to present proposed instructions, object to tendered instructions, and make a record of refused instructions.⁸

In a criminal case, the specific crime charged must be set forth in the abstract portion of the court's instructions. The abstract portion of the court's

¹ **ACKNOWLEDGEMENT:** I would like to give special thanks to Judge Terry McDonald and Ed Wilkerson for allowing me to incorporate some of their works into this article.

² *People v. McClendon*, 554 N.E. 2d 791, 796 (Ill. App. Ct. 1990); See also *People v. Roberts*, 537 N.E.2d 1080, 1083 (Ill. App. Ct. 1989)(failure to provide jury instructions results in the denial of due process).

³ See, e.g. H. Kalven & H. Zeisel, *The American Jury* 149 (1966).

⁴ See William Erickson, *Criminal Jury Charges*, 1993 U. Ill. L. Rev. 285

⁵ Dallas County, Texas has a jury orientation handbook.

⁶ See William Erickson, *Criminal Jury Charges*, 1993 U. Ill. L. Rev. 285, 287

⁷ *Id.*

⁸ *Id.* at 288

instructions explains substantive law such as elements of the offense, presumption of innocence, lesser-included offenses, affirmative defenses, and the definitions of the relevant legal terms in the case.

C. Evidentiary Instructions

Evidentiary instructions provide general standards for jurors to use in considering particular kinds and types of evidence and are included in the general charges at the end of the case.⁹ Upon request, evidentiary instructions applicable to the case must be included in the charge. However, there must be evidence in the record to support the instruction before an evidentiary instruction may be included in the charge.¹⁰

Evidentiary instructions include instructions involving confessions, accomplice witness testimony, illegal arrest and search, extraneous offenses, and impeachment evidence. Evidentiary instructions also consist of instructions that admonish or caution jurors as to the limited use of certain type of evidence.¹¹

A commonly encountered problem with evidentiary instructions is that they frequently serve as an improper comment on the evidence.

D. Supplemental Instructions

Supplemental instructions are instructions typically given to the jury after deliberations have begun. Supplemental instructions usually come in a response to a jury note. The instructions may indicate under what circumstances the jury may have testimony read to the jury or it may indicate a portion of the charge the jury should be guided by. Supplemental instructions may also encourage the jury to continue deliberations when the jury has indicated that it is deadlocked.

IV. JURY COMPREHENSION OF INSTRUCTIONS

Several studies have indicated that jurors do not fully understand judges' instructions on the law.¹² For

⁹ Id.

¹⁰ Id. citing *Boynton v. Fox Denver Theatres*, 214 P. 2d 793 (Colo. 1950)

¹¹ Id.

¹² See Amiram Elwork et. al., *Making Jury Instructions Understandable* (1982); Raymond W. Buchanan et. al., *Legal Communication: An Investigation of Juror Comprehension of Pattern Instructions*, Com. Q., Fall 1978, at 31; Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L. Rev. 1306 (1979); Amiram Elwok et. al., *Toward Understandable Jury Instructions*, 65 *Judicature* 432, 434 (1981082); Edward J. Imwinkerfried & Lloyd R. Schwed, *Guidelines for Drafting Understandable Jury Instructions: An Introduction to the Use of Psycholinguistics*, 23 *Crim. L. Bull.* 135, 137-50 (1987)

example law professors Walter Steele and Elizabeth Thornburg designed a study to test whether jurors attempt to reach verdicts consistent with the law as they understood it.¹³ The study found that although a typical jury makes a good faith effort to use its instructions for the purpose intended, "the jury's efforts are seriously undermined because of the badly organized, jargon-filled, convoluted prose used by lawyers and judges who write the jury instructions."¹⁴

Another study found that "although pattern instructions may be effective in reminding jurors of concepts with they already are generally familiar, they do not improve comprehension of new, difficult or counter-intuitive laws."¹⁵ When tested, one researcher has shown that jurors answered fewer than half of the questions on substantive and procedural law correctly.¹⁶

There are several recognized areas where jurors have been typically confused. One study found that eighty percent of the subjects did not understand basic rules of evidence and burdens of proof.¹⁷ Another study recognized that there were "startling" low rates in areas of reasonable doubt, impeachment by prior conviction, and circumstantial evidence.¹⁸ Although test results may vary depending on the instructions provided and the group tested, what is evident is that jury instructions have caused juries some confusion.

V. IMPROVING JURY COMPREHENSION

One jury reform scholar has noted "Although, under our system, it is deemed essential that instructions be made intelligible to a jury, there is not requirement that they be useful to a jury."¹⁹ In his nineteenth-century treatise on jury trials, Proffatt wrote:

In discharging the important function of instructing the jury on the law, a court may avoid some of the errors and mistakes [of

¹³ See Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 *N.C. L. Rev.* 77, 96 (1988).

¹⁴ Id.

¹⁵ J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 *Neb. L. Rev.* 71, 80 (1990).

¹⁶ See, e.g. Alan Reifman et al., *Real Juror's Understanding of the Law in Real Cases*, 16 *Law & Hum. Behav.* 539, 542 (1992)

¹⁷ Robert F. Forston, *Justice, Jurors and Judges' Instructions*, 12 *Judges J.* 68 (1973).

¹⁸ See, e.g., Geoffrey P. Kramer & Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 *U.Mich. J.L. Refrom.* 401 (1990)

¹⁹ R.J. Farley, *Instructions to Juries - Their Role in the Judicial Process*, 42 *Yale L.J.* 194, 208 (1932)(citing *Vicksburg R.R. Co. v. Putnam*, 118 *U.S.* 545 (1886)).

incorrectly instructing the law], yet fail to adequately discharge its duty. The statement of law may be given in such a manner as to be beyond the comprehension of the jury, in a too technical or in an indirect manner. Something more is required from a court than mere abstract statement of law; there is required an exposition of the law pertinent to the case before the jury, in its adaptation and well as exceptions.²⁰

For as long as courts have issued jury instructions, there has been a constant struggle to balance correctness with comprehensibility and comprehension has in too many instances become the loser. Trial judges have often had the tendency to use prior instructions and are leery of changing an instruction that has been approved by an appellate court.²¹

The development of standard or pattern instructions was supposed to provide understandable and concise statements of the applicable law for the jury.²² While this development has generally been hailed as a success, one major weakness still remains - while jury instructions may be legally accurate not much effort has been made to insure that they are understandable to jurors.²³

Dr. Veda Charrow, after many years of extensive study on jury comprehension, has come up with some guidelines for clear jury instructions:

1. Write short sentences
2. Avoid intrusive phrases and clauses
3. Put the parts of each sentence in a logical order.
4. Untangle complex conditionals. A conditional is a statement of the “if-the” or “when-then” type.
5. Use the active voice rather than passive voice whenever possible.
6. Avoid nominalizations (nouns constructed from verbs and used to take the place of a verb clause). Use verb clauses and adjectives instead. For example, say that a person “admitted” something; don’t speak of the party’s “admission.” Nominalizations are abstract and can be especially difficult to follow for someone who is not already familiar with the subject matter.
7. Use the positive unless you want to emphasize the negative. Do not use multiple negatives.
8. Avoid noun strings. That is, noun-noun-noun, as in “policy implementation” or “decision analysis.” Like nominalizations, noun strings are hard for the listener or reader to process.
9. Avoid ambiguity in words and sentences.
10. Eliminate redundancy and extraneous words.
11. Choose your vocabulary with care. (Use words that can be commonly understood by the layperson.)
12. Use parallel structure.
13. Use an appropriate tone.²⁴

VI. CHARGE ON GUILT/INNOCENCE

A. The Charge in General

The Code of Criminal Procedure mandates that before closing argument, the “judge shall . . . deliver to the jury . . . a written charge distinctly setting forth the law applicable to the case.” TEX. CODE. CRIM. PROC. ANN. Art. 36.14. The purpose of the jury charge is to inform the jurors of the applicable law and guide them in its application to the case. *See Hutch v. State*, 922 S.W.2d 166, 170 (Tex. Crim. App. 1996). A charge thus consists of two general parts: the abstract portion, which apprises the jury of the law; and the application portion, which applies the law to the facts. *Williams v. State*, 547 S.W.2d 18, 20 (Tex. Crim. App. 1997). The abstract paragraphs serve “as a kind of glossary” to help the jury understand the meaning of concepts and terms used in the application paragraphs of the charge.²⁵ *Plata v. State*, 926 S.W.2d 300, 302

²⁰ John Proffatt, *A Treatise on Trial by Jury* 411 (1877).

²¹ Justice Fortas highlighted the tendency to use jury instructions that previously have been approved by appellate courts: “A jury instruction is not abracadabra. It is not a magical incantation, the slightest deviation from which will break the spell. Only its poorer examples are formalistic codes recited by a trial judge to please appellate masters.” *Time, Inc. v. Hill*, 385 U.S. 374, 418 (1967) (Fortas, J., dissenting).

²² See, e.g. *Manual of Modern Criminal Jury Instructions for the Ninth Circuit* (1992); Hon. Edward J. Devitt, *Ten Practical Suggestions About Federal Jury Instructions*, 38 F.R.D. 75 (1965).

²³ See Amiram Elwork et. al., *Making Jury Instructions Understandable* 4 (1982) (“There is no justification for juries, out of ignorance, to reach verdicts that are inconsistent with the law.”); Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 *Colm. L. Rev.* 1306, 1359 (1979) (“If many jurors do not properly understand the laws that they are required to use in reaching their verdicts, it is possible that many verdicts are reached either without regard to the law or by using improper law.”); William W. Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 *Cal. L. Rev.* 731, 759 (1981) (“Proper communication with jurors is the most direct and effective way of mobilizing [jurors’] qualities to further the cause of intelligent administration of justice.”)

²⁴ Veda Charrow, *Some Guidelines for Clear Legal Writing*, 8 *U. Bridgeport L. Rev.* 405, 406 (1987).

²⁵ The trial court is obligated to charge the jury on the “law applicable to the case” which requires that the jury be instructed concerning each element of the offense or offenses charged and that each statutory definition that affects the meaning of an element of the offense must also be given. *Murphy v. State*, 44 S.W.3d 656 (Tex. App. - Austin 2001, *no pet.*). Failure to give abstract instruction is

(Tex. Crim. App. 1996). The application paragraph instructs the jury regarding the circumstances under which the accused can be convicted or acquitted. See *Campbell v. State*, 910 S. W.2d 475, 477 (Tex. Crim. App. 1995). Every jury charge is required to contain at least one application paragraph.²⁶ Please note, however, that in light of *Malik v. State*, 953 S.W.2d 234 (Tex. Crim. App. 1997), we can question whether any jury charge is *per se* reversible error. In *Malik*, the Court of Criminal Appeals held that the sufficiency of the evidence is now measured “by the elements of the offense as defined by the hypothetically correct jury charge for the case.” *Malik*, 953 S.W.2d at 240. Such a charge is one that “accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State’s burden of proof or unnecessarily restrict the State’s theories of liability, and adequately describes the particular offense for which the defendant was tried.” *Id.* *Malik* overruled the *Benson/Boozer* line of cases, so potential reversible error in jury charges must be viewed in light of *Malik*. [*Benson v. State*, 661 S.W.2d 708 (Tex. Crim. App. 1982), *cert. denied*, 467 U.S. 1219, 104 S. Ct. 2667, 81 L.Ed. 2d 372 (1984); *Boozer v. State*, 717 S.W.2d 608 (Tex. Crim. App. 1984)].

B. Framework for the Charge²⁷

Generally speaking, the court’s charge should have a certain structure. The suggested order in which certain items should appear in a charge is listed below:

1. Caption and Salutation

Generally speaking, the caption is a heading showing the names of the parties, the court, and the docket number. The salutation is the greeting or addressing of the jury by the court in the jury charge.

2. Commencement

After a proper caption and salutation, the charge is commenced by stating to the jury the offense with which the defendant is charged, the county in which the offense is alleged to have been committed, the date

reversible only when such instruction is necessary to correct or complete understanding of concepts or terms in the application part of the charge; therefore, inclusion of merely superfluous abstraction never produces reversible error in court’s charge because it has no effect on the jury’s ability to fairly and accurately implement the commands of the application paragraph or paragraphs. *Plata v. State*, 926 S.W.2d 300 (Tex. Crim. App. 1996).

²⁶ General instructions and definitional instructions need not be applied to the facts of the case. *Clark v. State*, 929 S.W.2d 5 (Tex. Crim. App. 1996), *cert. denied*, 520 U.S. 1116, 117 S. Ct. 1246, 137 L. Ed. 328 (1997)

²⁷ Michael J.McCormick, Thomas D. Blackwell and Betty Blackwell, Texas Practice Volume 8, Criminal Forms and Trial Manual, 10th Edition.

of the alleged offense, and the defendant’s plea to the charge. For example the commencement portion of the charge may read as follows:

CHARGE OF THE COURT

Ladies and Gentlemen of the Jury:

The defendant, John Doe, stands charged by way of indictment with the offense of murder, alleged to have been committed in Dallas County, Texas on or about July 28, 2003. To this charge the defendant has pleaded not guilty. You are instructed that the law applicable to this case is as follows:

3. Statute Violated

Set out only that portion of the statute as it applies to the offense charged in the indictment or information. However, do not set out alternative manner and means of committing the offense found in the statute unless the alternative manner and means have been alleged in the conjunctive in the indictment or information. Submit separate counts in the indictment or information separately. This portion of the charge may read as follows:

A person commits the offense of _____.

4. Definitions

Set out the definition of any term or words which are defined in the statute of which have been required by law to be defined. However, include only that portion of the statutory definition that is applicable to the case. Terms that are not necessary to the applicable law and evidence should not be included in the charge. The definition portion of the charge may use the following language:

The term “_____” is defined as _____.

5. Law of Parties

If raised by the evidence and requested by either side, the law of parties should be set out in this portion of the charge.

6. Application Paragraph

Set out the allegations charged in the indictment or information that has been raised by the evidence. For example the application paragraph may read as follows:

Now bearing in mind the foregoing instructions, if you believe from the evidence beyond a reasonable doubt, that the defendant, John Doe, on or about the 28th day of July, 2003, in the County of Dallas and State of Texas, as alleged in the

indictment, did then and there knowingly or intentionally cause the death of Jane Doe, an individual, by shooting Jane Doe with a firearm, a deadly weapon, you will find the defendant guilty of the offense of murder and so say by your verdict. But if you do not so believe, or if you have a reasonable doubt thereof, you will acquit the defendant of the offense of murder and proceed to consider whether the defendant is guilty of the lesser-included offense of _____.

7. Lesser-Include Offenses

Submit any lesser-included offenses authorized by law raised by the evidence and requested by the State or Defense.

8. Alternative Counts

Submit in the disjunctive any alternative counts contained in the indictment or information which are supported by the evidence and which have not been abandoned by an election.

9. Evidentiary Instructions

Submit evidentiary instructions applicable to the case, such as: circumstantial evidence, confessions, etc.

10. Defenses

Submit defenses and affirmative defenses as authorized by law and raised by the evidence.

11. Concluding Instructions

The last set of written instructions included in the jury charge will include such information as Burden of Proof, Presumption of Innocence, Reasonable Doubt, Failure of Defendant to Testify, Indictment Not Evidence, etc.

12. Verdict Forms

Attach the appropriate forms of verdict including any lesser-included offenses submitted.

C. **Definitions**

Any term or words which are defined in the statute or which have been required by law to be defined should be defined at the outset of the charge and left to the jury to apply where appropriate. The “better practice” in most cases is to define the elements and the terms in the abstract portion of the charge, and refer back to the definition included in the abstract portion when using the term later in the application paragraph. *Jackson v. State*, 633 S.W.2d 897, 899 (Tex. Crim. App. 1982).

As a general rule, terms need not be defined in the charge if the legislature failed to define the terms in the

relevant statute.²⁸ *Martinez v. State*, 924 S.W.2d 693, 698 (Tex. Crim. App. 1996); *Garcia v. State*, 887 S.W.2d 846, 859 (Tex. Crim. App. 1994). However, if the term has a technical legal meaning, the term may need to be defined. *See Medford v. State*, 13 S.W.3d 769, 772 (Tex. Crim. App. 2000); *Andrews v. State*, 652 S.W.2d 370, 375-76 (Tex. Crim. App. 1983)(explaining that term acquiring technical meaning need not necessarily 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. *Medford*, 13 S.W.3d at 772; *See Draughon v. State*, 831 S.W.2d 331, 338 (Tex. Crim. App. 1992).

When the statutory definition is not included in the charge, it is assumed that the jury would consider the commonly understood meaning in its deliberations. *See Rohlfling v. State*, 612 S.W.2d 598, 603 (Tex. Crim. App. 1981). Error will normally occur where the common meaning is more expansive than the statutory definition. *See Olveda v. State*, 625 S.W.2d 13, 14 (Tex. App. – San Antonio 1981), *reversed on other grounds*, 650 S.W.2d 408 (Tex. Crim. App. 1983).

Some terms that need not be defined are: “deliberately,” “probability,” “society,” “continuing threat,” and “criminal acts of violence.” *Hogue v. Scott*, 874 F. Supp. 1486 (N.D. Tex. 1994); *Clark v. State*, 881 S.W.2d 682 (Tex. Crim. App. 1994). Other terms which need not be defined are: “acquit” [*Penry v. State*, 903 S.W.2d 715 (Tex. Crim. App. 1995), *cert. denied*, 516 U.S. 977, 116 S.Ct. 480, 133 L.Ed.2d 408 (1995)]; concurrent cause [*Mattox v. State*, 874 S.W.2d 929 (Tex. App. – Houston [1st Dist.] 1994, *no pet.*)]; “lewd exhibition of genitals” [*Alexander v. State*, 906 S.W.2d 107 (Tex. App. – Dallas 1995, *no pet.*)]; “non-hazardous casual employment” [*Wadie v. State*, 923 S.W.2d 152 (Tex. App. – Beaumont 1996, *no pet.*)]; “criminal episode” [*Dodgen v. State*, 924 S.W.2d 216 (Tex. App. – Eastland 1996, *pet. ref’d*)]; “rebuttal” [*Willis v. State*, 802 S.W.2d 337 (Tex. App. – Dallas 1990, *pet. ref’d*)]; “encouragement” [*Mills v. State*, 625 S.W.2d 47 (Tex. App. – San Antonio 1981, *no pet.*)].

D. **Culpable Mental State**

Generally, “in order to constitute a crime, the act or *actus reus* must be accompanied by a criminal mind or *mens rea*.” *Cook v. State*, 884 S.W.2d 485, 487 (Tex. Crim. App. 1994). This principle is reflected in four culpable mental states contained in Section 6.03 of the Penal Code. The four culpable mental states are

²⁸ Article 3.01 of the Code of Criminal Procedure provides that “all words, phrases, and terms in this Code are to be taken and understood in their usual acceptance in common language, except where specifically defined.” TEX. CODE CRIM. PROC. ANN. Art. 301.

“intentional”, “knowing”, “reckless”, and “criminal negligence.” The type of the offense to which each may apply limits the scope of these culpable mental states. It is therefore necessary to understand the “conduct elements” involved in an offense.

There are three “conduct elements” which may be involved in an offense: (1) nature of the conduct; (2) circumstances surrounding the conduct and (3) the result of the conduct. *Cook*, 884 S.W.2d at 487. Any offense “may contain any one or more of these ‘conduct elements’ which alone or in combination form the overall behavior which the Legislature has intended to criminalize.” *Cook*, 884 S.W.2d at 487 [quoting *McQueen v. State*, 781 S.W.2d 600, 603 (Tex. Crim. App. 1989)]. The “conduct elements” form an essential part of the culpable mental state in the court’s jury charge.

The culpable mental state required by law and alleged in the indictment or information must be properly defined in the court’s charge. *West v. State*, 567 S.W.2d 515 (Tex. Crim. App. 1978). Only that portion of the statutory definition that is applicable to the case on trial should be included in the charge.²⁹ *Cook v. State*, 884 S.W.2d 485 (Tex. Crim. App. 1994). If the definition of an offense does not prescribe a culpable mental state, one is nevertheless required unless the definition plainly dispenses with any mental element. Penal Code § 6.02 (b). Failure to instruct the jury concerning a culpable mental state required by law, results in the omission of an element of the offense from the instruction and would be error. *Price v. State*, 923 S.W.2d 214 (Tex. Crim. App. – Eastland 1996, *pet. ref’d*).

1. Nature of the Conduct

A “nature of conduct” offense is one in which the defendant’s conduct is criminal because of the very nature of the conduct itself. It is an offense for which the legislature intended to punish specified conduct as opposed to a specific result. *See Alvarado v. State*, 704 S.W.2d 36, 39 (Tex. Crim. App. 1985). For example, assault is ordinarily a result of conduct offense – that is, in order to be criminal, the defendant must not have simply intentionally or knowingly engaged in conduct which happens to cause bodily injury, but have intentionally or knowingly caused bodily injury. *See Sneed v. State*, 803 S.W.2d 833, 835 (Tex. App. – Dallas 1991, *pet. ref’d*); *see also Peterson v. State*, 836 S.W.2d 760, 765 (Tex. App. – El Paso 1992, *pet. ref’d*).

²⁹ In the absence of an objection or request the trial judge has no duty to limit the definition; and even when the definition is not limited on request the error is subject to a harmless error analysis. *See Escobar v. State*, 28 S.W.3d 767 (Tex. App. – Corpus Christi 2000, *pet. ref’d*); *see also Schumacher v. State*, 814 S.W.2d 871 (Tex. App. – Austin 1991, *no pet.*).

The offense of assault by threat is also a nature of conduct offense, not a result oriented offense, because it punishes specific conduct – threats of bodily injury – and not a specific result – bodily injury. *See Guzman v. State*, 988 S.W.2d 884, 887 (Tex. App. – Corpus Christi 1999, *no pet.*); *see also Guinther v. State*, 982 S.W.2d 506, 510 (Tex. App. – San Antonio 1998, *no pet.*)

2. Circumstances Surrounding the Conduct

The conduct element of the circumstances surrounding the offense is present where “otherwise innocent behavior becomes criminal because of the circumstances under which it is done.” *See Cook*, 884 S.W.2d at 487. In such a case, the applicable culpable mental state is required as to those surrounding circumstances. *See id.* A specific example of this conduct element is the offense of theft. *See McQueen*, 781 S.W.2d at 602. Theft constitutes “otherwise innocent behavior” which, when done under certain circumstances, becomes criminal. That is, the otherwise innocent behavior of taking possession of an object with the intention of keeping it becomes criminal under circumstances in which the actor takes the object knowing that it belongs to another without the other’s effective consent, with intent to deprive the owner of the property. TEX. PENAL CODE ANN § 31.03 (a) (Vernon 1994). The result of the conduct, the permanent deprivation of the property from its owner, is not the “conduct element,” as that is not that which the legislature intended to criminalize unless it occurred under the circumstances set out in the theft statute. *See McQueen*, 781 S.W.2d at 603; *see also McClain v. State*, 687 S.W.2d 350, 355 (Tex. Crim. App. 1985).

3. Result of the Conduct

A result of the conduct offense is one in which “unspecified conduct . . . is criminal[ized] because of its result,” and “requires culpability as to that result.” *Cook*, 884 S.W.2d at 487. For example, the offense of injury to a child requires that the defendant be proven guilty of intending the result of his conduct – the injury to a child – and not simply that the defendant consciously desired to engage in the conduct which caused the result. *See Alvarado v. State*, 740 S.W.2d 36, 39-40 (Tex. Crim. App. 1985).

The following offenses have been held to be result of the conduct offenses:

a. Capital Murder

Patrick v. State, 906 S.W.2d 481 (Tex. Crim. App. 1995); *Cooper v. State*, 877 S.W.2d 773 (Tex. Crim. App. 1994); *Turner v. State*, 805 S.W.2d 423, 430 (Tex. Crim. App. 1991)

b. Murder

Martinez v. State, 763 S.W.2d 413, 419 (Tex. Crim. App. 1988); *Leal v. State*, 800 S.W.2d 346, 347 (Tex. App. – Corpus Christi 1990, *pet. ref'd*).

c. Injury to Elderly Person

Kelly v. State, 748 S.W.2d 263 (Tex. Crim. App. 1988).

d. Injury to a Child

Alvarado v. State, 704 S.W.2d 36 (Tex. Crim. App. 1985); *Calhoun v. State*, 951 S.W.2d 803 (Tex. App. – Waco 1997, *pet. ref'd*).

e. Obstruction of Justice

Herrera v. State, 915 S.W.2d 94 (Tex. App. - San Antonio 1996, *no pet.*).

f. Abandonment of a Child

Schultz v. State, 879 S.W.2d 377 (Tex App. – Amarillo 1994), *aff'd*, 923 S.W.2d 1 (Tex. Crim. App. 1996).

g. Aggravated Assault on Police Officer

Green v. State, 891 S.W.2d 289 (Tex. App. – Houston [1st Dist.] 1994, *pet. ref'd*).

4. Transferred Intent

Section 6.04(b) of the Texas Penal Code provides as follows:

A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that:

- (1) A different offense was committed; or
- (2) a different person or property was injured, harmed, or otherwise affected.

The law of transferred intent normally benefits the state and not the defendant. The law of transferred intent must be included in the application paragraph or otherwise it is not properly charged and may not be relied upon by the state to meet its sufficiency burden on appeal. *Garrett v. State*, 749 S.W.2d 784 (Tex. Crim. App. 1986). In *Chimney v State*, 6 S.W.3d 681 (Tex. App. – Waco 1999, *no pet.*) the defendant requested the charge. The defense was claiming sudden passion when attempting to kill one person and he accidentally killed another. The court held absent evidence that the object of the defendant's sudden passion was acting with the victim at the time of the provocation, the defendant would not be entitled to the charge as it related to sudden passion.

E. Law of Parties

A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or both. TEX. PENAL CODE § 7.01 (a). A person is criminally responsible for an offense committed by the conduct of another if: (1) acting with the kind of culpability required for the offense, he causes or aids an innocent or non-responsible person to engage in conduct prohibited by the definition of the offense; (2) acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense; or (3) having a legal duty to prevent commission of the offense and acting with intent to promote or assist its commission, he fails to make a reasonable effort to prevent commission of the offense. TEX. PENAL CODE ANN. § 7.02 (a)(1) – (3) (Vernon 1994)

1. When to Submit A Parties Instruction

An instruction on the law of parties should be given whenever there is sufficient evidence to support a jury verdict that the defendant is criminally responsible under the law of parties. In *McCuin v. State*, 505 S.W.2d 827, 830 (Tex. Crim. App. 1974) the Court of Criminal Appeals articulated the standard that should be used in determining whether the parties charge should be given.

*Where the evidence introduced upon the trial of the cause shows the active participation in the offense by two or more persons, the trial court should first remove from consideration the acts and conduct of the non-defendant actor. Then, if the evidence of the conduct of the defendant then on trial would be sufficient, in and of itself, to sustain the conviction, no submission of the law of principals [now parties] is required. **
* *

*On the other hand, if the evidence introduced upon the trial of the cause shows, or raises an issue, that the conduct of the defendant then upon trial is not sufficient, in and of itself, to sustain a conviction, the State's case rest upon the law of principals [now parties] and is dependent, at least in part, upon the conduct of another. In such a case, the law of principals [parties] must be submitted and made applicable to the facts of the case. * * *³⁰*

³⁰ The trial court would be justified in submitting the law of parties even though there was sufficient evidence to support the defendant's guilt as a primary actor, provided there was sufficient evidence of guilt as a party.

Most claims of improper party charges have involved the question of what is required to fully to apply the law of parties to the facts. Merely stating in the application paragraph that the jury is to find the defendant guilty if the jury found the defendant committed the offense “acting alone or with another for whose conduct he is criminally responsible under the law of parties” is not a full application paragraph. *Teague v. State*, 864 S.W.2d 505, 517 (Tex. Crim. App. 1993). Instead, the trial court is required to instruct the jury as to the conduct of the person whom the State contends was the primary actor, the identity of the primary actor and the type of assistance the State contends imposes criminal responsibility on the defendant as a party.³¹

An abstract charge on the law of parties without a proper application of the law to the facts is error. Over defense objection it is reversible error. *Scott v. State*, 768 S.W.2d 308 (Tex. Crim. App. 1989). It is reversible error even if the defendant might have been convicted as a primary actor. *Johnson v. State*, 739 S.W.2d 299 (Tex. Crim. App. 1987). However, if the defendant fails to make an objection to the charge, error if any may be harmless. *Chatman v. State*, 846 S.W.2d 329, 330 (Tex. Crim. App. 1993).

On request, it is error to fail to charge that mere presence alone will not constitute one a party to an offense. *McShane v. State*, 530 S.W.2d 307 (Tex. Crim. App. 1975).

2. No Pleading Required

The jury may be instructed on the law of parties even though there is no allegation in the charging instrument. *English v. State*, 592 S.W.2d 949 (Tex. Crim. App. 1980); *Tate v. State*, 811 S.W.2d 607 (Tex. Crim. App. 1991).

3. Independent Impulse

The “independent impulse” theory is sometimes used by the defendant to exonerate him of the wrongs committed by his cohorts. *Mayfield v. State*, 716 S.W.2d 509 (Tex. Crim. App. 1986) defined “independent impulse” in the following terms:

“...it seems to embrace the theory that an accused, though he was admittedly intent on some wrongful conduct, nevertheless did not contemplate the extent of the criminal conduct actually engaged in by his fellows,

and thus cannot be held vicariously responsible for their conduct.”
Id. at 513.

The issue is whether the offense actually committed was in furtherance of the intended crime, or if it should have been anticipated by the accused. If there is evidence that raises the issue, then upon timely request an affirmative instruction should be submitted to the jury. *Id.* at 515. Reversals for failing to give the requested instruction are rare. *Simmons v. State*, 594 S.W.2d 760 (Tex. Crim. App. 1980); *LeDuc v. State*, 593 S.W.2d 678 (Tex. Crim. App. 1979).

If a defendant denies participation in any offense, then the defendant is not entitled to a charge on independent impulse. *Garcia v. State*, 882 S.W.2d 856 (Tex. App. – Corpus Christi 1994, *no pet.*).

4. Limiting the Parties Instruction

Since, under the law of parties the State is able to enlarge a defendant’s criminal responsibility to acts in which he may not have been a principal actor, the State is required to request a proper parties instruction if it proceeds upon a parties theory. *See Goff*, 931 S.W.2d at 544. On the other hand, upon request by a defendant, the trial court should specifically limit the parties charge to those actions enumerated in Section 7.01(a), which are supported by the evidence. *See Teague v. State*, 864 S.W.2d 505, 517 (Tex. Crim. App. 1993); *Chatman v. State*, 846 S.W.2d 329, 332 (Tex. Crim. App. 1993). Error in failing to properly limit the parties instruction is subject to harmless error analysis. *Compare Teague*, 864 S.W.2d at 517 – 18 (error harmless) with *Johnson*, 739 S.W.2d at 30.

F. Application Paragraph

In order to convict, the court’s charge must require the jury to find that each element of the offense charged has been proven by the State beyond a reasonable doubt and a charge with fails to do so is erroneous. *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970). Therefore, every jury charge is required to contain at least on application paragraph. *Plata v. State*, 926 S.W.2d 300, 303 (Tex. Crim. App. 1996); *Williams v. State*, 547 S.W.2d 18, 20 (Tex. Crim. App. 1977). It is the application paragraph of a jury charge that authorizes conviction, and an abstract charge on a theory of law which is not applied to the facts, is insufficient to bring that theory before the jury. *See McFarland v. State*, 928 S.W.2d 482, 515 (Tex. Crim. App. 1996), *cert. denied*, 519 U.S. 1119, 117 S. Ct. 966, 136 L. Ed.2d 851 (1997). The application paragraph must charge on all essential elements of the offense. *See Jackson v. State*, 633 S.W.2d 897, 899 (Tex. Crim. App. 1982). Tracking the exact language of the indictment or information normally sets out the elements of the offense. *Cumbie v. State*, 578 S.W.2d

³¹ Dawson and Dix, Texas Practice, Criminal Practice and Procedure §36.20, p. 569. The State has the burden to secure a jury charge applying the law of parties to the facts of the case. *Plata v. State*, 875 S.W.2d 344 (Tex. App. – Corpus Christi 1994), *aff’d*, 926 S.W.2d 300, (Tex. Crim. App. 1996).

732 (Tex. Crim. App. 1979). An application paragraph that omits an allegation, which the State is required to prove, is improper. *Id.*³² Similarly, an application paragraph which substitutes the State's theory of the offense for one not alleged, or expands the theory pled to include theories not included in the charging instrument, is erroneous. *See Cumbie*, 578 S.W.2d at 734.³³ Additionally, the application paragraph should not include facts that are not essential elements of the offense. *See Langson v. State*, 855 S.W.2d 718, 721 (Tex. Crim. App. 1993).

The nonconforming portion of a jury charge may not be disregarded as surplusage if that portion authorized a conviction. *Miller v. State*, 846 S.W.2d 513 (Tex. App. – Texarkana 1993, *pet. ref'd*)

1. Variance

A variance results when the charge does not track the exact language of the indictment or information. However, the variance is not fatal if it is not material and does not surprise or prejudice the defendant. *Gollihar v. State*, 46 S.W.3d 243 (Tex. Crim. App. 2001) (model number alleged 136202, actual number 136203).

A charge is not erroneous even though it does not track the statute where the substitute language comports with and is equivalent to the statute and to the legal theory in the indictment. *Thomas v. State*, 605 S.W.2d 290 (Tex. Crim. App. 1980).

2. Conjunctive Allegations and Disjunctive Submission

Although the charging instrument may allege different methods of committing an offense in the conjunctive, it is proper for the jury to be charged in the disjunctive. *See Kitchens v. State*, 823 S.W.2d 256, 258 (Tex. Crim. App. 1991), *cert. denied*, 504 U.S. 958, 112 S. Ct. 2309, 119 L. Ed.2d 230 (1992). Where the alternative theories of committing the same offense are submitted in the disjunctive, the jury may return a general verdict if the evidence is sufficient to support a finding under any of the theories. *See id.* The court

³² *See also Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997) (correct charge “accurately sets out the law, is authorized by the indictment, does not necessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried.)

³³ When an indictment fails to facially allege a complete offense, the State may attempt to prove any theory of offense that is consistent with the incomplete indictment and controlling penal provision examined together; jury instructions may broaden the State's theory as set forth in the incomplete indictment as long as instruction remains consistent with allegations contained in the indictment and with controlling penal provisions. *Garcia v. State*, 911 S.W.2d 866 (Tex. App. – El Paso 1995).

should only instruct the jury in the disjunctive only if evidence supports *all* of the allegations. *See Zanghetti v. State*, 618 S.W.2d 353 (Tex. Crim. App. 1981). While a jury's verdict must be general,³⁴ a verdict form which lays out the primary offense, the lesser included offense, and acquittal for the jury constitutes “an unusually clear and user-friendly verdict form in harmony with” statutory requirements. *See Carpenter v. State*, 952 S.W.2d 1, 7-8 (Tex. App. – San Antonio 1997), *aff'd*, 979 S.W.2d 633 (Tex. Crim. App. 1998).

Although it is proper to allege two theories in the conjunctive and instruct in the disjunctive,³⁵ great care should be taken to avoid allowing a conviction of less than a unanimous verdict. Submitting two separate offenses³⁶ to the jury in the disjunctive can cause a conviction of less than a unanimous verdict. *Francis v. State*, 36 S.W.3d 127 (Tex. Crim. App. 2000).

3. Comment on the Weight of the Evidence

The application paragraph must apply the law to the facts in a clear and unambiguous manner and do so without comment on the weight of the evidence. TEX. CODE CRIM. PROC. art. 36.14; *Gonzales v. State*, 800 S.W.2d 621 (Tex. App. – Dallas 1990, *no pet.*). Some examples of comments on the weight of the evidence are listed below.

- a. Reference in the charge to the complainant, as the “victim,” is a comment on the weight of the evidence. *Talkington v. State*, 682 S.W.2d 674 (Tex. App. – Eastland 1984, *no pet.*).
- b. An instruction that testimony of victim alone is sufficient, while legally accurate is an erroneous comment on the weight of the evidence. *Veteto v. State*, 8 S.W.3d 805 (Tex. App. – Waco 2000).
- c. An instruction that the jury may consider flight is a comment on the weight of the evidence. *Giesberg v. State*, 984 S.W.2d 245 (Tex. Crim. App. 1998).
- d. A requested instruction on the reliability of DNA evidence is properly refused as a comment on the weight of the evidence. *Matamoros v. State*, 901 S.W.2d 470 (Tex. Crim. App. 1995).
- e. An instruction commented on the weight of the evidence when it authorized a conviction on the testimony of only one witness and named the witness. *Veteto v. State*, 8 S.W.3d 805 (Tex. App. – Waco 2000, *pet. ref'd*).

³⁴ TEX. CODE OF CRIM. PROC. ANN. Art 3707 § 1 (a)

³⁵ *Sidney v. State*, 560 S.W.2d 679 (Tex. Crim. App. 1978); *Guidry v. State*, 896 S.W.2d 381 (Tex. Crim. App. 1995).

³⁶ There is a distinction between a court's charge submitting a single offense to the jury on different legal theories in the disjunctive (which is permissible) versus submitting two different offenses in the disjunctive (which is not permissible).

- f. Instructing the jury on inferences can constitute a comment on the weight of the evidence. *Browning v. State*, 720 S.W.2d 504 (Tex. Crim. App. 1986).
- g. A jury instruction which includes, among other clues to determining witness credibility, the “existence or nonexistence of a bias, interest, or other motive” is a prohibited comment in a case in which the defendant testifies in his own behalf. *Slaughter v. State*, 809 S.W.2d 949 (Tex. App. – Beaumont 1991, *no pet.*); *Runnels v. State*, 860 S.W.2d 545, 548 (Tex. App. – Beaumont 1993, *pet ref’d*).

An instruction should never comment on the elements of the alleged offense, or assume a disputed fact. *See Grady v. State*, 634 S.W.2d 316, 317 (Tex. Crim. App. 1982). A charge, which assumes the truth of a controverted issue, constitutes a comment upon the weight of the evidence and is thus erroneous. *See Hathorn v. State*, 848 S.W.2d 101, 114 (Tex. Crim. App. 1992). This is not to say, however, that a court may never call the jury’s attention to specific evidence. *See Atkinson v. State*, 923 S.W.2d 21, 24 (Tex. Crim. App. 1996). A jury instruction which identifies evidence requiring special jury consideration under the law, and which sets out the law governing such consideration, does not violate the prohibitions of Article 36.14 against judicial comment, so long as it does not intimate that the jury should resolve any fact question in a certain way or that any of the evidence bearing upon such a fact question should be given greater weight or credibility than other evidence bearing on the same question. *See id.* at 25.

4. Converse Instruction

Each part of the charge authorizing a conviction if the jury believes the elements of the offense have been proved beyond a reasonable doubt must conclude with a general converse instruction requiring an acquittal if they do not so believe or if they have a reasonable doubt.³⁷ The defendant is entitled to a converse instruction on the elements of the offense in an application paragraph. It is not enough to merely give a general instruction on a defensive issue. “The failure of the charge to apply the law to the facts is calculated to injure the rights of the defendant . . . to a trial by jury; it deprives him of a neutral and unbiased application of the law, leaving that function to the partisan advocacy of opposing counsel in argument.” *Beggs v. State*, 597 S.W.2d 357, 379 (Tex. Crim. App. 1980).

³⁷ Michael J. McCormick, Thomas D. Blackwell and Betty Blackwell, *Texas Practice Volume 8*, § 96.01 (f), *Criminal Forms and Trial Manual*, 10th Edition.

5. Obverse Instruction

An “obverse instruction” is one that tells the jury some of the circumstances without which it could not find the accused guilty. This type of instruction is discouraged because it is an indirect comment on the weight of the evidence. *Duke v. State*, 950 S.W.2d 424 (Tex. App. – Houston 1997, *pet. ref’d*)

G. Multiple Counts and Paragraphs

A “count” is used to charge an offense and a “paragraph” is a portion or subset of a count charging a method of committing that offense. *Watkins v. State*, 946 S.W.2d 594, 601 (Tex. App. – Fort Worth 1997, *no. pet.*) The State may utilize as many paragraphs as are necessary to allege the various manner and means of committing the one alleged offense. *See Romine v. State*, 722 S.W.2d 494, 501 (Tex. App. – Houston [14th Dist.] 1986), *pet. ref’d*, 747 S.W.2d 382 (Tex. Crim. App. 1988).

When a single offense is charge in multiple paragraphs,³⁸ no election by the State is necessary, and each paragraph supported by the evidence may be submitted to the jury. *Foster v. State*, 661 S.W.2d 205 (Tex. App.- Houston [1st Dist.] 1983, *pet. ref’d*). The jury is not required to agree upon a single mode of commission. *Schad v. Arizona*, 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed. 555 (1991). Proof of any of the alleged means is sufficient to support a conviction. *Wheeler v. State*, 35 S.W.3d 126 (Tex. App. – Texarkana 2000, *pet. ref’d*).

If a charging instrument charge only one offense but the evidence shows two or more acts with in the statute of limitations, on motion of the defendant an election is required.³⁹ *Stahle v. State*, 970 S.W.2d 682 (Tex. App. – Dallas 1998, *pet. ref’d*).

³⁸ Multiple manner and means.

³⁹ Multiple convictions may be obtained from one indictment where the offenses alleged arose out of the same criminal episode. *Fortune v. State*, 745 S.W.2d 364 (Tex. Crim. App. 1988); *Coleman v. State*, 788 S.W.2d 369, 371 (Tex. Crim. App. 1990) “[T]he first rule in Fortune can be expanded as follows: a defendant charged with multiple property offenses in separate counts within a single indictment may be tried and convicted for each count in a single trial; however, he may timely request a severance so that he is tried for each count in a separate trial. Furthermore, we have held that if such a request is timely, the defendant’s right to a severance is absolute, and severance is mandatory.” *See also, Washington v. State*, 771 S.W.2d 537, 546 (Tex. Crim. App.), *cert. denied*, 492 U.S. 912, 109 S.Ct. 3229, 106 L.Ed.2d 578 (1989). “We believe that misjoinder, as contemplated and prohibited by [CCP art. 21.24] does not encompass the allegation of two offenses in a single indictment where one is a lesser included offense of the other.”

H. Lesser Included Offenses

Under Article 37.09 of the Code of Criminal Procedure, an offense is a lesser included offense if: (1) it is established by proof of the same or less than all of the facts required to establish the commission of the offense charged; (2) it differs from the offense charged only in respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission; (3) it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission; or (4) it consists of an attempt to commit the offense charged and an otherwise included offense. TEX. CODE CRIM. PROC. Art. 37.09.

In determining whether a lesser-included offense may be submitted to the jury in the charge, a trial court must apply a two-part test. “First, the lesser-included offense must be included within the proof necessary to establish the offense charged. Secondly, there must be some evidence in the record that if the defendant is guilty, he is guilty of only the lesser offense.” *Royster v. State*, 622 S.W.2d 442 (Tex. Crim. App. 1981); *Aevalo v. State*, 943 S.W.2d 887, 889 (Tex. Crim. App. 1997). This two-part test is commonly referred to as the “*Royster* test” and is designed to protect due process and to clarify the roles of the court and the jury. *Aevalo*, 943 S.W.2d at 889.

The Court, in applying the *Royster* test, may not consider whether the evidence is credible, controverts, or in conflict with other evidence. Any evidence that the defendant is guilty only of a lesser-included offense is sufficient to entitle the defendant to a jury charge. *Moore v. State*, 969 S.W.2d 4 (Tex. Crim. App. 1998).

1. First Prong of the *Royster* Test

The first prong of the *Royster* test is a determination of whether the requested offense is a lesser-included offense of the offense charged. In other words does the offense to be submitted come within the definition of lesser-included offenses as defined by Article 37.079 of the Code of Criminal Procedure? *See Aevalo*, 943 S.W.2d at 889 n.4. Whether an offense constitutes a lesser-included offense under the statutory definition of lesser-included offenses must be determined on a case-by-case basis, because the statute defines a lesser-included offense both in terms of the offense charged and in terms of the facts actually proved at trial. *See Bartholomew v. State*, 871 S.W.2d 210, 212 (Tex. Crim. App. 1994); *Cunningham v. State*, 726 S.W.2d 151, 153 (Tex. Crim. App. 1987).

In addressing the first prong of the *Royster* test, the Court must make a statutory and then a factual analysis in light of the offense charged. *Jacob v. State*, 892 S.W.2d 905, 908 (Tex. Crim. App. 1995). The elements of the offense claimed to be a lesser-included offense must be examined to see if the elements are functionally the same or less than those required to

prove the charged offense. *See id.* Then the proof or facts actually presented to prove the elements of the charged offense must be examined to see if that proof also shows the lesser-included offense. *See id.* Thus the evidence presented at trial, viewed by itself, does not determine whether an offense constitutes a lesser-included offense under the first part of the “*Royster* test,” *see id.* at 908, nor will the statutory definitions alone control, as the issue is “not whether the primary offense is capable of proof on some theory that would not show lesser-included offense,” but “whether the State’s case as presented to prove the offense charged included proof of a lesser included offense.” *Cunningham v. State*, 726 S.W.2d 151, 154 (Tex. Crim. App. 1987). A lesser-included offense must therefore be determined by looking at: (1) the elements of the offense actually charged; (2) the statutory elements of the offense sought as a lesser included offense; and (3) the proof presented at trial to show the elements of the charged offense. *See Jacob*, 892 S.W.2d at 908-09.

2. The Second Prong of the *Royster* Test

The second prong of the *Royster* test requires that there must be some evidence in the record that if the defendant is guilty, he is guilty of only the lesser offense.” *Royster v. State*, 622 S.W.2d 442 (Tex. Crim. App. 1981); *Aevalo*, 943 S.W.2d at 889. While the first prong of the *Royster* test ensures due process, *see Jacob*, 892 S.W.2d at 907, the rationale for the second prong of the test “involves the very nature of the jury’s function” at the guilt stage of a criminal trial. *Aevalo*, 943 S.W.2d at 889. The second prong of the test “preserves the integrity of the jury as the fact finder by ensuring that the jury is instructed as to a lesser included offense only when that offense constitutes a valid rational alternative to the charge offense.” *Id.* If a jury were instructed as to a lesser-included offense even though the evidence did not raise it, the courts have speculated, the jury instruction “would constitute an invitation to the jury to return a compromise or unwarranted verdict.” *Id.* (quoting MODEL PENAL CODE § 1.07 (5) at 134).

A lesser-included offense may be required under the second prong of the *Royster* test in either of two ways. First, if there is some evidence which affirmatively refutes or negates an element establishing the greater offense, or if the evidence of the aggravating element is so weak that a rational jury might interpret it in such a way as to give it no probative value, then a lesser-included offense may be submitted in the charge. *See Wolfe v. State*, 917 S.W.2d 270, 278 (Tex. Crim. App. 1996); *Schweinle v. State*, 915 S.W.2d 17, 19 (Tex. Crim. App. 1996). For example, if a defendant was charged with aggravated robbery and evidence presented indicated he may not have used a deadly weapon, then a charge on the lesser offense of

robbery would be required. *See Sanders v. State*, 840 S.W.2d 390, 391-92 (Tex. Crim. App. 1992). If however, the defendant simply denied committing the offense, or if there were no evidence specifically raising an issue of whether he had used a weapon, then the lesser offense could not be submitted. *See id.*

The second way in which a lesser include offense may be required under the second prong of the *Royster* test is if the evidence on the issue is subject to two different interpretations, and one of the interpretations negates or rebuts an element of the greater offense, then a lesser included offense is required if requested. *See Schweinle*, 915 S.W.2d at 19. For example, in *Schweinle* the defendant was charged with aggravated kidnapping. *See id.* at 18. The evidence revealed that he had abducted the victim, his ex-fiancé, and brought her to his residence. Additional evidence suggested that the fiancé had once lived in the house and still had a key to it, and that the victim's mother, when she realized that the victim was missing, had driven by the residence. *See id.* at 20. The Court of Criminal Appeals concluded that the issue of whether or not the residence was a place where the victim was not likely to be found was open to differing interpretations, one of which negated the aggravating element of the offense. *See id.* The lesser-included offense of false imprisonment should therefore have been submitted. *See id.*

The second prong of the *Royster* test requires that a lesser offense be submitted *only* if the jury could rationally find the defendant guilty *only* of the lesser offense; therefore, if more than one theory of the greater offense is presented to allow the jury to be charged on alternative theories, the second prong of the *Royster* test is satisfied “only if there is evidence which, if believed, refutes or negates every theory which elevated the offense from the lesser to the greater.” *Arevalo v. State*, 970 S.W.2d 547, 549 (Tex. Crim. App. 1998). In other words, “[o]nly if every theory properly submitted is challenged would the jury be permitted to find the defendant guilty *only* of the lesser offense.” *Id.* (emphasis in original)

3. Evidence Necessary to Require A Submission

If evidence from any source raises the issue of a lesser-included offense, a charge on that offense must be included in the jury charge. *See Saunders v. State*, 840 S.W.2d 390, 391 (Tex. Crim. App. 1992). The credibility of the evidence and whether it conflicts with other evidence must not be considered in deciding whether the charge on the lesser offense should be given. *See id.* Regardless of which party proffers the evidence, and regardless of its strength or weakness, if any evidence raises the issue that the defendant was guilty only of the lesser offense, then the charge must be given. *See Robertson v. State*, 871 S.W.2d 701, 706 (Tex. Crim. App. 1993). “Anything more than a scintilla of evidence is sufficient to entitle a defendant

to a lesser charge.” *Jones v. State*, 984 S.W.2d 254, 257 (Tex. Crim. App. 1998) [quoting *Bignall v. State*, 887 S.W.2d 21, 23 (Tex. Crim. App. 1994)].

Statutory provisions governing requirements for requesting a jury instruction on a lesser included offense do not require the requested charge to be in perfect form; rather the requested charge need only be sufficient to call the trial court's attention to the omission in the court's charge. *Ford v. State*, 38 S.W.836 (Tex. App. – Houston [14th Dist.] 2001, *pet. ref'd*)

4. Dangers when A Lesser Culpable Mental State is not In the Indictment⁴⁰

There are several possible results that can occur when a culpable mental state that was not in the indictment is included in the charge. First, the inclusion of a lower culpable mental state that is not listed in the statute may allow conviction for conduct that is not prohibited by law. For example, if the statute requires the culpable mental state of “intentionally” but the charge allows conviction for “recklessly” then there is error if recklessly committing the act does not constitute an offense. In *Alvarado v. State*, 912 S.W.2d 199, 216 (Tex. Crim. App. 1995), the Court of Criminal Appeals held that there was error in a charge which authorized the jury to find the defendant guilty if it found that he knowingly caused the victim's death during the course of robbery although he was charged with capital murder, which requires that the defendant intentionally caused the death while in the course of robbery. *See also Hutchins v. State*, 590 S.W.2d 710 (Tex. Crim. App. 1979); *Hawkins v. State*, 579 S.W.2d 923 (Tex. Crim. App. 1979); *Dowden v. State*, 537 S.W.2d 5 (Tex. Crim. App. 1976) (error for the jury charge to allow a robbery conviction for recklessly threatening or placing the victim in fear of imminent bodily injury or death, which is not an offense under the laws of this State).

Second, the inclusion of a lesser culpable mental state may allow conviction for an offense under a theory that was not alleged in the indictment. In *Lampkin v. State*, 607 S.W.2d 550 (Tex. Crim. App. 1980), the indictment charged the defendant with intentionally and knowingly causing serious bodily injury. The jury instructions also authorized a robbery conviction if they found that he recklessly caused bodily injury or threatened or placed the victim in fear of imminent bodily injury or death. The Court of Criminal Appeals held that this was error.

Third, the inclusion of a lower culpable mental state in the jury instructions may refer to a lesser-included offense of the offense charged in the

⁴⁰ This entire section is taken from *Reed v. State*, ___ S.W.3d ___, No. 1410-01 (Tex. Crim. App. May 14, 2003)

indictment. In *Little v. State*, 659 S.W.2d 425, 426 (Tex. Crim. App. 1983), the Court held that it was not error for the charge to authorize conviction of the lesser included offense of robbery upon a finding of the lower mental state of recklessness although the indictment alleged the greater offense of aggravated robbery by intentionally and knowingly causing serious bodily injury. See also *Rocha*, 648 S.W.2d 298 (Tex. Crim. App. 1982); *Zuliani*, 903 S.W.2d 812, 816 (Tex. App. – Austin 1995, *pet. ref'd*).

Finally, the inclusion in the jury instructions of a lower culpable mental state than that charged in the indictment can lead to the possibility that the defendant was convicted of an offense that is allowed under the statute but was not alleged in the indictment. This issue arose in *Wilson v. State*, 625 S.W.2d 331, 333 (Tex. Crim. App. 1981), where the defendant was indicted for aggravated robbery with the culpable mental states of intentionally and knowingly. The Court of Criminal Appeals found error because the application paragraph of the jury charge allowed him to be convicted of aggravated robbery if the jury found that he acted intentionally, knowingly, or recklessly. In *Reed v. State*, No. 1410-01, Slip Op. At 9 (Tex. Crim. App. May 14, 2003) the Court held when recklessness is left out of the indictment for the charged offense, and no lesser included offense is submitted to the jury, then Article 21.15 of the Code of Criminal Procedure precludes the inclusion of recklessness or criminal negligence in the jury instructions for the charged offense.

5. General Lesser-Included Offense Cases

Ramous v. State, 865 S.W.2d 463 (Tex. Crim. App. 1993) held a single statement from defendant's testimony cannot be examined in isolation to determine if the lesser-included offense has been raised and the instruction is required.

Arevalo v. State, 943 S.W.2d 887 (Tex. Crim. App. 1997) held that the state must also satisfy the second prong of *Royster* before they are entitled to an inclusion of a lesser-included offense.

Hirad v. State, 14 S.W.3d 351 (Tex. App. – Houston [14th Dist.] 2000, *pet. ref'd*) held if a defendant asks for the lesser and is convicted of the lesser, they cannot complain on appeal about insufficient evidence.

Waddel v. State, 918 S.W.2d 91 (Tex. App. – Austin 1996, *no pet.*) held defense counsel's failure to request an instruction on criminal trespass in a burglary of a building prosecution constituted ineffective assistance of counsel.

Ford v. State, 38 S.W.3d 836, (Tex. App. Houston [14th Dist.] 2001, *pet. ref'd*) deadly conduct instruction properly given in aggravated assault prosecution. The defendant, the state, and the court, sua sponte, are all

entitled to include an instruction on a lesser offense if appropriate.

Bisco v. State, 964 S.W.2d 29 (Tex. App. – Tyler 1997, *pet. ref'd*) precludes a defendant from challenging both the legal and factual sufficiency of the evidence when there was no objection to charging the jury on a lesser included offense.

Yount v. State, 853 S.W.2d 6 (Tex. Crim. App. 1993). If a defendant requests and receives a charge on a lesser-included offense and is convicted of the lesser offense, the defendant may not then assert the conviction is barred by the statute of limitations. The concurring opinion would urge a bright line rule permitting the defendant to urge the limitations when the state request the lesser-included charge.

Bigley v. State, 865 S.W.2d 26 (Tex. Crim. App. 1993). If the charge includes a lesser-included offense and the conviction on the original charge is reversed for insufficiency of the evidence, the appellate court may enter a conviction on the lesser offense if the evidence is sufficient to support the conviction.

Martinez v. State, 16 S.W.3d 845 (Tex. App. – Houston [1st Dist.] 2000, *pet. ref'd*). Defendant was tried for capital murder and convicted of murder. The appellate court held that he record did not establish that the defendant, if guilty of killing the victim, was guilty only of a lesser included offense of manslaughter and, thus, defendant had not been entitled to a jury charge on manslaughter, Defendant claimed that he stabbed the victim and cut the victim's throat without intending to kill him, but the defendant's intent to hurt the victim with the knife was intent to cause serious bodily injury, which was inconsistent with the reckless state of mind of manslaughter.

6. Specific Lesser Included Offense Topics

a. Capital Murder

Moore v. State, 969 S.W.2d 4 (Tex. Crim. App. 1998) held murder and voluntary manslaughter in this case were lesser-included offenses and it was error not to charge on these lesser offenses. The date of offense was January 21, 1994, when voluntary manslaughter was still a criminal offense. *Ahrens v. State*, 43 S.W.3d 630 (Tex. App. – Houston [1st Dist.] 2001, *pet. ref'd*) the court affirmed the denial of a charge of manslaughter in a capital murder prosecution. *Williams v. State*, 34 S.W.3d 587 (Tex. App. – Eastland 2000, *pet. ref'd*) lesser offense of murder properly submitted over defense counsel's objection.

The defendant was convicted of capital murder where two people were killed in a drive-by shooting. The defendant requested a charge on murder claiming lack of specific intent. The court held the intent element was satisfied by the double killing, and the defendant would only be entitled to such an instruction if he produced evidence of intent to kill one victim and not the other. No evidence produced that the defendant

intended only one victim or knew with reasonable certainty that only one person would die. *Medina v. State*, 7 S.W.3d 633 (Tex. Crim. App. 1999).

Paz v. State, 44 S.W.3d 98 (Tex. App. – Houston [14th Dist.] 2001, *pet. ref'd*) affirmed conviction from denial to instruct on injury to a child in a capital murder prosecution. Expert testified she could not say for certain if blow inflicted was intentional or reckless and defendant testified “anything is possible”. The evidence did not raise a lesser-included offense.

Martinez v. State, 16 S.W.3d 845 (Tex. App. – Houston [1st Dist.] 2000, *pet. ref'd*) defendant charged with capital murder, convicted of murder, was not entitled to charge on manslaughter.

b. Attempted Capital Murder

Douglas v. State, 915 S.W.2d 166 (Tex. App. – Corpus Christi 1996, *pet. ref'd*) held aggravated assault on a peace officer is not a lesser-included offense in the charge of Attempted Capital Murder of a Peace Officer because aggravated assault requires an additional element of threat.

c. Murder

Saunders v. State, 913 S.W.2d 564 (Tex. Crim. App. 1995) held harmless error not to charge on lesser-included offense of negligent homicide. Inclusion of lesser-included offense of involuntary manslaughter where jury convicts of murder rendered harmless failure to include negligent homicide.

Jones v. State, 900 S.W.2d 103 (Tex. App. – Houston [14th Dist.] 1995, *no pet.*) reversed the lower court for failure to include both lesser offenses of involuntary manslaughter and negligent homicide.

Johnson v. State, 915 S.W.2d 653 (Tex. App. – Houston [14th Dist.] 1996, *pet. ref'd*) affirmed murder conviction holding that the defendant was not entitled to lesser-included offense of involuntary manslaughter, negligent homicide, or aggravated assault.

Crunk v. State, 934 S.W.2d 788 (Tex. App. – Houston [14th Dist.] 1996, *pet. ref'd*) held defendant not entitled to a lesser charge of voluntary manslaughter in murder prosecution.

d. Aggravated Robbery

Jones v. State, 921 S.W.2d 361 (Tex. App. – Houston [1st Dist.] 1996, *pet. ref'd*) reversed an aggravated robbery conviction for the failure to charge on the lesser offense of robbery. Defendant denied using a weapon but the trial court held the testimony of the defendant alone was not sufficient to require the inclusion of a lesser offense.

Mendoza v. State, 923 S.W.2d 760 (Tex. Crim. App. 1996) held a defendant was entitled to an instruction on the lesser-included offense of heft in a robbery case.

Morales v. State, 4 S.W.3d 455 (Tex. App. – Houston [1st Dist.] 1999 *no pet.*). The defendant was charged with aggravated robbery by use of a deadly weapon. A charge on robbery by bodily injury was given and the Court of Appeals held this to be error for this is not a lesser offense when the indictment does not charge aggravated robbery by causing serious bodily injury. Error was harmless since the jury had been instructed on robbery threats and defense counsel argued to the jury for conviction on robbery.

Castillo v. State, 944 S.W.2d 440 (Tex. App. – Houston [14th Dist.] 1997, *no pet.*) held failure to request lesser-included offense of robbery in an aggravated robbery case was not error in the absence or egregious harm.

e. Aggravated Kidnapping

Schweinle v. State, 915 S.W.2d 17 (Tex. Crim. App. 1996) reversed for failure to give the lesser offense of false imprisonment.

f. Aggravated Assault

McKinney v. State, 12 S.W.3d 580 (Tex. App. – Texarkana 2000, *pet. ref'd*) the defendant was charged with aggravated assault and convicted of the lesser offense of assault. His request for the lesser did not request the inclusion of “reckless” mental state, but it was included. Conviction affirmed citing *Little v. State*, 659 S.W.2d 425 (Tex. Crim. App. 1983)

g. Assault

Lofton v. State, 45 S.W.3d 649 (Tex. Crim. App. 2001) affirmed reversal of conviction for assault of a public servant. The defendant had requested a charge on the lesser offense of resisting arrest arguing the evidence was subject to different interpretations. Police officer attempted to arrest defendant and defendant testified he did not strike the police officer. Whether instructions are given is decided on a case by case basis.

h. Burglary of a Vehicle

Thomas v. State, 919 S.W.2d 810 (Tex. App. – Houston [14th Dist.] 1996, *pet. ref'd*) affirmed a conviction holding that criminal trespass is not a lesser-included offense of burglary of a vehicle.

i. Burglary

Waddell v. State, 918 S.W.2d 91 (Tex. App. – Austin 1996, *no pet.*) held failure to request a lesser-included offense charge of criminal trespass was ineffective assistance of counsel.

Jacob v. State, 892 S.W.2d 905 (Tex. Crim. App. 1995) held aggravated assault was not a lesser-included offense of burglary with intent to commit aggravated assault.

j. Aggravated Sexual Assault

Caicedo v. State, 981 S.W.2d 817 (Tex. App. – Houston [1st Dist.] 1998, *pet. ref'd*) held defendant was not entitled to a charge on sexual assault as a lesser offense. The first prong of the test was met, but defendant denied he committed any offense and absents any other evidence to show the defendant is guilty of the lesser offense, the charge is not required.

Ramos v. State, 981 S.W.2d 700 (Tex. App. – Houston [1st Dist.] 1998, *pet. ref'd*) held assault is not a lesser-included offense of aggravated assault or indecency with a child under the first prong of the test.

k. Indecency with a Child

Flores v. State, 42 S.W.3d 277 (Tex. App. – Corpus Christi 2001, *no pet.*) the conviction was affirmed where defense counsel did not properly request the charge on the lesser offense of indecent exposure. Counsel orally requested the charge but failed to submit a written request or dictate a request into the record.

l. Injury to a Child

Castillo v. State, 7 S.W.3d 253 (Tex. App. – Austin 1999, *pet. ref'd*) the original indictment charged defendant with intentional injury to a child. The lesser offense of “reckless” injury added that the victim was “shaken.” The conviction was reversed for expanding upon the factual allegations contained in the indictment.

m. Retaliation

Helleston v. State, 5 S.W.3d 393 (Tex. App. – Ft. Worth 1999, *pet. ref'd*) held assault by threat and terrorist threat are not lesser offenses of retaliation for they do not threaten imminent bodily injury.

7. Lesser-Included Offenses and Harmless Error

A trial court’s error in refusing to submit a lesser-included offense to a jury when a party is entitled to the charge is susceptible to a harmless error analysis. *See Saunders v. State*, 913 S.W.2d 564 574 (Tex. Crim. App. 1995) If the defendant objected to the court’s failure to submit the offense, reversal is required if the error resulted in “some harm” to the accused. *Id.* at 570; *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985). In cases in which a defendant has been denied a lesser included offense which he requested and to which he was entitled, a finding of harm is “essentially automatic.”⁴¹ This is because the absence of the lesser-included offense instruction left the jury only with the options either to convict the defendant of the charged offense or to acquit him, and the jury is thus denied the opportunity to convict the

defendant of the lesser offense. *See Saunders*, 913 S.W.2d at 571; *see also Beck v. Alabama*, 447 U.S. 625, 634, 100 S. Ct. 2382, 65 L. Ed.2d 392 (1980).

The exception to this general rule occurs where a trial court denies a defendant’s request for multiple lesser-included offenses. In such a situation, a reviewing court must assess whether there is a “realistic probability” that the jury, believing the defendant guilty of some crime, would have found itself in the dilemma of having to convict the defendant of a greater offense, rather than acquit him altogether, even though it may have harbored a reasonable doubt as to whether the defendant was actually guilty of the greater offense. *See Saunders*, 913 S.W.2d at 571. While it is not an *a fortiori* conclusion, a jury’s conviction of defendant upon the greatest possible offense may often render harmless an error in refusing to submit one of several lesser-included offenses. *See id.* at 574; *see also Benavides v. State*, 992 S.W.2d 511, 529 (Tex. App. – Houston [14th Dist.] 1999, *pet. ref'd*) (defendant suffered no “actual harm” from trial court’s failure to submit lesser-included offense of voluntary manslaughter, where charge included capital murder, murder, involuntary manslaughter, and negligent homicide).

Where the defendant has timely objected to the submission of a lesser-included offense at the State’s request, the reviewing court must assay the actual degree of harm by examining the error in light of the entire jury charge, the state of the evidence, including the contested issues and the weight of probative evidence, the argument of counsel, and any other relevant information revealed by the record of the trial as a whole. *See Arevalo v. State*, 987 S.W.2d 164, 165 (Tex. App. – Houston [14th Dist.] 1999, *pet. ref'd*). Obviously where the jury found the defendant guilty of the greater offense, except under unusual circumstances the submission of the lesser included offense at the State’s behest will be harmless. *See id.* at 166; *see also O’Pry v. State*, 642 S.W.2d 748, 764-65 (Tex. Crim. App. 1981).

When a defendant has failed to request the submission of a lesser included offense or has not objected to the omission, error, if any, has not been preserved and will not be addressed on appeal. *See Hernandez v. State*, 10 S.W.3d 812, (Tex. App. - Beaumont 2000, *pet. ref'd*); *Garza v. State*, 974 S.W.2d 251, 257 (Tex. App. – San Antonio 1998, *pet. ref'd*.); *see also Posey v. State*, 966 S.W.2d 57, 62 (Tex. Crim. App. 1998) (trial court does not err in failing to include defensive issue in jury charge where the defendant has not requested it.);

I. Defenses and Affirmative Defenses

The Texas Penal Code provides for two types of defenses: (1) defenses and (2) affirmative defenses. PENAL CODE § 2.03 and § 2.04. The term “defense”

⁴¹ *See Loftin v. State*, 6 S.W.3d 796, 800 (Tex. App. – Austin 1999, *pet. ref'd*)

should not be used for an issue that has not been specifically labeled as such by the legislature. *See Giesberg v. State*, 984 S.W.2d 245, 249 (Tex. Crim. App. 1998). Because the authority to establish what constitutes a defense rest solely with the legislature, a defense, which is not recognized by the legislature as either a defense or affirmative defense, does not warrant a separate instruction. *See id.* A special instruction on an issue that is not a defense constitutes an impermissible comment on the weight of the evidence by the trial court. *See id.* (an instruction on alibi would have constituted improper comment on the weight of the evidence); *Robertson v. State*, 859 S.W.2d 508, 511 (Tex. Crim. App. 1993)(instruction on mistaken identity would have constituted comment on the weight of the evidence.) *Hawkins v. State*, 656 S.W.2d 70, 73 (Tex. Crim. App. 1983 (instruction on defense of good faith would constitute comment upon the weight of the evidence.))

A defensive theory when raised by the evidence must be submitted to the jury. *See Arnold v. State*, 742 S.W.2d 10 (Tex. Crim. App. 1987). The defendant has a right to an affirmative instruction on every defensive issue raised by the evidence whether it is strong or feeble, whether it is impeached or contradicted or whether it is conflicting. *Harris v. State*, 486 S.W.2d 88 (Tex. Crim. App. 1972). However, a defendant is not entitled to a charge where his theory simply negates an element of the offense (for example alibi). *Giesberg v. State*, 984 S.W.2d 245 (Tex. Crim. App. 1998).

A defendant need not admit all the elements of the offense in order to be entitled to the submission of a defensive issue; earlier cases which suggest that a defendant must concede the commission of the offense “spoke too generally in deciding that all defenses were in the nature of confession and avoidance.” *See Willis v. State*, 790 S.W.2d 307, 313-14 (Tex. Crim. App. 1990).

The proper method of charging a defense is to track the statute and then apply the law to the facts of the case.⁴² An instruction on a defensive issue must be in the affirmative. *See Lynch v. State*, 643 S.W.2d 737, 738 (Tex. Crim. App. 1983); *Montgomery v. State*, 588 S.W.2d 950, 953 (Tex. Crim. App. 1979). Furthermore, it is not sufficient for the trial court to submit a general instruction on the appropriate defensive issue in the abstract portion of the charge; the court must apply the defense to the facts. *See Barrera v. State*, 982 S.W.2d 415, 416 (Tex. Crim. App. 1998); *Beggs v. State*, 597 S.W.2d 375, 379-80 (Tex. Crim. App. 1980).

When a defendant raises the issue of a defense, the trial court is required to charge that a reasonable

doubt on the issue requires that the defendant be acquitted. V.T.C.A., PENAL CODE § 2.03 (d). When a defendant raises the issue of an affirmative defense he must prove it by a preponderance of the evidence. V.T.C.A., PENAL CODE § 2.04 (d). A ground of defense not plainly labeled is to be treated as a defense. V.A.T.C., PENAL CODE § 2.03 (e).

Error in the failure to submit a defensive issue is subject to a harmless error analysis under *Almanza*.⁴³ *See Reich-Bacot v. State*, 936 S.W.2d 961, 962 (Tex. Crim. App. 1996); *Hamel v. Stae*, 916 S.W.2d 491, 494 (Tex. Crim. App. 1996). Such a failure does not constitute federal constitutional error nor does not implicate the harmless test for constitutional error. *See Barrera*, 982 S.W.2d at 417.

The trial judge has no duty to sua sponte instruct the jury on a defensive issue, so the failure to request or object at trial results in a procedural default on appeal. *Posey v. State*, 966 S.W.2d 57 (Tex. Crim. App. 1998).

1. Statutory Defenses

a. Insanity

Under section 8.01(a) of the Texas Penal Code, insanity is an affirmative defense. There is no presumption of sanity in Texas, and the issue of insanity must be proven by the defense by a preponderance of the evidence. *Madrid v. State*, 595 S.W.2d 106 (Tex. Crim. App. 1979). However, if the defendant has previously been adjudicated insane and the adjudication has not been vacated, the presumption of insanity continues and the burden is on the state to prove beyond a reasonable doubt that the defendant is sane and the defendant is entitled to a charge on the issue. *Riley v. State*, 830 S.W.2d 584 (Tex. Crim. App. 1992).

Expert testimony is not required to raise the issue of insanity and lay opinion, when considered with the facts and circumstances may be sufficient. *Pacheco v. State*, 757 S.W.2d 729 (Tex. Crim. App. 1988). It is error, however, for the trial court to instruct the jury it was not bound by the testimony of the expert witness. *Russell v. State*, 749 S.W.2d 77 (Tex. Crim. App. 1988). Testimony of expert witness based on

⁴³ The Court of Criminal Appeals in *Posey v. State*, 966 S.W.2d 57 (Tex. Crim. App. 1998), seems to carve out a significant exception to the principle of *Almanza* when it came to jury charges on statutory defenses. Basically, it held that *Almanza* does not apply to jury charges on statutory defenses. Failure to charge on a statutory defense in the *Posey* case was egregious harm. [*Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1984)(on motion for rehearing) said that failure to request a charge or failure to object to not giving a charge did not forfeit a claim of error, but only increased the measure of harm that must be shown to obtain appellate relief from ordinary harm to egregious harm.]

⁴² Michael J. McCormick, Thomas D. Blackwell and Betty Blackwell, Texas Practice Volume 8, § 96.01 (f), Criminal Forms and Trial Manual, 10th Edition.

hypothetical questions was not sufficient to raise issue of insanity and therefore no instruction was required. *Jeffley v. State*, 938 S.W.2d 514 (Tex. App. – Texarkana 1997, *no pet.*).

A defendant is not entitled to an instruction, which informs the jury of the effect of finding of not guilty by reason of insanity. *Granviel v. State*, 552 S.W.2d 107 (Tex. Crim. App. 1979).

“[I]f a defendant’s evidence is undisputed as to the presence of a mental disease or defect, even if it established medical insanity, it would not necessarily establish legal insanity.” *Schuessler v. State*, 719 S.W.2d 320, 329 (Tex. Crim. App. 1986) *overruled on other grounds*, 785 S.W.2d 146 (1990).

Evidence that the defendant took valium tablets and consumed a six-pack of malt beer before the robbery and he felt like he was in a “walking sleep” and only remembered part of what occurred did not raise the issue that defendant did not know his conduct was wrong or that he was incapable of conforming his conduct to the requirements of law and thus did not entitle defendant to an instruction on temporary insanity. *Madden v. State*, 628 S.W.2d 161 (Tex. App. – Eastland 1982, *pet. ref’d*).

b. Mistake of Fact

Mistake of fact is a defense in Texas under Section 8.02 of the Texas Penal Code. Unlike other statutory defenses, mistake of fact negates an element of the offense, the culpable mental state. The general principle prohibiting the submission of a defensive issue when it negates an element of the offense does not apply to the defense of mistake of fact. Because mistake of fact is statutory, the Court of Criminal Appeals has held that the defendant is entitled to an instruction on the defense when raised by the evidence. *Miller v. State*, 815 S.W.2d 582, 585 (Tex. Crim. App. 1991); *Willis v. State*, 790 S.W.2d 307, 314 (Tex. Crim. App. 1990). Since mistake of fact negates a culpable mental state of the charged offense, it cannot be used regarding elements of a defense or affirmative defense. *Lugo v. State*, 923 S.W.2d 598 (Tex. App. – Houston [1st Dist.] 1995, *pet. ref’d*) (refusing to apply mistake of fact defense to affirmative defense to kidnapping of abducting a relative.). See *Byran v. State*, 814 S.W.2d 482 (Tex. App. – Waco 1991, *pet. ref’d*) (mistake of fact can not be used to form a defense of promiscuity in statutory rape prosecution).

When discussing the mistake of fact defense it is important to understand that this defense goes not to the “forbidden” conduct, but rather to the “attendant circumstances.” *Gardner v. State*, 780 S.W.2d 259 (Tex. Crim. App. 1989). In *Gardner*, the defendant argued it was the state’s burden in prosecuting an unauthorized use charge, to prove that the defendant knew he was operating the vehicle without the owner’s consent. Operating the vehicle was the “forbidden

conduct” while not having the owner’s consent was the “attendant circumstance.” The court held one of the elements to be proven was the knowledge of the defendant that he did not have the consent of the owner. *Id.* at 263. Mistake of fact defense, therefore, would not apply to the act of operating the vehicle or the lack of consent, but rather, the issue of the defendant’s knowledge that there was lack of consent. When a defense of mistake fact is raised by the evidence the defendant is entitled to an affirmative submission of the defense. *Bruno v. State*, 812 S.W.2d 56 (Tex. Crim. App. – Houston [14th Dist.] 1991, *aff’d*, 845 S.W.2d 910 (Tex. Crim. App. 1993). A defendant testifying that he had the owner’s consent does not raise the issue, unless his belief is based upon a third party representation. *Bruno v. State*, 845 S.W.2d 910 (Tex. Crim. App. 1993).

In *Hill v. State*, 765 S.W.2d 794 (Tex. Crim. App. 1989), the defendant was a physician charged with dispensing a controlled substance without a valid medical purpose. His testimony was that based on tests performed on the patient, he believed he had a valid medical purpose. The “forbidden conduct” was the dispensing, and the “attendant circumstance” was the defendant’s belief. Failure to give a charge on mistake of fact was reversible error.

In *Knowles v. State*, 672 S.W.2d 478 (Tex. Crim. App. 1884), the defendant was charged with stealing a check (forbidden conduct) mailed to him as a bon premium (attendant circumstances). The trial court erred in failing to give a charge on mistake.

In *Sirocky v. State*, 650 S.W.2d 472 (Tex. App. – Tyler 1983, *pet. ref’d*), court erred in refusing charge in delivery of methamphetamine where defendant testified she thought it was caffeine.

In *Jackson v. State*, 880 S.W.2d 432 (Tex. App. – Houston [14th Dist.] 1994, *pet. ref’d*), it was not error to deny a charge on mistake of fact in an aggravated sexual assault prosecution that the victim was younger than seventeen.

In *Maupin v. State*, 930 S.W.2d 267 (Tex. App. – Fort Worth 1996, *pet. ref’d*), testimony that defendant thought victim was burglarizing his home did not authorize charge in a case involving the result crime of injury to an elderly person.

In *Lugo v. State*, 923 S.W.2d 598 (Tex. App. – Houston [1st Dist.] 1995, *no pet.*), the court held no charge required in the kidnapping case. Defendant contended he thought he was the father of the child and was attempting to gain lawful control. This is affirmative defense and as such no instruction of mistake of fact is required.

In *Anderson v. State*, 11 S.W.3d 369 (Tex. App. – Houston [1st Dist.] 2000, *pet. ref’d*) the court distinguished *Giesberg v. State*, noting mistake of fact is a statutory defense and not merely negating an element of the offense.

In *Green v. State*, 899 S.W.2d 245 (Tex. App. – San Antonio 1995, *no pet.*), failure to request a charge on mistake of fact was ineffective assistance of counsel.

In *Jackson v. State*, 646 S.W.2d 225 (Tex. Crim. App. 1983), a request for a charge in terms of “good faith,” not mistake of fact was sufficient.

c. Mistake of Law

Mistake of law is an affirmative defense under Section 8.03 of the Texas Penal Code. A defendant is entitled to a charge when the record contains any written interpretation of Texas law contained in an opinion of a court of record, or made by a public official charged with the responsibility for interpreting the law, which would justify a reasonable belief the conduct was not a crime. *Austin v. State*, 541 S.W.2d 162 (Tex. Crim. App. 1976); *see also Knorpp v. State*, 645 S.W.2d 892, 903 (Tex. App. – El Paso 1983, *no. pet.*)

Incorrect legal advice is not sufficient to establish a defense of mistake of law or fact. *Barrera v. State*, 978 S.W.2d 665, 671 (Tex. App. – Corpus Christi 1998, *pet. ref’d.*)

d. Intoxication

Intoxication is no defense to crime in Texas unless it is involuntary or rises to the level of temporary insanity. Intoxication is voluntary if the accused has exercised independent judgment or volition in taking the intoxicant. *Heard v. State*, 887 S.W.2d 94, 98 (Tex. App. – Texarkana 1994, *pet. ref’d.*) Intoxication is involuntary when the defendant is unaware of what the intoxicating substance is, is under duress or force, or has taken medically prescribed drugs according to the prescription. *Id.*⁴⁴

“Involuntary intoxication is a defense to criminal culpability when it is shown that: (1) the accused has exercised no independent judgment or volition in taking the intoxicant; and (2) as a result of his intoxication the accused was incapable of conforming his conduct to the requirements of the law he allegedly violated”. *Torres v. State*, 585 S.W.2d 746 (Tex. Crim. App. 1979). Evidence of addiction or alcoholism does not meet the requirements. *Rassner v. State*, 705 S.W.2d 798 (Tex. App. – Houston [14th Dist.] 1986, *pet. ref’d.*) *Shubert v. State*, 652 S.W.2d 425 (Tex. App. – Austin 1982, *no pet.*). *See generally*, 12 ST. MARY’S L.J. 232 (1980). *Compare Tyler v. State*, 885 S.W.2d 154, 158 (Tex. Crim. App. 1994)(if there is evidence from any source that might lead a jury to

conclude the defendant’s intoxication somehow excused his actions, an instruction is appropriate.)

Involuntary intoxication by prescription medicine is a recognized defense. *Mendenhall v. State*, 15 S.W.3d 560 (Tex. App. – Waco 2000) *aff’d*, 77 S.W.3d 815 (Tex. Crim. App. 2002). In this instance failure to instruct was held harm less. *Id.*

“Temporary insanity caused by intoxication may be introduced in mitigation of the penalty attached to the offense for which he is being tried.” Tex. Penal Code § 8.04 (b). The proper place for such a charge is at the punishment phase of the trial, but it is not reversible error to give the charge at guilt/innocence stage. To receive such a charge, the defendant must do more than show he was intoxicated, or even grossly intoxicated. His intoxication must reach the level of temporary insanity. *Arnold v. State*, 742 S.W.2d 10 (Tex. Crim. App. 1987). Insanity as applied under §8.04 is not the same as that defined by the entire section of V.T.C.A. Penal Code §8.01. Rather, it means that as a result of intoxication the defendant (1) did not know his conduct was wrong or (2) was incapable of conforming his conduct to the requirements of the law he violated. *Netherly v. State*, 692 S.W.2d 686, 711 (Tex. Crim. App. 1985), *cert. denied*, 474 U.S. 1110, 106 S.Ct. 897, 88 L.Ed. 931 (1986).

Charges on intoxication may be appropriate in cases where the defense relies on insanity in an effort to excuse the conduct. *Taylor v. State*, 895 S.W.2d 154 (Tex. Crim. App. 1994). In *Taylor* a charge on intoxication was given in the guilt stage over defendant’s objection. The evidence showed the defendant smoked marijuana and committed a murder shortly thereafter in a psychotic episode. The court reasoned if there is evidence from any source that might lead the jury to conclude that the defendant’s intoxication somehow excuses his actions, then an instruction on intoxication is appropriate.

e. Duress

Duress is an affirmative defense under section 8.05 of the Texas Penal Code. The defense is based on compulsion by threat, and focuses on the conduct of the person making the threats. *Montgomery v. State*, 588 S.W.2d 950, 953 (Tex. Crim. App. 1979, panel op.) Coercion or duress would have to include “force or threat of force.” *State v. Trevino*, 930 S.W.2d 713, 715 (Tex. App. – Corpus Christi 1996, *pet. ref’d.*) The threat of losing one’s job does not amount to force. *Id.*

It is not a violation of due process to place the burden of proof on the defendant. *Alford v. State*, 866 S.W.2d 619 (Tex. Crim. App. 1993). Duress is an absolute defense, not a matter of mitigation of punishment. *Henley v. State*, 644 S.W.2d 950, 957 (Tex. App. – Corpus Christi 1982, *pet. ref’d.*)

⁴⁴ Logic would seem to dictate that the defendant couldn’t reasonably anticipate the resulting side effects of taking the prescribed drug. If defendant was aware of the side effects of the drug and took the drug anyway then that should be considered voluntary intoxication.

f. Entrapment

Entrapment is a defense under section 8.06 of the Texas Penal Code. When evidence of entrapment is admitted it then becomes “the burden of the prosecution to disprove the defense beyond reasonable doubt.” *Soto v. State*, 681 S.W.2d 602 (Tex. Crim. App. 1984). To raise the issue of entrapment, there must be a direct link between the defendant and the law enforcement agent. One cannot be entrapped by a codefendant, for there is no defense of “vicarious” entrapment in Texas. *Melton v. State*, 713 S.W.2d 107 (Tex. Crim. App. 1986). The defense must offer evidence that the police exercised some degree of control over the individual in order to qualify that person as an agent of law enforcement. *Soto v. State, supra*.

Entrapment is normally a fact issue, unless it is established beyond a reasonable doubt as a matter of law. When there is any conflict on the issue of entrapment, the issue should be submitted to the jury. *Melton v. State, supra*. “Representations by a law enforcement agent that a criminal act is a legal act is, as a matter of law, an inducement or persuasion likely to cause other persons to commit the act, unless the act is so inherently criminal in nature that no reasonable person would believe such a representation.” *Gifford v. State*, 740 S.W.2d 76 (Tex. App. – Fort Worth 1987, *pet. ref’d*). If the state merely provides the opportunity to commit the offense, entrapment is not raised. *Reese v. State*, 877 S.W.2d 328 (Tex. Crim. App. 1994); *England v. State*, 887 S.W.2d 902 (Tex. Crim. App. 1994).

A promise to get the defendant “high” is insufficient to raise the issue. *Bush v. State*, 611 S.W.2d 428 (Tex. Crim. App. 1981).

Entrapment is not available to a defendant who affirmatively denies the commission of the offense. A plea of “not guilty” is not an affirmative denial and defense of entrapment is still available as long as no evidence is presented by the defense that is inconsistent with the commission of the offense. *Norman v. State*, 588 S.W.2d 340 (Tex. Crim. App. 1979). In federal court the defense is available even after the defendant denies the commission of the offense. *Matthews v. State*, 485 U.S. 58, 108 S.Ct. 883, 99 L.Ed.2d 54 (1983).

g. Self Defense

Section 9.31 of the Texas Penal Code provides that a person is “justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force”. Section 9.32 provides when the use of deadly force is justified.

(1) Raising the Issue

An accused is entitled to an instruction on every defensive issue raised by the evidence, regardless of whether the evidence is strong or weak, unimpeached or contradicted. The truth or credibility of the evidence is not at issue and the testimony of the defendant alone may be sufficient to require an instruction. *Hayes v. State*, 728 S.W.2d 804 (Tex. Crim. App. 1987). “It is the trier of the facts, and no one else, who has the responsibility to decide whether to accept or reject the defensive theory.” *Booth v. State*, 679 S.W.2d 498, 500 (Tex. Crim. App. 1984). See also *Martinez v. State*, 775 S.W.2d. 645 (Tex. Crim. App. 1989). When there is evidence that the victim verbally threatened defendant and that the defendant may have acted in self-defense, charge on self-defense should not be restricted to only the acts of the victim; verbal threats should be included as well. *Ellis v. State*, 811 S.W.2d 99 (Tex. Crim. App. 1991). The testimony of the defendant alone is sufficient to raise the issue. *Hamel v. State*, 916 S.W.2d 491 (Tex. Crim. App. 1996). *Reich-Bacot v. State*, 914 S.W.2d 666 (Tex. App.--Texarkana 1996, *pet. ref’d*); *Hudson v. State*, 956 S.W.2d 103 (Tex. App. - Tyler 1997, *no pet.*).

(a) Non-testifying Defendant

It is possible to raise the issue of self-defense without the defendant testifying. *Williamson v. State*, 672 S.W.2d 484 (Tex. Crim. App. 1984)(confession raised self -defense). *Smith v. State*, 676 S.W.2d 584 (Tex. Crim. App. 1984). *Alaniz v. State*, 865 S.W.2d 529 (Tex. App.- Corpus Christi 1993, *no pet.*).

(b) Inconsistent Defenses

Where a defendant's confession raises self -defense, but at trial the defendant denies the commission of the offense, he is still entitled to the submission of the issue, although the defensive theories are inconsistent. *Booth v. State*, 679 S.W.2d 804 (Tex. Crim. App. 1984).

(2) Reasonable Belief

An instruction on self-defense should include a definition of “reasonable belief,” pursuant to section 1.07(a)(31) of the Texas Penal Code. *Arline v. State*, 721 S.W.2d 348 (Tex. Crim. App. 1986). Whether defendant's beliefs were reasonable and justifiable, and whether he used more force than was necessary, were fact questions for the jury to decide. *Hayes v. State*, 728 S.W.2d 807 (Tex. Crim. App. 1987). A defendant is entitled to an instruction on self-defense if he “reasonably believes” that the other's use of force is unlawful or that defensive force was necessary. “Therefore, the question is not whether there was any evidence that the deceased attempted use of force was unlawful; the appellant was entitled to an instruction

on the law of self-defense if there was any evidence that he reasonably believed that the deceased attempted use of force was unlawful." *Semaire v. State*, 612 S.W.2d 528, 530 (Tex. Crim. App. 1980). See *Jones v. State*, 544 S.W.2d 139 (Tex. Crim. App. 1976)(trial court erred in not instructing on apparent danger).

(3) Multiple Assailants

The ordinary charge on self defense has been held to be too restrictive if there is evidence that more than one person attacked the defendant. *Frank v. State*, 688 S.W.2d 863 (Tex. Crim. App. 1985). Accordingly, 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 threatened attack at the hands of more than one assailant." *Id.* at 868. A proper instruction is that the defendant has a right to defend against either or both of the assailants, not just both simultaneously. *Brown v. State*, 651 S.W.2d 782 (Tex. Crim. App. 1983). *Alaniz v. State*, 865 S.W.2d 529 (Tex. App.- Corpus Christi 1993, *no pet.*). In *Kemph v State*, 12 S.W.3d 530 (Tex. App.- San Antonio 1999 *pet. ref'd*) the court held it was error to deny the charge when the defendant alleged five police officers assaulted him during an arrest.

(4) Provoking the Difficulty

A charge on provoking the difficulty is a limitation on the right of self-defense. Accordingly, it is error to charge on provoking the difficulty when the evidence does not raise the issue. *Williamson v. State*, 672 S.W.2d 484 (Tex. Crim. App. 1984). "A jury instruction on provoking the difficulty should not be submitted to the jury unless self-defense is an issue and there are facts in evidence which show that the deceased made the first assault on the defendant. There also must be some evidence that the defendant, in order to have a pretext for killing or inflicting bodily injury upon the deceased, did some act or used some words intended to and calculated to bring on the difficulty. *Id.* at 486. (trial court erred in submitting instruction); *accord, Stanley v. State*, 625 S.W.2d 320 (Tex. Crim. App. 1981). If the jury is charged on provoking the difficulty, the court should also instruct on the converse "from the defendant's viewpoint untrammelled by any extra burden or insinuation." *Dirck v. State*, 579 S.W.2d 198 (Tex. Crim. App. 1978). In *Williams v State*, 35 S.W.3d 783 (Tex. App.—Beaumont 2001, *pet. ref'd*) the court held denial of a charge on self defense was proper where the evidence is undisputed that the defendant provoked the difficulty. The Court of Criminal Appeals in *Smith v. State*, 965 S.W.2d 509 (Tex. Crim. App. 1998) has stated that this charge should be given more often.

Either side may request a charge on provoking the difficulty, if raised by the evidence. *Cole v. State*, 923 S.W.2d 749 (Tex. App.- Tyler 1996, *no pet.*).

(5) Right to Arm

If the trial court does charge on provoking the difficulty, "the trial court is obligated to also charge on a defendant's right to carry arms to the scene of the difficulty and seek an explanation where supported by the evidence". *Banks v. State*, 656 S.W.2d 446 (Tex. Crim. App. 1983); *accord, Williams v. State*, 580 S.W.2d 361 (Tex. Crim. App. 1979)(trial court erred in not instructing the jury on the right to carry a shotgun to the scene to protect himself against possible unlawful attack).

The Court of Appeals in Corpus Christi has held that this charge is not required in all cases where a charge of provoking the difficulty is given. In *Tijerina v. State*, 921 S.W.2d 287 (Tex. App.- Corpus Christi 1996, *no pet.*) it was not error to charge on provoking the difficulty and not to include the right to arm. This was a case that preceded the abolishment of the common law right to arm.

Defendants committing offenses after September 1, 1994 are not entitled to the right to bear arms instruction. Section 9.31 (b)(5) provides use of force is not justified: if the actor sought an explanation from or discussion with the other person concerning the actor's differences with the other person while the actor was possessing or transporting carry a weapon in violation of section 46.02. *Bumguardner v. State*, 963 S.W.2d 171 (Tex. App.- Waco 1998, *pet. ref'd*) is first case to discuss this statute and an example of the appropriate charge is set forth within the opinion. The Beaumont Court of Appeals has held a defendant is not entitled to a charge on self-defense if the defendant illegally arms himself to seek an explanation. *Williams v State*, 35 S.W.3d 783 (Tex. App. – Beaumont 2001, *pet. ref'd*)

This amendment does not prohibit the arming with weapons not covered in section 46.02 of the Penal Code. Therefore one can still arm oneself with a rifle or shotgun.

(6) Right to Strike First

Instruction in a murder case on the right to strike first is not required even if the evidence raises it. *DeLaCruz v. State*, 490 S.W.2d 839 (Tex. Crim. App. 1973). Where self-defense charge given by the trial court, particularly portion relating to defendant's reasonable belief that deadly force was immediately necessary to protect himself, adequately preserved defendant's right and defendant was not harmed by court's refusal to charge jury on the right to strike first. *Villalobos v. State*, 756 S.W.2d 847 (Tex. App.- Corpus Christi 1988, *no pet.*).

(7) Right to Pursue and Continue Shooting

In a murder prosecution a defendant does not have a right to a jury instruction on the right to continue shooting and pursue the adversary until all danger has passed. *Cisneros v. State*, 747 S.W.2d 946 (Tex. App.-San Antonio 1988, *pet. ref'd*). The Court of Criminal Appeals held that an instruction on self-defense was sufficient in *Philan v. State*, 683 S.W.2d 440 (Tex. Crim. App. 1984).

(8) Apparent Danger

A defendant is entitled to a charge that a person has a right to defend their life and person from apparent danger, as fully and to the same extent as they would had the danger been real, provided the apprehension of danger was reasonable as it appeared from their standpoint at the time. Evidence of past violent encounters with the deceased, and the reputation of the deceased for violence or specific acts of violence against third parties, which are known to the defendant, may justify a charge on apparent danger. *Fielder v. State*, 756 S.W.2d 309 (Tex. Crim. App. 1988). After a verbal argument, the complainant approached the defendant with a stick. This evidence was enough to raise the issue of apparent danger. *Reese v. State*, 877 S.W.2d 328 (Tex. Crim. App. 1994). See also, *Courtney v. State*, 908 S.W.2d 48 (Tex. App.-Houston [1st Dist.] 1995, *pet. ref'd*). A charge that merely permits self-defense if "under attack or attempted attack" is not sufficient. *Torres v State*, 7 S.W.3d 712 (Tex. App.- Houston [14th Dist.] 1999, *pet. ref'd*).

(9) Retreat

A person is not justified in using deadly force if a reasonable person in the defendant's position would have retreated without using deadly force. Tex Penal Code Ann. Sec. 9.32(a)(2). Effective September 1, 1995, this provision does not apply when the actor is using deadly force to prevent the unlawful entry into the habitation of the actor. Tex. Penal Code Ann. Sec. 9.32(b). A defendant is not entitled to an instruction that he was in fact retreating at the time deadly force was used, for that would be a comment on the weight of the evidence prohibited by Art. 38.05 of the Texas Code of Criminal Procedure. *Juarez v. State*, 886 S.W.2d 511 (Tex. App.- Houston [1st Dist.] 1994, *pet. re'd*).

h. Defense Of Third Persons

Section 9.33 of the Texas Penal Code permits the use of both force and deadly force to protect a third person.

A person is not entitled to use deadly force in defending himself unless he shows that a reasonable person in his situation would not have retreated. Tex. Penal Code Ann. Sec. 9.32(2) (Vernon Supp. 1990).

There is no requirement, however, that the defender of a third person himself retreats before using deadly force. This would nullify the obvious purpose of Sec. 9.32. Instead, the jury should be instructed that the defendant is justified if a reasonable person in the third person's situation would not have retreated. That is, the accused is required "to make the reasonable assessment, from his standpoint, that a reasonable person in the third person's shoes would not have retreated, before he may act with deadly force in that person's behalf." *Hughes v. State*, 719 S.W.2d 560, 564-65 (Tex. Crim. App. 1986). *Hamel v. State*, 916 S.W.2d 491 (Tex. Crim. App. 1996). *Cooper v. State*, 910 S.W.2d 605 (Tex. App.- Tyler 1995, *no pet.*).

If an innocent bystander is injured or killed, a defendant is not entitled to a charge on self defense or defense of a third person. *Banks. v. State*, 955 S.W.2d 116 (Tex. App.- Fort Worth 1997, *no pet.*). This case also holds that if a charge on self -defense is given, then a defendant is not entitled to a charge on Necessity.

i. Necessity

Necessity is a defense under Texas law. Tex. Penal Code Ann. Sec. 9.22 (Vernon 1974).

In *Williams v. State*, 630 S.W.2d 640 (Tex. Crim. App. 1982), the defendant was charged with assaulting his girlfriend. He admitted striking her, but claimed he had to, to keep her from wrecking the car she was driving. This testimony was sufficient to raise the defense of necessity. The defendant must admit the offense before being entitled to a charge. *Auston v. State*, 892 S.W.2d 141 (Tex. App.-- Houston [14th Dist] 1994, *no pet.*). Testimony that the defendant struck his mother out of immediate necessity to avoid imminent harm from his father was deemed to be conclusory and a failure to charge was not error. *Arnwine v State*, 20 S.W.3d 155 (Tex. App.- Texarkana 2000, *no pet.*).

Necessity can be a defense to a charge of unlawfully carrying a weapon. In *Armstrong v. State*, 653 S.W.2d 810 (Tex. Crim. App. 1983), the appellant testified that she had been raped two weeks before and threatened with death if she reported the rape. She further testified that she had turned the rapist in, that he had been released on bail, and that she was in great fear of him. This testimony raised the defense of necessity. "We decline to hold that, as a matter of law, specific threats by a specific person who has committed violent acts directed against the threatened person cannot raise the defense of necessity if the person so threatened is then charged with carrying a weapon which she believes to have been necessary, in the circumstances, to her defense." *Id.* at 810-11; *accord, Johnson v. State*, 650 S.W.2d 414, 416 (Tex. Crim. App. 1983).

Threats made by cell-mates are sufficient to raise the issue of necessity in a prosecution for escape and the defendant is not required to present evidence of attempted surrender. *Spakes v. State*, 913 S.W.2d 597 (Tex. Crim. App. 1996). In *Shugart v State*, 32 S.W.3d 355 (Tex. App.-Waco, 2000, *pet ref'd*) the court cited *Spakes*, but held the defendant was not entitled to the charge for failure to show how his safety "clearly outweigh[ed] the safety of numerous other inmates and employees."

In *Thomas v. State*, 678 S.W.2d 82 (Tex. Crim. App. 1984), the appellant was convicted of aggravated robbery. At trial, he admitted fighting with the police officer, complainant, and taking his gun, but claimed that he did not have the intent to steal the gun, and only took it to keep from being shot himself. *Id.* at 83. The court held that this testimony raised the defense of necessity, and also rejected the state's theory that, by denying intent to steal, the appellant forfeited his right to rely on necessity. Alternative defenses are proper. "Appellant was entitled to have the jury consider the necessity defense even though a portion of his testimony can be interpreted as denying the intent to deprive element of the underlying theft." *Id.* at 85.

Defendant's fear that she would be arrested if police did not believe that marijuana discovered in her attic was not hers was sufficient to warrant a charge on necessity when she attempted to transport and dispose of the marijuana. *Brazelton v. State*, 947 S.W.2d 644 (Tex. App.- Fort Worth, 1997, *no pet.*).

2. Non-Statutory Defenses

a. Alibi

"Alibi had never been characterized as an affirmative defense in this State but always as a defense." *Miller v. State*, 660 S.W.2d 95, 97 (Tex. Crim. App. 1983). The state is not required to disprove the alibi defense beyond a reasonable doubt. *Drake v. State*, 860 S.W.2d 182 (Tex. App.- Houston [14th Dist.] 1993, *pet. ref'd*).

In *Miller*, the court approved the following instruction:

The defense set up by the defendant is what is known in the law as an alibi, that is, if the offense was committed, as alleged, then the defendant was at the time of the commission thereof at another and different place from that at which the same was committed, and therefore, was not and could not have been the person who committed same, if same was committed.

Now, if the evidence raises in your mind a reasonable doubt as to the presence of the defendant at the place where the offense was committed, at the time of the commission of

the same, if the same was committed, you will give the defendant the benefit of such doubt and find him not guilty. Id. at 96 (emphasis in original).

"The defense of alibi arises when there is evidence that the accused is at a place where he could not have been guilty of participating in the offense. A charge on alibi need not be given unless the evidence is inconsistent with the State's case which puts the defendant at the scene at the time of the commission of the offense." *Arney v. State*, 580 S.W.2d 836, 840 (Tex. Crim. App. 1979)(citations omitted)(No error in refusing charge where defendant's evidence put him at the scene and was therefore consistent with the State's case).

In *Giesberg v. State*, 984 S.W.2d. 245 (Tex. Crim. App. 1998), the Court of Criminal Appeals held that a defendant is not entitled to an instruction of alibi if it merely negates an element of the offense. 5-4 decision abrogating *Arney*.

"Where the issue of alibi is raised, it is error for the court to refuse to charge." *Jones v. State*, 398 S.W.2d 753, 754 (Tex. Crim. App. 1966); *accord*, *DelBosque v. State*, 325 S.W.2d 147, 148 (Tex. Crim. App. 1959); *Bates v. State*, 305 S.W.2d 366, 368 (Tex. Crim. App. 1957); *Johnson v. State*, 124 S.W.2d 1001, 1002 (Tex. Crim. App. 1939).

"An instruction as to alibi is not required when the defendant merely denies that he was at the place where the crime was committed, but does not offer affirmative evidence as to his presence elsewhere." *Windham v. State*, 288 S.W.2d 73, 76 (Tex. Crim. App. 1956). It is not, however, "essential that the witness testify in so many words that he was at another and different place or to name such place." *Id.*

If a charge on alibi is given, it should not be phrased so as to comment on the evidence. Thus, it is error for the charge to use the words, "at the place where the offense was committed." The charge must include the qualifying language if any offense was committed. See *Richardson v. State*, 390 S.W.2d 772, 773 (Tex. Crim. App. 1965); *Supina v. State*, 27 S.W.2d 198 (Tex. Crim. App. 1930).

The Fourth Court of Appeals in San Antonio has held a charge on alibi is no longer required and bases their opinion on *Sanders v. State*, 707 S.W.2d 78 (Tex. Crim App. 1986). See *Villarreal v. State*, 821 S.W.2d 682 (Tex. App.-San Antonio 1991, *no pet.*). The appellate court reasoned that *Sanders* in finding a charge on "good faith purchase" was not required, for this is not a "defense" but rather a negation of an element of the offense, was applicable to the charge on alibi. *Accord*, *Holliman v. State*, 879 S.W.2d 85 (Tex. App.- Houston [14th Dist.] 1994, *no pet.*). See also *Greene v. State*, 928 S.W.2d 119 (Tex. App. – San Antonio 1996, *no pet*)(alibi is not the type of defense

that entitles defendant to an instruction.); *Haliburton v. State*, 23 S.W.3d 192 (Tex. App. – Waco 2000, *pet. ref'd.*)

b. Mistaken Identification

"The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *United States v. Wade*, 388 U.S. 218 (1967). Federal courts, and many state jurisdictions, use the so-called *Telfaire* instruction to guard against mistaken identification. See *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972).

In light of the decision in *Wilson v. State*, 581 S.W.2d 661 (Tex. Crim. App. 1979), it is doubtful whether anyone is entitled to a charge on mistaken identification. The majority held that the defendant's rights were adequately protected by the court's charge on the presumption of innocence and the requirement that the jury find the defendant guilty beyond a reasonable doubt. That the complainant had failed to identify the defendant on a previous occasion did not give rise to an affirmative defense. *Id.* at 665; *accord*, *Hill v. State*, 608 S.W.2d 932 (Tex. Crim. App. 1980). Judge Clinton dissented and suggested the following instruction:

You must be satisfied beyond a reasonable doubt of the accuracy of identification of defendant as perpetrator of the offense charged, and you are instructed that if from facts and circumstances in evidence you have a reasonable doubt as to whether defendant is the person who committed the offense alleged in the indictment you will find the defendant not guilty of the offense. Id. at 671 n.3⁴⁵

c. Good Faith Purchase

Merely denying participation in an alleged crime, or an element of the crime, does not raise the issue of good faith purchase. *Sanders v. State*, 707 S.W.2d 78 (Tex. Crim. App. 1986). In *Sanders*, the court stated that testimony of a good faith purchase in certain cases, however, might raise the issue, where the defendant acknowledges participation in the offense, but seeks to justify his conduct. An example of the latter case might be one in which the defendant is charged with possession of stolen goods. *Id.* at 81 n.3. Serious doubt was cast on the continued validity of this holding by *Willis v. State*, 790 S.W.2d 307 (Tex. Crim. App. 1990). The court held that the defendant was not entitled to an instruction on good faith purchase since this was a non-penal code defense, and since there was a specific penal code defense—mistake of fact—which

might be applicable. *State v. Hart*, 905 S.W.2d 690 (Tex. App.- Houston [14th Dist.] 1995, *pet. ref'd.*) (Requested charge of "temporary withholding" not required for it merely negates element of offense of theft).

d. Excessive Force

A charge on use of excessive force is required in resisting arrest prosecution. Failure to give a properly requested charge is reversible error unless the error is harmless.

e. Accident

The term "accident" in connection with offenses in the Penal Code should be avoided; instead, accident is covered by a charge that the jury may acquit if there is reasonable doubt as to whether defendant voluntarily engaged in conduct of which he is accused. *Owens v. State*, 786 S.W.2d 805 (Tex. App. Ft. Worth 1990, *pet. ref'd.*)

Section 6.01(a) of the Texas Penal Code provides that "a person commits an offense only if he voluntarily engages in conduct, including an act, an omission, or possession". At common law there was a defense of "accident," but the Court of Criminal Appeals has advised the bench and bar to avoid the use of the term "accident" in connection with offenses defined by the penal code. *Williams v. State*, 630 S.W.2d 640 (Tex. Crim. App. 1982). Defendant entitled to instruction on voluntary nature of his acts. *Brown v. State* 955 S.W.2d 276 (Tex. Crim. App. 1997).

Rather than giving a charge on accident, the trial court should instruct the jury, if the issue is raised by the evidence, that the defendant should be acquitted if there is a reasonable doubt as to whether he voluntarily engaged in the conduct for which he stands charged. Where the defendant acted voluntarily up to the point where the gun was pointed at the victim, an instruction on voluntary conduct of the discharge of the weapon is not required. *Convoy v. State*, 843 S.W.2d 67 (Tex. App.-Houston [1st Dist.] 1992, *no pet.*). Voluntarily as used in Section 6.01(a) of the Penal Code refers only to the physical conduct, in the sense of one's bodily movement, not to any mental state. 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 physical reflex or convulsion, or are the product of unconsciousness, hypnosis or other nonvolitional impetus, that movement is not voluntary. *Rodgers v. State*, ___S.W.3d ___ (Tex. Crim. App. No. 1412-01 delivered May 21, 2003).

In *Valenzuela v. State*, 943 S.W.2d 130 (Tex. App.--Amarillo 1997, *no pet.*) the court held the defendant was not entitled to an instruction on the voluntariness of the defendant's conduct.

⁴⁵See also 8 MCCORMICK AND BLACKWELL, Texas Criminal Forms and Trial Manual, Sec. 85.10 (9th ed. 1985).

In *Payne v. State*, 11 S.W.3d 231 (Tex. Crim. App. 2000), the defendant was entitled to a charge on the voluntariness of his conduct in the discharge of a weapon in a murder case, but the case was remanded for a harm analysis. In *Sparks v State*, 68 S.W.3d 6 (Tex. App. - Dallas 2001, *pet. ref'd*) the defendant testified he was carrying a sack of weights and tripped causing him to fall and strike his child with his elbow. His request for a charge on the voluntariness of his conduct was denied. The conviction was reversed.

For the purposes of Section 6.01 (a), an "accident" is not the same as, and should not be treated as the equivalent of, the absence of any voluntary act. *Rodgers v. State*, ___ S.W.3d ___ (Tex. Crim. App. No. 1412-01 delivered May 21, 2003). The word accident generally means "a happening that is not expected, foreseen, or intended. Its synonyms includes, but certainly is not limited to, unintended bodily movements." *Id.* (citations omitted). Requesting a charge on accident is not the same as requesting a charge on voluntary conduct. *Id.*

3. Submission of Defensive Issues

a. General Rule

It is a "well-known legal principle that a defendant is entitled to an affirmative defensive instruction on every issue raised by the evidence, regardless of whether it is strong, feeble, impeached, or contradicted, and even if the trial court is of the opinion the testimony is not entitled to belief." *Sanders v. State*, 707 S.W.2d 78 (Tex. Crim. App. 1986).

In determining whether any defensive charge should be given, the credibility of evidence or whether it controverts or conflicts with other evidence in the case may not be considered. When a defensive theory is raised by evidence from any source and a charge is properly requested, it must be submitted to the jury." *Woodfox v. State*, 742 S.W.2d 408 (Tex. Crim. App. 1987)(only evidence of mistake of fact came from arresting officers who testified as to what appellant told them; appellant himself did not testify). The purpose of this rule is to "insure that the jury, not the judge, will decide the relative credibility of the evidence. When a judge refuses to give an instruction on a defensive issue because the evidence supporting it is weak or unbelievable, he effectively substitutes his judgment on the weight of the evidence for that of the jury. The weight of evidence in support of an instruction is immaterial." *Id.* at 409 (citations omitted).

"A defendant who relies on a justification or defense such as one of those enumerated in chapters 8 and 9 of the Penal Code does not deny any element of the State's case. He admits to having committed the culpable conduct charged, but asserts he should be found not guilty because his action was somehow justified or excusable. That is why he is entitled to a

jury charge on such an issue, so that the jury can find that the State has proven every element of the offense and yet find the defendant not guilty." *Barnette v. State*, 709 S.W.2d 650 (Tex. Crim. App. 1986).

It is not enough that the charge actually given requires the jury to passively decide the defensive issue in the case. The defendant is entitled to an affirmative submission of the defenses raised by the evidence. *Lynch v. State*, 643 S.W.2d 737 (Tex. Crim. App. 1983)(mistake of fact).

A defendant's testimony alone may be enough to raise an issue. *Thomas v. State*, 678 S.W.2d 82 (Tex. Crim. App. 1984).

A defendant may be entitled to a charge if there is some evidence raising the issue from any source, even if his own testimony tends to negate the issue. *Lugo v. State*, 667 S.W.2d 144 (Tex. Crim. App. 1984).

Submission of only one of several defensive issues raised does not eliminate a defendant's right to submission of other issues raised. "The court is required to charge on every defensive issue raised by the evidence." *Montgomery v. State*, 588 S.W.2d 950 (Tex. Crim. App. 1979)(submission of duress and entrapment does not eliminate right to charge on mistake of fact).

A defendant may be entitled to submission of multiple issues, which are inconsistent with each other, if the evidence raises all of the issues. *See Warren v. State*, 565 S.W.2d 931 (Tex. Crim. App. 1978)(self-defense and insanity).

b. Exception To The Rule

Conversely, however, "if the alleged defensive theory merely negates an element of the offense, then no affirmative charge must be given." *Sanders v. State*, 707 S.W.2d 78 (Tex. Crim. App. 1986). In *Sanders*, the court held that no affirmative instruction on good faith purchase was required, where appellant's testimony simply negated his entire participation in the burglary with which he was charged. *Id.* *Cannon v. State*, 691 S.W.2d 664 (Tex. Crim. App. 1985), *cert. denied*, 474 U.S. 1110, 106 S.Ct. 897, 88 L.Ed.2d 931 (1986)(court need not give instruction which is an affirmative submission of a defensive issue which merely denies the existence of an essential element of State's case); *see also Reyes v. State*, 741 S.W.2d 414 (Tex. Crim. App. 1987)("merely present" is not a defense). However in *Golden v. State*, 851 S.W.2d 291 (Tex. Crim. App. 1993), the defendant was entitled to an instruction that "mere presence" in the company of an accomplice shortly before or after the commission of the crime is not sufficient corroboration. In *Cox v. State*, 843 S.W.2d.750 (Tex. App.- El Paso 1993, *pet. ref'd*) the court affirmed the conviction stating that not only is an instruction on "mere presence" not required, but if given would be a comment on the weight of the evidence.

The Court of Criminal Appeals has held that Art. 36.14 of the Code of Criminal Procedure does not require a judge to include a defensive instruction unless the defendant requests the instruction. The Court held that defensive issues are not considered “law applicable to the case” which would require the court to sua sponte include the instruction. This does not constitute charge error so *Almanza* does not apply. *Posey v. State*, 966 S.W.2d 57 (Tex. Crim. App. 1998).

c. Application Paragraph

It is not enough to merely give a general instruction on the appropriate defensive issue. The mandate of instructing on the law applicable to the case “was held to require the court in its instruction to apply the law to the very facts of the case before it.” *Beggs v. State*, 597 S.W.2d 375 (Tex. Crim. App. 1980). “The failure of the charge to apply the law to the facts is calculated to injure the rights of defendant . . . to a trial by jury; it deprives him of a neutral and unbiased application of the law, leaving that function to the partisan advocacy of opposing counsel in argument.” *Id.* The “hypothetically correct jury charge” law still applies to determining the correctness of the application paragraph. In *Nguyen v State*, 21 S.W.3d 609 (Tex. App.- Houston [1st Dist.] 2000, *pet. ref’d*) the indictment and jury charge authorized conviction in an organized crime prosecution if the defendant participated with four other persons. The court affirmed because a “hypothetically correct charge” would authorize conviction if the defendant participated with at least two of the persons listed in the indictment.

J. Evidentiary Instructions

1. Confessions

Under Texas law, after the trial court has made an independent finding as to whether a defendant’s statement was voluntary, “evidence pertaining to such matter may be submitted to the jury and it shall be instructed that unless the jury believes beyond a reasonable doubt that the statement was voluntarily made, the jury shall not consider such statement for any purpose nor any evidence obtained as a result thereof.” TEX. CODE CRIMINAL PROC. ANN. Art. 38.22, § 6. When the issue is raised by the evidence, the trial judge shall appropriately instruct the jury, generally, on the law pertaining to the statement. TEX. CODE CRIM. PROC. ANN. Art. 38.22 § 7. *See also Dinkins v. State*, 894 S.W.2d 330, 353 (Tex. Crim. App. 1995), *cert. denied*, 516 U.S. 832, 116 S.Ct. 106, 133 L. Ed.2d 59 (1995).

As Article 38.22 implies, the key to determining whether an instruction under Article 38.22 is warranted is whether there is “some positive evidence” that a defendant’s statement was not voluntary. *See Janecka*

v. State, 937 S.W.2d 456, 472 (Tex. Crim. App. 1996), *cert. denied*, 522 U.S. 825, 118 S.Ct. 86, 139 L.Ed. 2d 43 (1997). It is not sufficient that a jury might disbelieve the testimony of the officers who took the statement, or that the jury “could have interpreted” the police statement to the defendant as coercive. *See id.* Rather, there must be some evidence of “coercive police activity” adduced before the jury before an instruction must be submitted to the jury. *See Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App.), *cert. denied*, 513 U.S. 1157, 115 S. Ct. 1115, 130 L.Ed.2d 1079 (1996) (trial court did not err in failing to include instruction in charge where defendant testified that his confession was coerced in hearing outside the jury’s presence but failed to introduce any evidence of coercion before the jury).

An issue of the voluntariness of a confession may be raised several ways: if the statement was induced by a promise made by a person in authority, *see Penry v. State*, 903 S.W.2d 715, 748 (Tex. Crim. App. 1995), *cert. denied*, 516 U.S. 977, 116 S. Ct. 480, 133 L.Ed.2d 408 (1995); the defendant was lacked the mental capacity to understand his rights, *Rogers v. State*, 549 S.W.2d 726 (Tex. Crim. App. 1977), *see also Washington v. State*, 388 S.W.2d 200 (Tex. Crim. App. 1965); the defendant invoked his right to counsel before making the statement, *see Dinkins v. State*, 894 S.W.2d 330, 354 (Tex. Crim. App. 1995); the evidence was obtained through the use of threat or physical force, *see Butler*, 872 S.W.2d at 236; the defendant was told by authorities that the confession would be used for him, *see Dinkins*, 894 S.W.2d at 354;

The Court of Criminal Appeals has consistently held that when the issue of voluntariness is raised, a defendant is only entitled to a *general* instruction on voluntariness. *See Dinkins*, 894 S.W.2d at 353; *Bell v. State*, 582 S.W.2d 800, 805 (Tex. Crim. App. 1981), *cert. denied*, 453 U.S. 913, 101 S.Ct. 3145, 69 L.Ed.2d 995 (1979). Thus instructions which specifically require the jury to determine whether the police threatened the defendant into confessing, or whether a confession was induced by a promise, are improper. *See Burdine v. State*, 719 S.W.2d 309 (Tex. Crim. App. 1989), *cert. denied*, 481 U.S. 1043, 107 S.Ct. 1988, 95 L.Ed.2d 828 (1987) (general instruction sufficient where defendant asserted that confession induced by a promise); *Moon v. State*, 608 S.W.2d 569, 570 (Tex. Crim. App. [Panel Opinion] 1980) (general instruction adequate where defendant contended that police had threatened him). Nevertheless, the court may clarify the law contained in a general instruction when necessary. *See Cockrell*, 933 S.W.2d at 90 (no error in court’s inclusion of an instruction outlining “substantial compliance” with the literal language of Article 38.22, section 2(a); *Dinkins*, 894 S.W.2d 353-54 (no error in additional instruction which outlined

what might constitute an “improper inducement” which would render a statement involuntary).

In addition to an instruction under Article 38.22, if an issue of fact is raised, a defendant will be entitled under Article 38.23 to an instruction informing the jury that it is not to consider a confession if it was obtained “in violation of any provisions of the Constitution or law of the State of Texas or laws of the United States of America.” See *Murphy v. State*, 640 S.W.2d 297, 299 (Tex. Crim. App. 1982); *Patterson v. State*, 847 S.W.2d 349, 352,353 (Tex. App. – El Paso 1993, *pet. ref’d*); TEX. CODE CRIM. PROC. ANN. Art. 38.23 (a). Statements taken in violation of *Miranda* are not obtained in violation of the law, and are not covered by the exclusionary rule contained in Article 38.23; hence, a defendant will not be entitled to an instruction under 38.22 on the mere showing of a *Miranda* violation. See *Baker v. State*, 956 S.W.2d 19, 24 (Tex. Crim. App. 1997).

2. Accomplice Testimony

The Texas Code of Criminal Procedure in Article 38.14 sets forth the general rule concerning accomplice witness testimony. A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense.

“[A]n accomplice witness is someone who participated with another before, during or after the commission of a crime.” *Harris v. State*, 738 S.W.2d 207, 215 (Tex. Crim. App. 1986); see also *Kutzner v. State*, 994 S.W.2d 180, 187 (Tex. Crim. App. 1999). The participation must be an affirmative act committed by the witness to promote the commission of the offense. *Kutzner, supra*. Mere presence at the scene of an offense does not make a witness an accomplice as a matter of law. *Marlo v. State*, 720 S.W.2d 496 (Tex. Crim. App. 1986). Further, a witness is not deemed an accomplice witness because he knew of the commission of the offense and failed to report it or concealed its commission. *Id.* at 499. Indeed, evidence that the witness was present during the commission of the crime *and* helped to conceal it, is not sufficient to raise the issue of accomplice status. See *Medina v. State*, 7 S.W.3d 633, 641 (Tex. Crim. App. 1999). A witness’s complicity of another crime does not make him an accomplice to the offense for which the accused stands trial. See *Kunkle v. State*, 771 S.W. 2d 435, 439 (Tex. Crim. App. 1986), *cert. denied*, 492 U.S. 925, 109 S.Ct. 3259, 106 L.Ed.2d 604 (1989); *May v. State*, 618 S.W.2d 33, 34 (Tex. Crim. App. 1981). In other words, an accomplice is one who could be prosecuted for the same offense as the defendant, or a lesser-included offense. See *Blake v. State*, 971 S.W.2d 451,454-55 (Tex. Crim. App. 1998). The test “is

whether or not there is sufficient evidence in the record to support a charge against the witness alleged to be an accomplice.” *Id.*

A defendant is entitled to a charge that his mere presence with an accomplice shortly before or after the commission of the offense is not sufficient corroboration. *Golden v. State*, 851 S.W.2d 291 (Tex. Crim. App. 1993).

a. Accomplice As A Matter Of Law Or Fact

Generally speaking, a witness indicted for the same offense as the defendant is an accomplice as a matter of law.⁴⁶ See *DeBlanc v. State*, 799 S.W.2d 701, 708 (Tex. Crim. App. 1990). “When there exists no doubt as to the character of a witness as an accomplice as a matter of law the court is under a duty to so instruct the jury.” *Burns v. State*, 703 S.W.2d 649, 651-52 (Tex. Crim. App. 1985). If the purported accomplice has not been indicted, and there is a fact question as to whether he is an accomplice, a fact question arises and it is proper to submit that issue to the jury “even though the evidence appears to preponderate in favor of the conclusion that the witness is an accomplice as a matter of law. It is only when the evidence clearly shows that the witness is an accomplice as a matter of law that the trial court must so instruct the jury.” *Harris v. State*, 645 S.W.2d 447, 454 (Tex. Crim. App. 1983). In *Harris*, the court was correct in not instructing that the witness was an accomplice as a matter of law, but erred in not submitting her status as a question of fact.

An eleven year old is too young to be prosecuted as an adult, and therefore, too young to be an accomplice. Accordingly, no instruction need be given requiring corroboration. *Villareal v. State*, 708 S.W.2d 845 (Tex. Crim. App. 1986). A fifteen-year old who is subject to certification as an adult may be an accomplice. *Harris v. State*, 645 S.W.2d 447 (Tex. Crim. App. 1983). In *Lane v. State*, 942 S.W.2d 208 (Tex. App.--Fort Worth 1997) a thirteen year old was held not to be an accomplice due to the fact that she could not be prosecuted for the offense due to her age. The argument was made that she was subject to a forty-year determinate sentence and should be considered an accomplice. The court said she was not an accomplice. The court did not address the issue that even without adult prosecution the witness could be sentenced to adult incarceration.

The Court of Criminal Appeals has abolished the rule that juveniles cannot be considered accomplices so as to entitle the defendant to the accomplice witness

⁴⁶ While this has been generally recognized as a true statement one should read *Blake v. State*, 971 S.W.2d 451 (Tex. Crim. App. 1998) (whether the person is actually charged and prosecuted for their participation is, however, irrelevant to the determination of accomplice status.)

instruction. *Blake v. State*, 971 S.W.2d 451 (Tex. Crim. App. 1998). This has been held to be retroactive by the Court of Criminal Appeals.

Gang affiliation may make a witness an accomplice if the crime is one associated with gang activity. *Medina v. State*, 7 S.W.3d 633 (Tex. Crim. App. 1999).

A defendant is not entitled to have a special issue submitted to the jury asking it to answer whether or not it found the witness to be an accomplice. Having said this, the court further noted: "This is not to say that a special issue could never be constitutionally necessary despite the statutory prohibition of Article 37.07, section 1(a)." *Harris v. State*, 790 S.W.2d 569, 579-80 (Tex. Crim. App. 1989).

Prior to *Malik v. State*, 953 S.W.2d 234 (Tex. Crim. App. 1997), if the state believes a charge on accomplice as a matter of law is not required, and it fails to object, the sufficiency of the evidence on appeal will be measured by the charge actually given, and not that which should have been given. If the state fails to corroborate the testimony of the witness, the evidence on appeal will be deemed insufficient. *Boozer v. State*, 717 S.W.2d 608 (Tex. Crim. App. 1984). *Boozer*, and its line of cases have been overruled by the decision in *Malik*. Sufficiency of the evidence is now based on what a "hypothetically correct jury charge" would have been.

Failure to request a charge where only evidence of accomplice connects the defendant to the offense has been held to constitute ineffective assistance of counsel. *Ex parte Zepeda*, 819 S.W.2d 874 (Tex. Crim. App. 1991). For an *Almanza* analysis of harm see *Saunders v. State*, 817 S.W.2d 688 (Tex. Crim. App. 1991).

b. Corroboration

Accomplice witness testimony must only be corroborated where the witness is called by the state. Where defendants are jointly tried and one testifies on his own behalf, he is a witness for the defense, not the state, and the other defendant is not entitled to an instruction on accomplice witness testimony. *Selman v. State*, 807 S.W.2d 310 (Tex. Crim. App. 1991). When a defendant calls a person as a witness the testimony elicited is not that of an accomplice and the defendant is not entitled to an instruction. *Johnson v. State*, 853 S.W.2d 527 (Tex. Crim. App. 1993). The testimony of one accomplice witness cannot be used to corroborate the testimony of another accomplice witness. *Fields v. State*, 426 S.W.2d 863 (Tex. Crim. App. 1986). A defendant is entitled to a charge that "mere presence" of the defendant with an accomplice shortly before or after the commission of the offense is not sufficient corroboration. *Golden v. State*, 851 S.W.2d 291, 294-95 (Tex. Crim. App. 1993).

Only in-court accomplice testimony need be corroborated under Art. 38.14 of the Texas Code of Criminal Procedure. *Bingham v. State*, 913 S.W.2d 208 (Tex. Crim. App. 1995). Justice Clinton wrote this opinion and concluded only sworn testimony elicited in court is accomplice testimony that need be corroborated.

The corroborative evidence may be circumstantial or direct, and it need not establish the defendant's guilt of the charged offense nor directly link the accused to the offense. *See Munoz v. State*, 853 S.W.2d 558, 559 (Tex. Crim. App. 1993); *Nolley v. State*, 5 S.W.3d 850 (Tex. App. – Houston [14th Dist.] 1999, *no pet.*). Rather, it is sufficient if the cumulative weight of the corroborative evidence "tends" to connect the defendant to the offense. *See Munoz*, 853 S.W.2d at 559; *Taylor v. State*, 7 S.W.3d 732, 737 (Tex. App. – Houston [14th Dist.] 1999, *no pet.*) If the corroborating evidence does no more than point the finger of suspicion towards the accused, it is insufficient to satisfy the statutory requirements. *See Paulus v. State*, 633 S.W.2d 827,843 (Tex. Crim. App. 1981); *Nolley*, 5 S.W.3d at 853. Furthermore, even though an accomplice witness may state any number of facts that are corroborated by other evidence, if the corroborated facts do not tend to connect the accused with the crime, the evidence is insufficient for the purpose of the rule. *See Munoz*, 853 S.W.2d at 560. The phrase "tends to connect" has the ordinary dictionary definition, "to serve, contribute or conduce in some degree or way . . . to have a more or less direct bearing or effect." *Holladay v. State*, 709 S.W.2d 194, 198 (Tex. Crim. App. 1986) (quoting *Booone v. State*, 90 Tex. Crim. R. 374, 235 S.W.2d 580, 584 (1922)). Each case must be evaluated on its own facts and circumstances. *See Munoz*, 853 S.W. 2d at 559.

c. Statutory Exceptions

The accomplice witness rule is a creature of statute, and is not constitutionally mandated. In fact, there are specific statutory provisions that permit convictions on the uncorroborated testimony of an accomplice. *See e.g.*, Tex. Code Crim. Proc. art. 38.07 (Vernon Supp. 1990)(Chapter 21 offenses and offenses under section 22.011 and 22.021 of the Texas Penal Code); Section 31.03 of the Texas Penal Code provides for conviction upon the partially corroborated testimony of an accomplice; *see also*, Sections 43.06(prostitution) and 47.09(gambling) of the Texas Penal Code.

d. Capital Cases

Holladay v. State, 709 S.W.2d 194 (Tex. Crim. App. 1986) abandoned the requirement that in capital cases accomplice witness had to be corroborated as to the specific elements that elevated the offense to capital murder. Under *Holladay*, the corroborating

evidence need only tend to connect the accused to the crime. In *Thompson v. State*, 691 S.W.2d 627 (Tex. Crim. App. 1984), the defendant urged the court to adopt a special accomplice witness rule in capital cases, namely that the corroborating evidence alone must be sufficient to establish guilt beyond a reasonable doubt or must tend to connect the defendant to the offense beyond a reasonable doubt. The court rejected this contention, holding that neither the Constitution nor article 38.14 of the code of procedure required a stricter standard of review in a capital case. *Id.* at 631. Finally, in *Johnson v. State*, 853 S.W.2d 527 (Tex. Crim. App. 1993), the Court of Criminal Appeals held that there is no requirement that an accomplice witness instruction be given at the punishment phase of a capital trial.

e. Wording of the Accomplice-Witness Instruction

The wording of the instruction satisfies the requirements of the statute if it makes clear to the jury that it must find: (1) that the offense itself has been committed, (2) that the accomplice witness's testimony was truthful, (3) that the accomplice's testimony showed the defendant was guilty as charged, (4) that there was other testimony in the case, outside the accomplice's testimony, that tended to connect the defendant with the offense committed, and (5) that, from all the evidence, the defendant was guilty of the offense charged. *See Farris v. State*, 819 S.W.2d 490, 507 (Tex. Crim. App. 1990), *cert denied*, 503 U.S. 911, 112 S.Ct. 1278, 117 L.Ed.2d 504 (1992); *Holliday v. State*, 709 S.W.2d 194, 201-02 (Tex. Crim. App. 1986). If the evidence raises the issue of whether the defendant was merely present during the offense, he is entitled, upon request, to an instruction that mere presence is insufficient to corroborate the accomplice witness's testimony. *See Golden v. State*, 851 S.W.2d 291, 295 (Tex. Crim. App. 1993). Similarly, where one witness is an accomplice as a matter of law, and a fact issue exists as to whether another is an accomplice witness, the defendant is entitled to an instruction that one accomplice witness may not corroborate the testimony of another accomplice witness. *See Aston v. State*, 656 S.W.2d 453, 454 (Tex. Crim. App. 1983).

f. Accomplice Witness Instruction and Harmless Error

Error in the submission of an accomplice witness instruction is subject to a harm analysis. *See Medina*, 7 S.W.3d 642. If a defendant did not object to the absence of an accomplice witness instruction, a reviewing court should reverse only if it determines that the absence of the instruction resulted in "egregious harm," that is, that the omission was so harmful that the defendant was denied a "fair and impartial trial." *Howard v. State*, 972 S.W.2d 121, 126 (Tex. App. – Austin 1998, no. pet.) (quoting *Almanza*

v. State, 686 S.W.2d 157, 172 (Tex. Crim. App. 1985) (opinion on reh'g)). In determining whether the failure to include an accomplice witness instruction "egregiously harmed" a defendant, a reviewing court "must inquire whether jurors would have found the corroborating evidence so unconvincing in fact as to render the State's overall case for conviction clearly and significantly less persuasive." *Saunders v. State*, 817 S.W.2d 688, 692 (Tex. Crim. App. 1991); *compare Matthews v. State*, 999 S.W.2d 563, 566 (Tex. App. – Houston [14th Dist.] 1999, *pet. ref'd*) (corroborating evidence and direct evidence of guilt sufficiently persuasive that prosecution's case would not have been clearly and significantly less persuasive if instruction had been included) *with Howard*, 972 S.W.2d at 128 (weak corroborating evidence, coupled with lack of any other evidence in support of the charge except the accomplice's testimony, made prosecution's case significantly less persuasively had proper instruction been given).

If the defendant either objected to the court's failure to submit an accomplice-witness instruction, or requested such an instruction, the error must be reviewed to determine if there is "some harm" from the trial court's mistake. *See Medina*, 7 S.W.3d at 642. The "some harm" test does not mandate reversal upon a showing of possible harm; rather it requires that actual harm be established. *See id.* The appellate court must "review the evidence and any part of the record as a whole in order to illuminate 'the actual, not just theoretical harm to the accused.'" *Id.* (quoting *Almanza*, 686 S.W.2d at 174). Where there is a substantial amount of non-accomplice testimony connecting the defendant to the crime, for example, and the evidence that the witness at issue was an accomplice is weak, a court's failure to submit an instruction may be harmless even under the "some harm" standard. *See Medina*, 7 S.W.3d 642.

3. Illegal Arrest and Search

Article 38.23 of the Code of Criminal Procedure provides that "in cases where the legal evidence raises an issue" of whether evidence was obtained "in violation of any provisions of the Constitution or laws of the State of Texas or laws of the United States of America," the jury shall be instructed "that if it believes, or has a reasonable doubt, that the evidence was obtained in violation" of the law, "then and in such event, the jury shall disregard any such evidence obtained." TEX. CODE CRIM. PROC. art.38.23 (a). Thus, where an issue of fact is created by the evidence before the jury as to the legality of the detention, arrest or search, the defendant is entitled to an instruction to disregard the evidence unless the jury finds beyond a reasonable doubt that the detention, arrest or search was legal. TEX. CODE CRIM. PROC. ART. 38.23; *Jordan v. State*, 562 S.W. 2d. 472 (Tex. Crim. App.

[Panel Op.] 1978); *Davy v. State*, 67 S.W.3d 382, 388 (Tex. App. – Waco 2001, *no pet.*). Naturally where a fact issue has not been raised regarding whether the evidence was obtained illegally, a defendant is not entitled to the instruction. *See Murphy*, 640 S.W.2d at 299; *see also Zervos v. State*, 15 S.W.3d 146 (Tex. App. – Texarkana, 2000, *no pet.*).

A trial court's failure to submit an instruction under 38.23 is subject to harmless error analysis under Article 36.19 and *Almanza*. *See id.* at 26; *Patterson v. State*, 847 S.W.2d 349, 352-53 (Tex. App. – El Paso 1993, *pet. ref'd*).

A jury instruction which identifies evidence requiring special jury consideration under the law, and which sets out the law governing such consideration, does not violate the statutory prohibition against judicial comment on the evidence, "so long as it does not intimate that the jury should resolve any fact question in a certain way or that any of the evidence bearing upon such a fact question should be given greater weight or credibility than other evidence bearing on the same question." *Id.*

The issue of illegal arrest or search frequently occurs in cases involving cars. Some of those cases are listed below:

- (i) *Speeding: Reynolds v. State*, 848 S.W.2d 148 (Tex. Crim. App. 1993).
- (ii) *Driving to Slowly: Morr v. State*, 631 S.W.2d 517 (Tex. Crim. App. 1982).
- (iii) *Weaving: Johnson v. State*, 743 S.W.2d 307 (Tex. Crim. App. 1987)
- (iv) *Breathalyser Consent: Hall v. State*, 649 S.W.2d 627 (Tex. Crim. App. 1983)

4. Extraneous Offenses

Upon timely request, the trial judge should instruct the jury that they cannot consider the extraneous offense for any purpose "unless they believed beyond a reasonable doubt that the appellant was guilty thereof." *Ernster v. State*, 308 S.W.2d 33 (Tex. Crim. App. 1957)(emphasis supplied); *accord, Curry v. State*, 333 S.W.2d 375 (Tex. Crim. App. 1960). Additionally, again upon timely request, when evidence is admitted for a specific purpose under rule 404(b), or otherwise, the trial judge should instruct the jury that it can consider the extraneous offense only for the limited purpose for which it was admitted. *Crawford v. State*, 696 S.W.2d 903 (Tex. Crim. App. 1985)(improper for judge to instruct jury to consider extraneous offense for purposes of credibility when it was admitted to show guilty knowledge, unnatural attention, and probability); *e.g., Abdnor v. State*, 871 S.W.2d 731 (Tex. Crim. App. 1994)(court erred in refusing to limit consideration to credibility). *Johnson v. State*, 509 S.W.2d 639 (Tex. Crim. App. 1974)(court erred in refusing to limit consideration of extraneous

evidence to issue of identity); *see generally, Hitchcock v. State*, 612 S.W.2d 930, 930-31 (Tex. Crim. App. 1981); *Bates v. State*, 305 S.W.2d 366, 368 (Tex. Crim. App. 1957); *Escovedo v. State*, 902 S.W.2d 109 (Tex. App.—Houston [1st Dist] 1995, *pet. ref'd*)(requires the instruction be given at both phases of the trial); *Avery v. State*, 941 S.W.2d 221 (Tex. App.—Corpus Christi 1997, *no pet.*). In order to be timely the request must be made before the testimony is admitted. *Gone v. State*, 54 S.W.3d 37 (Tex. App.—Texarkana 2001, *no pet.*).⁴⁷ In *Gone* the request was made before the testimony, but the trial court said it would consider the request, but did not rule. The request was renewed after the witness testified, but trial counsel did not have a written proposed instruction and the request was denied. On appeal the conviction was affirmed based on an untimely request.

The following instruction has been suggested:

The defendant is on trial solely on the charge contained in the indictment. The State has introduced in evidence transactions other than the one charged in the indictment in this case, and with reference to those other transactions you are instructed that said evidence was admitted only for the purpose of showing identity, [or intent or common plan or scheme or motive, etc.] if it does. You are further charged that if there is any evidence before you in this case tending to show that the defendant, A.B., committed acts other than the offense alleged against her in the indictment, you cannot consider said testimony for any purpose unless you find and believe beyond a reasonable doubt that the defendant committed such other acts, if any were committed and if you find and believe beyond a reasonable doubt from such testimony that other acts were committed, you may then consider the same in determining the purpose for which it was introduced and no other purpose.

8 M. McCormick & T. Blackwell, *Texas Criminal Forms and Trial Manual*, Sec. 88.05 (Texas Practice 9th Ed. 1985).

A limiting instruction is not required where the extraneous offense testimony is admitted to prove a main fact in the case. *McWherter v. State*, 607 S.W.2d 531, 535 (Tex. Crim. App. 1980)(court need not limit testimony about escape and flight because they are

⁴⁷ *See also Garcia v. State*, 887 S.W.2d 862 (Tex. Crim. App. 1994) (request for limiting instructions must be made at the time evidence is introduced or the instruction is waived; and a request at the time of the jury charge comes too late.)

circumstances from which an inference of guilt may be drawn).

A limiting instruction is not required where the extraneous offense shows the "res gestae," or the context in which the offense occurred. *King v. State*, 553 S.W.2d 105, 106 (Tex. Crim. App. 1977).

A limiting instruction is not required at the punishment phase of a capital murder trial. *Lewis v. State*, 815 S.W.2d 560 (Tex. Crim. App. 1991), *Marquez v. State*, 725 S.W.2d 217, 226 (Tex. Crim. App. 1987); *Santana v. State*, 714 S.W.2d 1, 11-12 (Tex. Crim. App. 1986).

Additionally, extraneous offenses might be admissible to impeach a witness under Rule 609 of the Texas Rules of Evidence. If so, the defendant is entitled to a charge so limiting the jury's consideration. *Porter v. State*, 709 S.W.2d 213 (Tex. Crim. App. 1986)(improper to refuse to limit extraneous offense evidence to credibility).

The Court of Criminal Appeals has distinguished between extraneous "offenses" and extraneous "transactions," the latter term referring to something less than a criminal offense. See *Robinson v. State*, 701 S.W.2d 895 (Tex. Crim. App. 1985). The theft statute has a built-in extraneous transaction provision, whereby evidence of "recent transactions other than, but similar to" the primary offense may be admitted to show knowledge or intent. TEX. PENAL CODE § 31.03(c)(1). In such a case, the trial court errs if it does not instruct in the language of the statute. That is, the court must instruct the jury in terms of "transactions," rather than "offenses," and it may not omit the words "recent" and "similar." *Villanueva v. State*, 768 S.W.2d 900, 902-03 (Tex. App.-San Antonio – 1989, *pet. ref'd*).

Failure to timely and properly request a limiting instruction may constitute ineffective assistance of counsel. *Ex parte Santiago*, 45 S.W.3d 627 (Tex Crim App. 2001). Trial counsel filed an affidavit stating his failure was "simply an oversight" and not trial strategy.

5. Impeachment Evidence

On request, impeachment evidence must be limited to the purpose for which it was admitted. TEX. R. EVID., Rule 105. Therefore, where evidence is offered for a specific purpose, the party opposing its admission is entitled to a limiting instruction informing the jury of the limited purpose of the evidence. *Williams v. State*, 927 S.W.2d 752, 760 (Tex. App. – El Paso 1996, *pet. ref'd*). If a limiting instruction is to be given, it must be when the evidence is admitted to be effective. *Hammock v. State*, 46 S.W.3d 889, 894 (Tex. Crim. App. 2001); *but see Thompson v. State*, 752 S.W.2d 12, 14 (Tex. App. – Dallas, *pet. disp'd*) ("[w]hile the better practice appears to be to give the instruction at the time the evidence is admitted, our

concern is satisfied by the fact that the limiting instruction was given to the jury in the jury charge.").

6. Relationship Of The Parties

Article 38.26 of the Code of Criminal Procedure states in part "[i]n all prosecutions for murder, the state or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense." TEX. CODE CRIM PROC. Art. 38.36 (a). Article 38.36 "in no way broadens or otherwise affects the rules of evidence which apply, or the way in which they apply in any given homicide case." *Fielder v. State*, 756 S.W.2d 309, 318 (Tex. Crim. App. 1988). Before a court can admit evidence of an extraneous offense under Article 38.36 (a), it first must find the evidence relevant to a material issue other than defendant's character. *Hernandez v. State*, 914 S.W.2d 225, 232 (Tex. App. – Waco 1996, *no pet.*); *Werner v. State*, 711 S.W.2d 639 (Tex. Crim. App. 1986), modified on other grounds, *Hamel v. State*, 916 S.W.2d 491 (Tex. Crim. App. 1996); *Bush v. State*, 958 S.W.2d 503 (Tex. App. – Fort Worth 1997, *no pet.*); *Avila v. State*, 954 S.W.2d 830 (Tex. App. – El Paso 1997, *no pet.*)

In *Avila v. State*, 954 S.W.2d 830 (Tex. App. – El Paso 1997, *no. pet.*) the El Paso court held that Section 38.36 was not intended to allow expert testimony concerning the state of mind of defendant at the time of the offense unless such testimony related to the previous domestic relationship between the deceased and the accused. The testimony in this case was inadmissible because the expert doctor focused on the defendant's training with handguns and the effect of this training on the defendant's mental state in committing the crime, rather than on the relationship between the defendant and his wife. The Court ruled that the trial court properly excluded the testimony.

In *Osby v. State*, 939 S.W.2d 787 (Tex. App. – Fort Worth 1997, *no pet.*), the court said that in Article 38.36, the Legislature intended to codify former Section 19.06 and to codify *Fielder v. State*, 756 S.W.2d 309 (Tex. Crim. App. 1988) *Fielder* allowed expert testimony about the parties' former relationship where there was a history of domestic violence between the victim and the defendant.

Evidence admissible under Article 38.36 (a) may be nevertheless excluded under Rule of Evidence 404(b) or Rule of Evidence 403. Consequently, if a defendant makes a timely 404(b) or 403 objection, before a trial court can properly admit the evidence under Article 38.36 (a), it must first find the non-character conformity purpose for which it is proffered is relevant to a material issue. If relevant to a material

issue, the trial court must then determine whether the evidence should nevertheless be excluded because its probative value is substantially outweighed by the factors in Rule of Evidence 403. *Smith v. State*, 5 S.W.3d 673, 679 (Tex. Crim. App. 1999).

If evidence concerning the relationship of the accused and the deceased in a murder case is admitted in accordance with the law, then on request the jury should be given an instruction. 8 MCCORMICK AND BLACKWELL, CRIMINAL FORMS AND TRIAL MANUAL, (2003 Supplement 10th ed.).

7. Presumptions

A permissive presumption is merely an evidentiary device by which a jury is told that if the State proves "X" beyond a reasonable doubt, the jury may presume "Y". Permissive presumptions are constitutional. G. REAMEY, CRIMINAL OFFENSES AND DEFENSE IN TEXAS, 309 (1987). The penal code permits the use of permissive presumptions in connection with several offenses. *E.g.*, Tex. Penal Code Sec. 22.03(b) (deadly assault on peace officer - presumption of knowledge that person assaulted is a peace officer); Tex. Penal Code Sec. 22.05(b) (reckless conduct - presumption of recklessness and danger); Tex. Penal Code Sec. 31.03(c)(3) (theft presumption of knowledge); Tex. Penal Code Sec. 31.04(b) (theft of service - presumption of intent to avoid payment) Tex. Penal Code Sec. 31.04 (theft of service - presumption of timely notice).

"[I]f the existence of the presumed fact is submitted to the jury, the court shall charge the jury, in terms of the presumption and the specific element to which it applies, as follows:

- (A) that the facts giving rise to the presumption must be proven beyond a reasonable doubt;
- (B) that if such facts are proven beyond a reasonable doubt the jury may find an element of the offense sought to be presumed exists, but it is not bound to so find;
- (C) that even though the jury may find the existence of such element, the state must prove beyond a reasonable doubt each of the other elements of the offense charged; and
- (D) If the jury has a reasonable doubt as to the existence of a fact or facts giving rise to the presumption, the presumption fails and the jury shall not consider the presumption for any purpose." TEXAS PENAL CODE, section 2.05.

If the jury is instructed on a statutory presumption, it must also be instructed on the restrictions on the use of that presumption as provided by section 2.05. *e.g.*, *Jones v. State*, 658 S.W.2d 594 (Tex. Crim. App. 1983). It is error not to follow the requirements of § 2.05 of the Penal Code and instruct

the jury that they are free to reject the presumptions. *Goswick v. State*, 656 S.W.2d 68 (Tex. Crim. App. 1983); *Webber v. State*, 29 S.W.3d 226, 230-31 (Tex. App. – Houston [14th Dist.] 2000, *pet. ref'd*).

It is important to distinguish between statutory and non-statutory presumptions. Older cases have recognized a variety of non-statutory "presumptions", such as the presumption that theft was presumed from a nighttime entry. A prosecutor may argue that it is a reasonable deduction from the evidence that an entry at night is for the purpose of committing theft, but a trial court would err to charge the jury on a presumption that is not contained in the statutes or recognized in case law. To do so would be an impermissible comment on the weight of the evidence. *LaPoint v. State*, 750 S.W.2d 180 (Tex. Crim. App. 1986).

Some impermissible charges are: flight infers guilt, *Roberts v. State*, 866 S.W.2d 773 (Tex. App. – Houston [1st Dist.] 1993, *pet. ref'd*); breaking and entry at night raises a presumption of intent to commit theft, *Browning v. State*, 720 S.W.2d 504 (Tex. Crim. App. 1986); intent to kill can be inferred from the use of a deadly weapon, *Mercado v. State*, 718 S.W.2d 291 (Tex. Crim. App. 1986).

Additionally, the jury charge should not contain excerpts from judicial decisions or any statement that an appellate court has held the proof of "X" fact fulfills "Y" legal requirement. *Watts v. State*, 99 S.W.3d 604 (Tex. Crim. App. 2003).

8. Deadly Weapon

In a jury trial, the court may only enter a finding of the use of a deadly weapon where the jury makes an affirmative finding or where the jury finds the defendant guilty as alleged in the indictment and the indictment charges the use of a deadly weapon. *Edwards v. State*, 21 S.W.3d. 625 (Tex. App. – Waco 2000, *no pet.*). The State is not entitled to a charge authorizing an affirmative finding on the use of a deadly weapon unless the defendant has been given notice by indictment or otherwise of the alleged use of a deadly weapon. *Ex parte Patterson*, 740 S.W.2d 766 (Tex. Crim. App. 1987). A deadly weapon finding does not increase the range of punishment but only requires that the defendant serve at least one-half of his sentence before being eligible for release on parole. *See* TEX. GOV'T CODE ANN. § 508.145 (Vernon Supp. 2002).⁴⁸

9. Rules of Evidence.

The Texas Rules of Evidence Rule 105 states the following:

⁴⁸ See C.C.P art 42.12, Sections 3g for the other effects of a deadly weapon finding.

- (a) When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to, its proper scope and instruct the jury accordingly; but, in the absence of such request the court's action in admitting such evidence without limitation shall not be a ground for complaint on appeal.
- (b) When evidence referred to in paragraph (a) above is excluded, such exclusion shall not be a ground for complaint on appeal unless the proponent expressly offers the evidence for its limited, admissible purpose or limits its offer to the party against whom it is admissible. TEX. R. EVID. RULE 105.

Whether to give the limiting instruction when the evidence is offered or to submit the instruction in the jury charge, has been addressed by the Dallas Court of Appeals in *Thompson v. State*, 752 S.W.2d 12 (Tex. App.--Dallas 1988). The court held it would be a "better practice" to give the instruction at the time the evidence is admitted. The court, however, was satisfied with the instruction being given with the general charge. The Court of Criminal Appeals denied petition for review noting this "should not be construed as approval of the Court of Appeals' opinion." *Thompson v. State*, 795 S.W.2d 177, 178 (Tex. Crim. App. 1990). Judges Miller, Clinton, and Teague dissented, asserting that the "trial judge who decides not to follow this better practice in the future runs the risk of being reversed for abuse of discretion should an appellate court find that the failure to timely instruct the jury resulted in harm under Tex. R. App. Proc. 81(b)(2)...." *Id.* at 178.

In *Gone v State*, 54 S.W.3d 31 (Tex. App.—Texarkana 2001, *no pet*) a request for a limiting instruction was made prior to the testimony of an extraneous offense but the trial court said it would consider the request but did not rule. The request was renewed after the witness had testified but trial counsel did not have a written proposed instruction and his request was denied. Conviction affirmed based on an untimely request.

10. D.N.A. Instruction

Any instruction concerning the reliability of D.N.A. evidence would constitute a comment on the weight of the evidence because it singles out a particular piece of evidence. *Matamoros v. State*, 901 S.W.2d 470 (Tex. Crim. App. 1995).

11. Failure To Testify

The failure of a defendant to testify shall not be taken as a circumstance against him, or alluded to or commented on by counsel. Tex. Code Crim. Proc. art. 38.08. Furthermore, a trial court has a constitutional obligation, upon proper request, to instruct the jury to draw no inference of guilt from the defendant's decision not to testify. *Carter v. Kentucky*, 450 U.S. 305 (1981). If a defendant chooses not to testify at the punishment phase of the trial, this charge must be again given to the jury. *Moss v. State*, 632 S.W.2d 344 (Tex. Crim. App. 1982).⁴⁹ This charge is required even when the defendant declines to attend the entire trial and fails to appear. *Vasquez v. State*, 680 S.W.2d 626 (Tex. App.--Corpus Christi 1984, *no pet.*).

The failure to give the no-inference charge involves federal constitutional rights, and therefore, the harm is not determined by *Almanza*, but rather by the harmless beyond a reasonable doubt standard set forth in *Chapman v. California*, 386 U.S. 18 (1967). *Beathard v. State*, 767 S.W.2d 423 (Tex. Crim. App. 1989) under the limited facts of the case applied the harmless beyond a reasonable doubt standard. If the defendant objects to the no-inference charge being given, the giving of the charge does not violate the federal constitution, but the Court of Criminal Appeals has "admonished trial judges to omit such an instruction when requested by the defense to do so." *Rogers v. State*, 486 S.W.2d 786, 788 (Tex. Crim. App. 1972).

12. Expert Witnesses

In *Russell v. State*, 749 S.W.2d 77 (Tex. Crim. App. 1988), the trial court erred in giving an instruction on the testimony of an expert witness. In Texas, unlike in federal court, it is improper to single out and comment on certain testimony. "The probable effect of the instruction was to lead the jury to believe that there was more question as to the credibility of [the expert], the sole expert witness, than as to that of the other witnesses. Thus the neutral instruction when taken in the context in which it was given was very capable of being construed by the jury as some kind of indirect standard for weighing the evidence endorsed by the trial court." *Id.* at 80.

13. Character Witnesses

Federal courts typically instruct the jury regarding character evidence similar to the following:

⁴⁹ Defendant waives the right to "no-adverse-influence" instruction, which is warranted when the defendant elects not to testify at the punishment state of trial, unless either a request is made to the trial court to add the instruction to its charge at the punishment stage or objection is made to its omission. *Castaneda v. State*, 852 S.W.2d 291 (Tex. App. – San Antonio 1993, *no pet.*).

In this case the defendant has offered evidence that he has a good reputation for being a peaceable and law-abiding citizen in the community in which he lives. Such evidence may be considered along with all the other evidence in this case. Character evidence alone may create reasonable doubt as to the defendant's guilt. See Michelson v. United States, 335 U.S. 469 (1948); Darland v. United States, 626 F.2d 1235 (5th Cir. 1980).

Such an instruction is not required in state court. *Saunders v. State, 572 S.W.2d 944 (Tex. Crim. App. 1978).*

14. Circumstantial Evidence

The trial court is no longer required to instruct the jury on how circumstantial evidence is to be considered. *Hankins v. State, 646 S.W.2d 191 (Tex. Crim. App. 1981).*

15. Co-Conspirator Hearsay

The rules of evidence leave questions of admissibility of evidence to the court rather than the jury. Tex. R. Crim. Evid. 104(a). Since admissibility is now for the court, the question of co-conspirator hearsay need no longer be submitted to the jury. *Cassillas v. State, 733 S.W.2d 158 (Tex. Crim. App. 1986).* Formerly, when testimony was admitted under the co-conspirator exception to the hearsay rule, the defendant was entitled to an instruction to the jury that it should disregard this evidence unless it found that the hearsay acts or declarations were made during the course and in furtherance of the conspiracy to which the defendant belonged.

16. Common-law Marriage

The existence of an informal marriage may be proven in a judicial proceeding in one of two ways. There can be a showing that a declaration of marriage has been signed. If there is no declaration, there must be evidence that the man and woman first agreed to be married and then lived together in Texas as husband and wife while representing to others that they were married. TEX. FAM. CODE. §2.401 (a)(1)(2) (Vernon 1998). The trial court's finding whether a common-law marriage exists is not determinative. "The proper procedure would have been the one appellant requested, to submit the issue to the jury, with an instruction to disregard the witness's testimony if they found she was the common-law wife of the appellant. The existence of a common-law marriage is an issue of fact to be determined by the trier of fact." *Aguilar v. State, 715 S.W.2d 645 (Tex. Crim. App. 1986).* The evidence must raise the issue, and appellant must properly request an instruction. *Id.* at 647.

The issue of common law marriage usually arises in the area of privilege. Under the rules of evidence the spouse of the accused has a privilege not to be called as a witness for the State. This privilege does not extend to matters occurring prior to the marriage. *Colburn v. State, 966 S.W.2d 511, 514 (Tex. Crim. App. 1996).* Under Rule 504 only the spouse called to testify may assert the privilege and the spouse's testimony cannot be stopped by the defendant. *Janecka v. State, 937 S.W.2d 456, 472 (Tex. Crim. App. 1996), cert. denied, 522 U.S. 825, 118 S.Ct. 86, 139 L.Ed.2d 43 (1997).*

17. Penal Code Objectives

A trial court in its discretion may give instructions on the objectives of the Penal Code contained in § 1.02 . . . When the court chooses to give such jury instructions it should instruct on all the statutory objectives, and not merely on some of them. *Teague v. State, 703 S.W.2d 199, 203 (Tex. Crim. App. 1986).* Therefore it is not error to charge on *all* the objectives of the penal code. *Id.*

The trial court does err in not including all of the objectives set forth in the code, but, in absence of a timely objection, reversal is not required unless there is "egregious harm." *Cane v. State, 698 S.W.2d 138 (Tex. Crim. App. 1985).*

The objectives of the penal code are:

- (1) to insure the public safety through:
 - (A) the deterrent influence of the penalties hereinafter provided;
 - (B) the rehabilitation of those convicted of violations of this code; and
 - (C) such punishment as may be necessary to prevent likely recurrence of criminal behavior.
- (2) by definition and grading of offenses to give fair warning of what is prohibited and of the consequences of violation;
- (3) to prescribe penalties that are proportionate to the seriousness of offenses and that permit recognition of differences in rehabilitation possibilities among individual offenders;
- (4) to safeguard conduct that is without guilt from condemnation as criminal;
- (5) to guide and limit the exercise of official discretion in law enforcement to prevent arbitrary or oppressive treatment of persons suspected, accused or convicted of offenses; and
- (6) to define the scope of state interest in law enforcement against specific offense and to

systematize the exercise of state criminal jurisdiction.⁵⁰

18. Intoxilyzer

A defendant is entitled to an instruction that the jury could consider intoxilyzer results only if it found beyond a reasonable doubt that the testifying officer complied with the Department of Public Safety Regulations. *Atkinson v. State*, 934 S.W.2d 896 (Tex. App.--Fort Worth 1996, *no pet.*). The defendant is entitled to this instruction under art. 38.23 of the Texas Code of Criminal Procedure as long as the requested instruction does not specifically point out what rules were possibly violated. This decision was reached on remand. See *Atkinson v. State*, 923 S.W.2d 21 (Tex. Crim. App. 1996) for discussion of applicable law. *Garcia v. State*, 874 S.W.2d 688 (Tex. App.--El Paso 1993, *pet. ref'd*).

19. Judicial Notice

The Texas Rules of Evidence provides that a trial court may take judicial notice of certain adjudicated facts. The Rules further provide that the trial court may instruct the jury it may, but is not required to, accept as conclusive any fact judicially noticed.

The Court of Criminal Appeals in *Emerson v. State*, 880 S.W.2d. 759 (Tex. Crim. App. 1994) took judicial notice that the underlying theory of the Horizontal Gaze Nystagmus test is reliable and the technique designed and promoted by N.H.T.S.A. is a reliable indicator of the possibility of intoxication. In a DWI case tried in Williamson County, where the crucial evidence was the HGN testimony, the trial court gave the following instruction over defense objection:

You are instructed that the Court has taken judicial notice of the fact the underlying theory (of) the Horizontal Gaze Nystagmus (HGN) test is sufficiently reliable. The Court has also taken judicial notice of the fact that the technique employed in the HGN test, as designed and promoted by N.H.T.S.A. is a reliable indicator of intoxication, You are instructed that you may, but are not required to, accept as conclusive any fact judicially noticed.

The case was reversed on appeal based on the fact the court's charge constituted an improper comment on the weight of the evidence. *O'Connell v. State*, 17 S.W.3d 746 (Tex. App.—Austin 2000, *no pet.*). The Court of Criminal Appeals in *Matamoros v. State*, 901 S.W.2d. 470 (Tex. Crim. App. 1995) held it was an improper comment upon the weight of the evidence to

single out a particular piece of evidence for special attention. In that case the issue was the reliability of DNA testing. See also: *Zani v. State*, 785 S.W.2d. 233 (Tex. Crim. App. 1988).

20. Impeachment Evidence

Normally, when testimony is offered and admitted for impeachment purposes only, it should be limited in the court's charge. *Adams v. State*, 862 S.W.2d 139 (Tex. App. – San Antonio 1993, *pet. ref'd*). If the impeachment testimony could have been admitted for both impeachment and as direct evidence, no limiting instruction is required. *Id.*

K. Reasonable Doubt and Presumption of Innocence

The Texas Penal Code sets out the requirement of proof of criminal charges beyond a reasonable doubt:

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 to guilt at his trial. PENAL CODE § 2.01; *See also*, CODE CRIM. PROC. Art. 38.03.

The beyond a reasonable doubt standard is a requirement of due process, but neither the Constitution nor the Penal Code explicitly requires that the term be defined as a matter of course in jury instructions, so long as the jury is instructed on the necessity that the defendant's guilt be proven beyond a reasonable doubt. *See Victor v. Nebraska*, 511 U.S. 1, 5, 114 S.Ct. 1239, 1243, 127 L. Ed. 583 (1994); TEX. PENAL CODE § 2.01 (Vernon 1994).

In *Geesa v. State*, 820 S.W.2d 154, 162 (Tex. Crim. App. 1991) the Court of Criminal Appeals defined reasonable doubt. The Court stated that the instruction is to be given "in all criminal cases, even in the absence of an objection or request by the State or the defendant, whether the evidence be circumstantial or direct." *Id.* However, in *Paulson v. State*, 28 S.W.3d 570 (Tex. Crim. App. 2000), the Court of Criminal Appeals decided to overrule that portion of *Geesa* which required the definitional instruction on reasonable doubt. The Court of Appeals then concluded "[w]e find that the better practice is to give no definition of reasonable doubt at all to the jury. On the other hand, if both the State and the defense were to agree to give the *Geesa* instruction to the jury, it would not constitute reversible error for the trial court to acquiesce to their agreement." *Paulson*, at 573. In the absence of an agreement between the State and the defense, it has been held that it was not reversible error

⁵⁰ TEX. PENAL CODE § 1.02.

for the trial court to include the instruction. *Jackson v. State*, ___ S.W.3d ___, No. 14-02-00465-CR. (Tex. App. – Houston [14th Dist.] delivered May 1, 2003) citing *Minor v. State*, 91 S.W.3d 824, 829 (Tex. App. – Fort Worth 2002, *pet. filed*); *Brown v. State*, 91 S.W.3d 353, 358 (Tex. App. – Eastland 2002, *no pet.*); *Carriere v. State*, 84 S.W.3d 840, 844 (Tex. App. – Dallas 2002, *pet. ref'd*). *But see Rodriguez v. State*, 96 S.W.3d 719, 721 (Tex. App. – Austin 2002, *pet. ref'd*) (holding it was error to include *Geesa* reasonable doubt instruction, but concluded such error was harmless); *Phillips v. State*, 72 S.W.3d 719, 721 (Tex. App. – Waco 2002, *pet. ref'd*) (holding it was error to include *Geesa* reasonable doubt instruction in absence of agreement between State and defense, but such error did not cause harm); *Colbert v. State*, 56 S.W.3d 857, 859 (Tex. App. – Corpus Christi 2001, *pet. granted*) (holding that in an absence of agreement by State and defendant to include *Geesa* instruction such instruction to jury constitute reversible error.)

Although the definitional portion of reasonable doubt may not be required, the charge is required to inform the jury that the State must prove its case beyond a reasonable doubt. The State's burden of proof need not be repeated in a separate and distinct manner as to each element of the crime. *McDonald v. State*, 911 S.W.2d 798 (Tex. App. – San Antonio 1995, *pet. dismissed*).

Though it is reversible error for trial court, over the objection of the defendant, to fail to charge on presumption of innocence, it was not error to fail to instruct that the information or indictment is not evidence of the defendant's guilt. *Garcia v. State*, 634 S.W.2d 888 (Tex. App. – San Antonio 1982, *no pet.*).

The trial court's jury charge regarding the presumption of innocence was proper, even though it left out a sentence that "no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt," where the court included the sentence in an adjacent paragraph regarding burden of proof. *Jones v. State*, 859 S.W.2d 537 (Tex. App. – Houston [1st Dist.] 1993, *no pet.*)

L. Concluding Instructions

The concluding instructions may be worded in a number of different ways depending upon the court. An example of a concluding instruction is set forth below.⁵¹

A grand jury indictment is the means whereby a defendant is brought to a trial in a felony prosecution. It is not evidence of guilt nor can it be considered by you in passing upon the issue of guilt of the defendant. The

burden of proof in all criminal cases rests upon the State throughout the trial and never shifts to the defendant.

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. In case you have a reasonable doubt as to the defendant's guilt after considering all the evidence before you, and these instructions, you will acquit him and say by your verdict "Not Guilty."

You are the exclusive judges of the facts proved, the credibility of the witnesses, and the weight to be given their testimony, but the law you must be governed by you shall receive in these written instructions.

After you retire to the jury room, you should select one of your members as your Foreperson. It is his duty to preside at your deliberations, vote with you, and, when you have unanimously agreed upon a verdict, to certify your verdict by using the appropriate form attached hereto, and sign the same as Foreperson.

No one has any authority to communicate with you except the officer who has you in charge. During your deliberations in this case, you must not consider, discuss, nor relate any matters not in evidence before you. You should not consider nor mention any personal knowledge or information you may have about any fact or person connected with this case which is not shown by the evidence.

After you have retired, you may communicate with this court in writing through the officer who has you in charge. Do not attempt to talk to the officer who has you in charge, or the attorneys, or the court, or anyone else concerning any question you may have. After you have reached a unanimous verdict, the Foreperson will certify thereto by filling in the appropriate form attached to this charge and signing his name as Foreperson.

Garza v. State, 974 S.W.2d 251 (Tex. App. – San Antonio 1998, *pet. ref'd*) serves as a reminder that the concluding instructions should be carefully drafted. In *Garza* the appellant court assumed that the language "deliberate with a view of reaching an agreement" in the jury charge given at the guilt phase of the murder prosecution could have a coercive effect standing

⁵¹ See gen. Carpenter and McCormick, Texas Criminal Jury Charges.

alone, the remainder of the jury charge, including the admonishment that “no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict,” eliminated any potential for coercion.

M. Verdict Forms

The verdict form should set out each offense included in the charge. The offenses should be set out from the greater to the lesser charge. Each verdict form should have a place for the foreperson to sign indicating the jury’s verdict.

N. Request for Charge

A defendant is not entitled to have instructions worded exactly as she requests, as long as the charge correctly states the law and tracks the statute. *Thacker v. State*, 889 S.W.2d 380 (Tex. App. – Houston [14th Dist.] 1994, *pet. ref’d*) *cert. denied*, 561 U.S. 810, 116 S.Ct. 57, 133 L.Ed.2d 21 (1995), *denial of habeas corpus affirmed* 999 S.W.2d 56.). The trial court may refuse a requested instruction if the substance of the matter contained in the requested instruction is included in the court’s charge even if the requested instruction is a correct statement of law. *Riley v. State*, 802 S.W.2d 909 (Tex. App. – Ft. Worth 1991), *affirmed* 830 S.W.2d 584, (Tex. Crim. App. 1992).

The accused should not become entitled, because of argument error, to additional written jury instructions unless traditional remedies for argument error are constitutionally inadequate. *Anderson v. State*, 932 S.W.2d 502 (Tex. Crim. App. 1996, *reh. denied*) *cert. denied* 521 U.S. 1122, 117 S.Ct. 2517, 138 L. Ed.2d 1019 (1997).

If the prosecutor allows an erroneous charge to be submitted to the jury without objection, the prosecutor voluntarily shoulders the increased burden of proof allotted to it by such charge. *Williams v. State*, 864 S.W.2d 81 (Tex. App.- Tyler 1993, *pet. ref’d*).

A special instruction is not necessary where the requested instruction merely emphasizes an element of the case, which the state is required to prove, and which the defendant affirmatively denies. *Campbell v. State*, 626 S.W.2d 91 (Tex. App. – Corpus Christi 1981, *no pet*).

O. Supplemental Instructions

Trial court’s admonishment to jury not to insert the clip into the gun when inspecting the gun was not required to be in writing. The admonishment was a safety precaution and not law applicable to the case. *Rosillo v. State*, 953 S.W.2d 808 (Tex. App. – Corpus Christi 1997, *pet. ref’d*).

VII. CHARGE ON PUNISHMENT

A. Law Of Parole

The legislature re-enacted article 37.07, section 4, requiring the trial court inform the jury on the law of parole, this time making its effect contingent on the passage of a constitutional amendment which gives the legislature "authority to enact parole laws and laws that permit courts to inform juries about the effect of good conduct time and eligibility for parole or mandatory supervision on the period of incarceration served by a defendant convicted of a criminal offense." Tex. S.J. Res. 4, 71st Leg. (1989). The passage of the constitutional amendment has accomplished its desired goal. The Court of Criminal Appeals in *Oakley v. State*, 830 S.W.2d 107 (Tex. Crim. App. 1992), held the instruction is constitutionally valid.

Defendants who are not eligible for good time credit have objected to the jury being instructed on the parole laws. Their objections have fallen on deaf ears based on a judicial belief that good conduct will be a factor in the actual granting of parole. *Felan v. State*, 44 S.W.2d 249 (Tex. App.—Ft. Worth 2001, *pet. ref’d*).

B. Affirmative Findings

1. Notice

An affirmative finding may not be made unless the defendant was given proper notice that the state would pursue an affirmative finding. *Ex parte Patterson*, 740 S.W.2d 766 (Tex. Crim. App. 1987). The notice must be in writing, and probably should be pled in the indictment, although it need not be so pled. *Luken v. State*, 780 S.W.2d 264 (Tex. Crim. App. 1989) held the affirmative finding or use of a deadly weapon must be supported by a written pleading, but does not require that it be pled in the indictment. Notice is given when the written pleading expressly alleges that the weapon is deadly, or when the weapon alleged is a deadly weapon per se. Further, "any allegation which avers a death was caused by a named weapon or instrument necessarily includes an allegation that the named weapon or instrument was, in the manner of its use ... capable of causing (since it did cause) death." *Ex parte Beck*, 769 S.W.2d 525 (Tex. Crim. App. 1989); *accord*, *Gilbert v. State*, 769 S.W.2d 535 (Tex. Crim. App. 1989)(allegation that the defendant caused serious bodily injury to complainant by placing him in hot liquid necessarily includes the allegation that the hot liquid was a deadly weapon); *Eason v. State*, 768 S.W.2d 312 (Tex. Crim. App. 1989)(allegation that defendant attempted to cause death with a named weapon necessarily includes allegation that weapon was deadly).

The defendant is only entitled to notice "in some form, that the use of a deadly weapon will be a fact issue at the time of trial." Sufficient notice was given although the state abandoned the count that alleged the

use of the deadly weapon, and proceeded on the remaining count. *Grettenberg v. State*, 790 S.W.2d 613 (Tex. Crim. App. 1990).

2. Finding

If the evidence shows that the defendant used or exhibited a deadly weapon during the commission of a felony offense, or during immediate flight therefrom, the trial court shall make an affirmative finding to that effect in the judgment. Tex. Code Crim. Proc. art. 42.12, section 3g(a)(2). The affirmative finding should be made by the appropriate trier of the facts, be it judge or jury. It is improper for the trial judge to make the affirmative finding when the jury is the trier of the facts. *Ex parte Campbell*, 716 S.W.2d 523 (Tex. Crim. App. 1986). When the jury is the trier of facts, an affirmative finding may be made in three ways.

1. First, “the trier of fact’s verdict on the indictment may constitute an affirmative finding” when the indictment itself alleges a deadly weapon. *Polk v. State*, 693 S.W.2d 391 (Tex. Crim. App. 1985);
2. Second, sometimes “an affirmative finding will arise as a matter of law” as when the instrument used is a *per se* deadly weapon, such as a pistol or firearm. *Id.*;
3. Third, the jury may make an affirmative finding through a deadly weapon special issue included in the charge. *Id.*

In *Davis v. State*, 897 S.W.2d 791 (Tex. Crim. App. 1995) the Court of Criminal Appeals held that “deadly weapon” language in a lesser-included manslaughter application paragraph is not sufficient to support a deadly weapon finding when the jury returns a guilty verdict on the lesser-included offense if the verdict form does not explicitly refer to the original indictment. However, in the recent case of *LaFleur v. State*, ___S.W.3d ___ (Tex. Crim. App. No. 1447-02, May 21, 2003) the Court of Criminal Appeals concluded that its reasoning in *Davis* was flawed. The Court now holds “that courts may look to the application paragraph of a lesser-included offense to determine if the expressly deadly weapon allegation in that portion of the jury charge matches the deadly weapon allegation in the indictment for the charged offense. If so, the trial court may enter a deadly weapon finding in the judgment based upon the jury’s verdict of guilt on the lesser-included offense. *Id.*”

3. Law of Parties

The language of the statute implies the defendant himself, not a party, must use or exhibit the weapon. “When the defendant is a party to the use or exhibition of a deadly weapon, there must be a specific finding by the trier of fact that the defendant himself used or

exhibited the deadly weapon.” *Travelstead v. State*, 693 S.W.2d 400 (Tex. Crim. App. 1985).

C. Conditions of Probation

Article 42.12, section 11(a) of the Texas Code of Criminal Procedure established 18 basic conditions of probation, which the trial court may, but is not obligated to, impose upon an individual granted probation. The granting of probation, and the conditions placed upon the defendant, are in the nature of a contract between the court and the defendant. Accordingly, the conditions of probation are not the concern of the jury in its recommendation, or non-recommendation on the issue of probation. The court is not required to instruct or charge the jury on the specific conditions available. If the court should so instruct, however, the instruction should include all relevant conditions and make it clear that the trial judge is not limited to imposing the enumerated conditions. *Murphy v. State*, 777 S.W.2d 44 (Tex. Crim. App. 1988); *Ellis v. State*, 723 S.W.2d 671 (Tex. Crim. App. 1986). The court must instruct the jury that in accordance with Article 42.12, Section 13(g), V.A.C.C.P. that they are authorized to recommend the defendant’s driver license not be suspended. *Hernandez v. State*, 842 S.W.2d 294 (Tex. Crim. App. 1992).

D. Failure To Testify

Even though the jury is given the no-inference instruction at the guilt phase, if the defendant does not testify at the punishment phase, and request an instruction, it must be repeated. *Brown v. State*, 617 S.W.2d 234 (Tex. Crim. App. 1981); *see Jannise v. State*, 789 S.W.2d 623 (Tex. App.--Beaumont 1990).

E. Unadjudicated Extraneous Offenses

A request that the jury should not consider extraneous offenses, admitted in the guilt/innocence stage for a limited purpose, in determining punishment is a proper limiting instruction and the trial court errs in not so instructing the jury. *Rodriguez v. State*, 781 S.W.2d 443 (Tex. App.--Fort Worth 1989, *pet. ref’d*); *See Crossman v. State*, 797 S.W.2d 321 (Tex. App.--Corpus Christi 1990, *no pet.*).

F. Penry Charge

In *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2943, 106 L. Ed. 2d 256 (1989) the United States Supreme Court held that the defendant was entitled to an additional special issue because the other special issues in the capital murder case placed beyond the effective reach of the jury the relevant mitigating qualities of the defendant’s evidence of mental retardation that rendered him unable at the time of the offense to appreciate the wrongfulness of his conduct or to conform his conduct to the law. *Penry*, 109 S. Ct. 2941. This evidence was relevant to mitigating

evidence because of the long-held belief by society “that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.” See *Penry* 109 S. Ct. 2947. The special issues placed the mitigating qualities of this evidence beyond the jury’s effective reach because it could not be determined for sure whether the jury could have given “appropriate” mitigating effect to the evidence in answering special issue one and the jury could have given the evidence only aggravating effect in answering special issue two. See *Johnson v. State*, 509 U.S. 350, 113 S.Ct. 2658, 2667-70, 125 L. Ed. 2d 290 (1993); *Penry*, 109 S. Ct. 2949.

In *Johnson*, the Supreme Court reaffirmed its prior decisions that in the context of a facial challenge, Texas law sufficiently limits the factfinder’s discretion in imposing the death penalty so it is not arbitrarily imposed, while Texas law also provides the factfinder sufficient discretion to give effect to a defendant’s “relevant mitigating evidence” in making an individualized assessment of whether the death penalty is appropriate. See *Johnson*, 113 S. Ct. at 2666-68, 2672. The Supreme Court also reaffirmed prior law that the States may constitutionally channel the factfinder’s consideration of “relevant mitigating evidence” so long as the States do not place this evidence completely beyond the factfinder’s effective reach. *Johnson*, 113 S. Ct. at 2669, 2672 (the court held the relevant mitigating evidence of Johnson’s youth was not placed beyond the factfinder’s effective reach in answering special issue two; therefore, Johnson was not entitled to a *Penry* charge.).

In *Richardson v. State*, 901 S.W.2d 941 (Tex. Crim. App. 1994) the court held appellant’s evidence of voluntary service and kindness to others, artistic and poetic talent, and religious devotions did not entitle him to a special *Penry* charge.

The court in *Norris v. State*, 902 S.W.2d 428, 447 (Tex. Crim. App. 1995) recognized *Penry* was not meant to require a jury to give possible effect to mitigating evidence in every conceivable manner in which the evidence might be relevant. The court stated *Penry* “requires us to determine ‘whether there is a reasonable likelihood that the jury has applied the challenged instruction[s] in a way that prevents the consideration of constitutionally relevant evidence.’” We should evaluate the instructions with a ‘commonsense understanding of the instruction[s] in the light of all that has taken place at trial.’” *Norris*, 902 S.W.2d at 447, citing *Johnson*, 113 S.Ct. at 2669-70.

G. Range Of Punishment

The Court of Criminal Appeals has recently addressed the standard for review when the jury is

improperly charged on the range of punishment. In *Cartwright v. State*, 833 S.W.2d 134 (Tex. Crim. App. 1992), the Court of Criminal Appeals disavowed the reasoning in *Uribe v. State*, 688 S.W.2d 534 (Tex. Crim. App. 1985) which authorized reversal of judgments merely because the jury was charged on a penalty range more severe than that authorized by law. In doing so the Court adopted an *Almanza* standard for review.

The trial court must instruct the jury that a possible punishment for a third degree felony can be confinement in a community correctional facility. The fact that a defendant is not eligible for placement as a condition of probation does not deprive him of the range of punishment set forth in section 12.34(a)(2) of the Texas Penal Code. *Tubert v. State*, 875 S.W.2d 323 (Tex. Crim. App. 1994). If there is not evidence that there is not a facility available, the court errs in instructing the jury concerning the unavailability. *Daniell v. State*, 848 S.W.2d 145 (Tex. Crim. App. 1993). *Blok, III v. State*, 986 S.W.2d. 389 (Tex. App.-Houston [1st. Dist.] 1999, *per ref’d*) held it to be harmless error to fail to instruct the jury on community correctional facilities. For third degree felonies committed after August 31, 1994 these facilities are no longer part of the punishment range.

In a kidnapping case, if the evidence raises the issue of releasing the victim in a safe place then the jury must be instructed in the punishment phase of the trial that the range of punishment is a second-degree felony. *Williams v. State* 851 S.W.2d 282 (Tex. Crim. App. 1993). After August 31, 1994, the burden of proof shifted to the defendant by a preponderance of the evidence thus overruling *Williams*.

H. Special Issues

1. Drug-free Zone

Since August 31, 1994, punishment has been enhanced for certain drug offense. These include delivery of the controlled substances in Penalty Groups 1-4 and marijuana. The state must plead and prove the offense was committed within one of the zones. The standard of proof is not set forth within the statute, but proof beyond a reasonable doubt would be the logical burden. Upon such a finding the minimum period of confinement and the maximum fine are doubled and the defendant must serve five years or the maximum sentence, whichever is less. Section 481.134 Texas Health and Safety Code.

2. Bias or Prejudice (hate crimes)

Since August 31, 1994, the punishment range may be increased by pleading and proving the victim was selected primarily because the defendant had a bias or prejudice against a particular person or group. An affirmative finding will enhance the punishment to the next highest level for all offenses except first-degree

felonies. Recent legislation establishes the burden of proof to be beyond a reasonable doubt. Section 12.47 Texas Penal Code & Article 42.014 Texas Code of Criminal Procedure provides that the trier of fact makes this determination.

3. Sudden Passion

Since August 31, 1994, the offense of Voluntary Manslaughter has been abolished. Procedurally if an individual is found guilty of Murder, then at the punishment phase the defendant must raise and prove by a preponderance of the evidence the offense was committed while under the immediate influence of sudden passion. If the jury makes such a finding, the punishment is reduced to a second-degree felony. Section 19.02 (d) Texas Penal Code. This statute has been held to be constitutional and not result in a shifting of the burden of proof. *Jones v. State*, 955 S.W.2d 438 (Tex. App.--Fort Worth 1997, *pet. ref'd*)

The Court of Criminal Appeals has held the issue of sudden passion is available in a case where the defendant has been found guilty of Attempted Murder. *Mims v. State*, 3 S.W.3d. 923 (Tex. Crim. App. 1999).

4. Release to a Safe Place

If a defendant is convicted of aggravated kidnapping the punishment was a second-degree felony if the victim was released in a safe place. It is the defendant's burden to raise the issue and prove it by a preponderance of the evidence. Section 20.04(d) Texas Penal Code.

5. Renunciation

The defendant has the burden to raise the issue and prove it by a preponderance of the evidence. Section 15.04 Texas penal Code.

I. Reasonable Doubt

The law governing the submission of the *definition* of reasonable doubt has been provided and does not require repeating. The purpose of placing this topic under the punishment phase is to serve as a reminder that there are a number of punishment issues that require *proof* beyond a reasonable doubt.

VIII. THE ALLEN CHARGE

The "dynamite" or "Allen" charge is a jury instruction given with the intent of persuading an apparently deadlocked jury to reconsider the evidence and attempt to reach a verdict. *Allen v. United States*, 164 U.S. 492 (1886). The American Bar Association has recommended that the charge should be abandoned, but at the present time the Allen charge is an accepted part of Texas jurisprudence. See American Bar Association, Standards Relating to Trial By Jury, section 5.4 (Approved Draft 1968); *Arrevelo v. State*, 489 S.W.2d (Tex. Crim. App. 1973). The

charge must be given in writing, and over a proper objection, it is error for the trial court to orally instruct the jury. *Edwards v. State*, 558 S.W.2d 452 (Tex. Crim. App. 1977).

Article 36.16 of the Texas Code of Criminal Procedure provides that no further charge shall be given to the jury after argument "unless required by improper argument of counsel or the request of the jury." In *Jackson v. State*, 753 S.W.2d 706 (Tex. App.-San Antonio 1988, *pet. ref'd*), a jury note stating it was "unable to come to unanimous verdict" did not amount to a request for further instruction and the giving of an Allen charge was deemed to be reversible error.

IX. PRESERVATION OF ERROR

A. Three Ways To Object

Objections to the charge may be made in three different ways:

1. in writing, distinctly specifying each ground of objection. Tex. Code Crim. Proc. art. 36.14.
2. orally, if the objection is dictated to the court reporter. Tex. Code Crim. Proc. art. 36.14.
3. by presenting written special requested instructions. Tex. Code Crim. Proc. art. 36.15.

If a defendant requests a special charge, no objection to the court's failure to include is required to preserve error. *Vasquez v. State*, 919 S.W.2d 433 (Tex. Crim. App. 1996). If the requests are lengthy so as to not fairly apprise the court of the specific request, error may be waived. *Arana v. State*, 1 S.W.3d 824 (Tex. App.—Houston [14th Dist] 1999, *pet. ref'd*). The best practice is to submit requests and also dictate objections into the record.

B. Apprising The Court of Error

The purpose of special requested instructions is to call the trial court's attention to error or omission in the court's charge. In *Stone v. State*, 703 S.W.2d 652 (Tex. Crim. App. 1986), the requested instruction was "clearly incorrect" and misstated the law. Despite its shortcomings it was obvious, however, that the trial court understood the nature of the objection. Because "the trial court was apprised of appellant's objection to omissions in the charge," the requested instruction, although improper, was sufficient to preserve error. *Id.* at 655. In *Jackson v. State*, 646 S.W.2d 225 (Tex. Crim. App. 1983), the requested charge on mistake of fact, though not drafted in terms of the statute, was sufficient. *But see Pennington v. State*, 697 S.W.2d 387 (Tex. Crim. App. 1985)(objections not "distinctly specified"); *Turner v. State*, 726 S.W.2d 140 (Tex. Crim. App. 1987)(objection "far too general and ambiguous"); *Black v. State*, 723 S.W.2d 674 (Tex. Crim. App. 1986)(failure to properly apply the law to

the facts was held to be insufficient to apprise the court of error).

In *Hackbarth v. State*, 617 S.W.2d 944 (Tex. Crim. App. 1981) the defendant's objection to the charge which stated "That the defendant objects and excerpts to the Court's charge as a whole as the same is not sufficient to protect the rights of the defendant" was not specific enough to appraise the court of the nature of his complaint with regard to the charge and thus presented nothing for review.

C. Invited Error

"You don't always get what you want," but if you get it, you cannot complain on appeal. *Gutierrez v. State*, 659 S.W.2d 423 (Tex. Crim. App. 1983); *Ayers v. State*, 606 S.W.2d 936 (Tex. Crim. App. 1980).

D. Timeliness

The court will presume objections are timely filed when they are filed marked the same day as the jury charge, and they are specifically denied. *McCloud v. State*, 527 S.W.2d 885 (Tex. Crim. App. 1975). To constitute a valid objection, the objection must be specific and clear enough to apprise the trial court of the nature of the objection. *Wells v. State*, 634 S.W.2d 868 (Tex. App. – Houston 1982, *pet. ref'd*)

E. Presentation

Mere timely filing of objections or requests will not preserve error. They must be presented to the trial court for ruling. *DeBlanc v. State*, 799 S.W.2d 701 (Tex. Crim. App. 1990).

F. Reasonable Time to Examine the Charge

The defendant and counsel are entitled to a reasonable time to examine the charge for the purpose of making objections and submitting requested instructions. Tex. Code Crim. Proc. arts. 36.14 & 36.15. The trial court will abuse its discretion and commit reversible error in denying counsel a reasonable time to examine the charge. *Gill v. State*, 521 S.W.2d 866 (Tex. Crim. App. 1975); *Lewis v. State*, 744 S.W.2d 377 (Tex. App.- Fort Worth 1988, *no pet.*);

In *Evans v. State*, 876 S.W.2d 459 (Tex. App. – Texarkana 1994, *no pet.*) the trial court did not abuse its discretion in allowing only 25 minutes for defense counsel to review a seven page jury charge before it was read to the jury.

X. JURY NOTES

Communications between the court and the jury should always be in writing. Before the court responds to a jury note, the court must "use reasonable diligence to secure the presence of the defendant and his counsel" to permit objections to the communication, if any. The written answer must be read in open court,

unless waived by the defendant. Tex. Code Crim. Proc. art. 36.27.

Before testimony can be read back to the jury, the jury must have a disagreement concerning a particular issue. In *Moore v. State*, 856 S.W.2d 502 (Tex. App.--Houston [1st Dist.] 1993), *aff'd*, 874 S.W.2d 671 (Tex. Crim. App. 1994) the court erred in causing trial testimony to be read without ascertaining that the jury disagreed as to the testimony. A question from the jury inquiring if a certain witness testified in a certain way does not indicate a specific disagreement so as to authorize the court to have testimony read back to the jury. *Degraff v. State*, 962 S.W.2d 596 (Tex. Crim. App. 1998).

If the jury informs the court that there is disagreement about a particular point of a witness' testimony, the judge may order that particular testimony read back, but no other. Tex. Code Crim. Proc. art. 36.28. In *Pugh v. State*, 376 S.W.2d 760 (Tex. Crim. App. 1964); the court committed reversible error by reading back more than that requested by the jury note, thus bolstering the state's case, and denying the appellant a fair trial. However, in fairness, both direct and cross-examination of the witness may be required. In *Jones v. State*, 706 S.W.2d 664 (Tex. Crim. App. 1986), the jury note expressly requested the prosecutor's question of a witness on a particular point. The court held it to error not to read both the direct and cross-examination of the witness's testimony upon the request of defendant's counsel. *Id.* at 668. The Court of Criminal Appeals has held the standard to determine error is whether or not the trial court has abused its discretion. *Brown v. State*, 870 S.W.2d 53 (Tex. Crim. App. 1994). Article 36.14 of the Texas Code of Criminal Procedure does not authorize the judge to give instructions with regard to factual matters, but only as to the applicable law. The trial court erred in responding to a jury question that there were no "correctional facilities available in Hill County." *Daniell v. State*, 848 S.W.2d 145 (Tex. Crim. App. 1993).

XI. AMENDING JURY INSTRUCTIONS

Article 36.16 of the Texas Code of Criminal Procedure does not authorize a trial judge to amend the jury charge after the jury has been read the charge. In *Moore v. State*, 848 S.W.2d 920,921 (Tex. App.--Houston, 1993, *pet. ref'd*) the court held the trial court erred in amending the jury instructions to add the law of parties after the jury had been instructed and final summations of counsel had been concluded. The charge is not considered submitted until the judge has finished reading the charge, even in the situation where the court has submitted copies of the charge to the jury. *Garner v. State*, 957 S.W.2d 112 (Tex. App.--Amarillo 1997, *no pet.*).

Revell v. State, 885 S.W.2d 206 (Tex. App.--Dallas 1994, *pet. ref'd*) reaffirms the proposition that the trial court cannot communicate with the jury after it has commenced its deliberations. The trial court may communicate orally if counsel is notified and expresses no objection.

Wilbon v. State, 961 S.W.2d 9 Tex. App.--Amarillo 1997, *pet. ref'd*) held an instruction that the jury should not consider parole was a clarifying measure and proper.

XII. READING THE CHARGE

Although the law contemplated that the trial court will read the charge to the jury, when a clerk reads the charge to the jury and the defendant fails to object and fails to establish harm the case will not be reversed. *Cardova v. State*, 698 S.W.2d 107 (Tex. Crim. App. 1985) *cert. denied*, 476 U.S. 1101, 106 S.Ct. 1942, 90 L. Ed. 352 (1986).

XIII. APPELLATE REVIEW – ALMANZA V. STATE

A. The Holding In Almanza.

Almanza v. State, 686 S.W. 2d 157 (Tex. Crim. App. 1984) re-examined over a century of case law concerning the issue of fundamental error in the jury charge. The importance of *Almanza* is that it provides the appellate standard to determine whether a particular charge, or lack thereof, constitutes reversible error. The court set forth the standard as follows:

After researching Texas statutory and decisional law from 1857 forward, we have concluded that Article 36.19 actually separately contains the standards for both fundamental error and ordinary reversible error. If the error in the charge was the subject of a timely objection in the trial court, then reversal is required if the error is "calculated to injure the rights of the defendant". In other words, an error, which has been properly preserved by objection, will call for reversal as long as the error is not harmless.

On the other hand if no proper objection was made at trial, and the accused must claim that the error was "fundamental", he will obtain a reversal only if the error is so egregious, and created such harm, that he "has not had a fair and impartial trial"--in short "egregious harm."

In both situations the degree of harm must be assayed in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel and any other relevant information revealed by the

record of the trial as a whole. *Id.* at 171. *See, Hutch v. State*, 922 S.W.2d 166 (Tex. Crim. App. 1996).

Therefore, if a proper objection is made reversal is required if there is "some harm", and if there was not a proper objection there must be "egregious harm". However, if counsel affirmatively endorses the jury charge then even fundamental error is waived. *Reyes v. State*, 934 S.W.2d 819 (Tex. App.--Houston [1st Dist.] 1996, *pet. ref'd*).

B. Proper Objection: "Some Harm"

When a proper objection is made, "some harm" must be demonstrated to require a reversal. This phrase was defined in *Arline v. State*, 721 S.W.2d 348 (Tex. Crim. App. 1986) as the presence of "any harm, regardless of degree, which results from preserved charging error." Cases involving preserved charging error will be affirmed only if no harm has occurred. *Id.* at 351; *accord, Hayes v. State*, 728 S.W.2d 804 (Tex. Crim. App. 1987). Article 38.15 does not require an instruction in perfect form to preserve error. *Chapman v. State*, 921 S.W.2d 694 (Tex. Crim. App. May 1996).

Cases demonstrating "some harm" are the following:

- a. *Mistake of Fact: Hill v. State*, 765 S.W.2d 794 (Tex. Crim. App. 1989).
- b. *Law of Parties: Scott v. State*, 768 S.W.2d 308 (Tex. Crim. App. 1989); *Johnson v. State*, 739 S.W.2d 299 (Tex. Crim. App. 1987); *Scott v. State*, 701 S.W.2d 692 (Tex. App.--Fort Worth 1986), *aff'd*, 768 S.W.2d 308 (Tex. Crim. App. 1989).
- c. *Lesser Included Offense: Hayes v. State*, 728 S.W.2d 804 (Tex. Crim. App. 1987)(reckless conduct); *Gibson v. State*, 726 S.W.2d 129 (Tex. Crim. App. 1987)(involuntary manslaughter); *Chamberlin v. State*, 704 S.W.2d 801 (Tex. App.--Dallas 1985, *no pet.*)(robbery); *Mitchell v. State*, 807 S.W.2d 740 (Tex. Crim. App. 1991)(burglary).
- d. *Accomplice Witness: Burns v. State*, 703 S.W.2d 650 (Tex. Crim. App. 1985).
- e. *Sudden Passion: Lawson v. State*, 775 S.W.2d 495 (Tex. App.--Austin 1989, *pet. ref'd*).
- f. *Deception: MacDougall v. State*, 702 S.W.2d 650 (Tex. Crim. App. 1986).
- g. *Constructive Transfer: Ruiz v. State*, 766 S.W.2d 324 (Tex. App.--Houston [14th Dist.] 1989, *pet. ref'd*).
- h. *Self-Defense: Holman v. State*, 730 S.W.2d 884 (Tex. App.--Fort Worth 1987, *no pet.*).
- i. *Provoking the Difficulty: Menchaca v. State*, 697 S.W.2d 857 (Tex. App.--San Antonio 1985, *no pet.*).

- j. *Voluntary Conduct: Whitehead v. State*, 696 S.W.2d 221 (Tex. App.--San Antonio 1985, *pet. ref'd*).
- k. *Limiting Instruction: Abdnor v. State*, 871 S.W.2d (Tex. Crim. App. 1994).

C. No Objection: "Egregious Harm"

"Egregious harm" is much like pornography; it is usually not clearly definable, but the courts know it when they see it. The following cases are illustrative.

- a. *Daniels v. State*, 754 S.W.2d 214 (Tex. Crim. App. 1988)(indicted for actual delivery, charge on constructive delivery).
- b. *Ruiz v. State*, 753 S.W.2d 681 (Tex. Crim. App. 1988)(sudden passion not in application paragraph in murder charge). (Only applies to pre September 1, 1994 cases).
- c. *Bellamy v. State*, 742 S.W.2d 677 (Tex. Crim. App. 1987)(presumption of knowledge charge in theft case).
- d. *Ellis v. State*, 723 S.W.2d 671 (Tex. Crim. App. 1986)(applicable conditions of probation omitted).
- e. *Castillo-Fuentes v. State*, 707 S.W.2d 559 (Tex. Crim. App. 1986)(failure to place burden of proving sudden passion on the state). (Only applies to pre September 1, 1994 cases).
- f. *Irizarry v. State*, 916 S.W.2d 612 (Tex. App.--San Antonio 1996, *pet. ref'd*).(Conviction of murder charge, then no charge of aggravated assault required.)
- g. *Land v. State*, 943 S.W.2d 144 (Tex. App.--Houston [1st Dist.] 1997, *no pet.*)(Egregious harm standard applies to unrequested jury instructions). If the matter is a defensive issue it is not "charge error" and *Almanza* does not apply. *Posey v. State*, 988 S.W.2d 899 (Tex. Crim. App. 1998). This opinion held that the trial court was under no responsibility to sua sponte instruct the jury on a defensive issue. Art 36.14 imposes a duty to charge on law "applicable to the case"and this court held a "defensive issue was not "law applicable to the case" unless requested or the omission is objected to by counsel.

D. When *Almanza* Does Not Apply

1. Non-testifying Defendant

A non-testifying defendant is entitled to an instruction that the jury draws no inference from his failure to testify. Failure to give such an instruction involves federal constitutional rights and harm is

determined, not by *Almanza*, but instead, by the harmless beyond a reasonable doubt standard articulated in *Chapman v. California*, 386 U.S. 18 (1967). *Beathard v. State*, 767 S.W.2d 423 (Tex. Crim. App. 1989).

2. Error may be waived

In *Arana v. State*, 1 S.W.3d 824 (Tex. App.—Houston[14th Dist.] 1999, *no pet.*) the defendant and the state presented written requested instructions. The court submitted the state's request that did not contain an instruction concerning the defendant not testifying and defense counsel did not object. Conviction affirmed error waived.