CRIMINAL LAW

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Chapter 1

PROCESS AND PURPOSES

This course has to do with the *substantive* criminal law. Substantive criminal law consists of that body of law which declares what conduct is criminal and prescribes the punishment to be imposed for such conduct.

This field of law includes not only the definition of specific offenses (e.g., murder, robbery, rape), but also a good many general principles of liability. Those general principles, which receive primary emphasis in this Book, are of two types. One, represented by the principles that an insane person cannot be guilty of a crime, or that one coerced into committing what would otherwise be criminal conduct cannot be guilty of most crimes, has to do with *defenses to liability*. The second concerns principles of the *affirmative liability* sort—for example, those having to do with accomplice liability (who, other than the person who pulled the trigger, may be convicted of a murder?) or with the "inchoate crimes" of attempt, conspiracy and solicitation.

The criminal justice process consists of that series of procedures through which the substantive criminal law is enforced. In the typical law school curriculum, that process is the subject of intense study in one or more courses often labeled *criminal procedure*. It is important, however, that students commencing their study of substantive criminal law have at least a general appreciation of how the criminal justice process is structured and how it operates. One of the objectives of this Chapter is to provide a general overview of the steps in the criminal justice process.[a]

Broadly stated, the purpose of the substantive criminal law and of the criminal justice process is to prevent people from doing what society considers to be undesirable. But, exactly how does the criminal law, with its threat of punishment to violators, operate to influence human conduct away from the undesirable and toward the desirable? There are a number of theories of punishment, and each theory has or has had its enthusiastic adherents. The choice of one theory over the others can have a profound effect upon one's view of what the sentence should be in a particular case, and also as to exactly how the sentencing step in the criminal justice process should be structured. These matters are considered in Section 2 of this Chapter.

a. There is, of course, no single criminal justice system in this country. The United States consists of 51 jurisdictions (federal, plus the individual states), and thus it is fair to say that there are many systems which are quite similar but yet have individual uniqueness. Because that is so and because the description which follows is necessarily brief, some degree of overgeneralization is inevitable. The reader is forewarned.

SECTION 1. THE CRIMINAL JUSTICE PROCESS[b]

This section describes the major steps taken in the processing of a criminal case. The focus is on the processing of a "typical case" in a "typical jurisdiction" (i.e., those procedures employed by most states in processing most of their criminal cases). The processing of both felony and misdemeanor cases is covered, but primary concentration is upon felony cases.[c]

Step 1. The Report of the Crime. The criminal justice process usually starts with the event that brings to the attention of the police the possible commission of a crime, for that event commonly triggers the administrative steps that may lead to the eventual enforcement of the criminal law against the offender. It has been estimated that of all the crimes committed, substantially less than half are brought to the attention of the police.

Police learn about crimes from reports of citizens (usually victims), discovery in the field (usually observation on patrol), or from investigative and intelligence work. Where the police conclude a crime may well have been committed, it will be recorded as a "known offense." The longstanding tradition of police departments is to devote the vast bulk of their investigative efforts to solving "known offenses" and to at least initially attempt to investigate the vast majority of such offenses. Accordingly, the distribution of "known offenses" provides a fairly accurate general picture of the types of crimes that are investigated (albeit sometimes minimally) by police. The dominant offenses among the reported-crimes are those involving the taking or destruction of property (likely to approximate 50%), offenses relating to the use of alcohol or drugs, and assaults of various types. The most serious violent offenses (e.g., robbery, rape, aggravated assault, and homicide) are likely to constitute as a group no more than 7% of all reported crimes.

Step 2. Prearrest Investigation. (a) On–Scene Arrests. A substantial percentage of arrests for a wide variety of crimes are made by police with little or no prearrest investigation. These are arrests made during the course of the crime or immediately thereafter either at the place where the crime occurred or in its immediate vicinity. Ordinarily, on-scene arrests will be based on the officer's own observation (leading to the alternative description of such arrests as "on-view"), although they will sometimes be based on the directive of a witness who has just viewed the crime. For some offenses, on-scene arrests typically are the product of prearrest investigative activities designed to place the police in a position where they will be able to view the crime as it is committed. That usually is the case, for example, with crimes which ordinarily involve willing participants, such as vice crimes or narcotics-transfer offenses. For other offenses, most on-scene arrests come about with basically no investigative activity beyond the immediate response to the event that calls the commission of the crime to the officer's attention. In these cases, a prompt response to a victim's call for assistance or a burglar alarm may place the officer in a position to make an arrest while the crime is in progress or immediately following its completion. So too, the officer may simply come across a crime, open to his view, in the course of regular patrol activities.

(b) Reactive Investigations. Where the police learn of the possible commission of a crime, but are not in a position to make an "on-scene" arrest, their responsibility then is to

b. The material in this section is abridged from Wayne R. LaFave, Jerold H. Israel & Nancy J. King, *Criminal Procedure* § 1.3 (3d ed.2000), where Prof. Israel has very effectively and thoroughly described these steps with greater precision and detail.

c. American jurisdictions commonly use one of two different standards in distinguishing between felonies and misdemeanors. Some classify as felonies all offenses punishable by a maximum term of imprisonment of more than one year; offenses punishable by imprisonment for one year or less are then misdemeanors. Others look to the location of the possible imprisonment: if the offense is punishable by incarceration in a penitentiary, it is a felony; if punishable only by a jail term, it is a misdemeanor.

"solve" that crime. This involves (1) determining whether there actually was a crime committed, (2) if so, determining who committed the crime, (3) collecting evidence of that person's guilt, and (4) locating the offender so that he can be taken into custody. Investigations directed at performing these crime-solving functions commonly are described as "reactive" or "retrospective" in nature because they focus on past criminal (or presumably criminal) activity. They reflect what is characterized as an "incident-driven" or "complaint-responsive" style of policing which has long dominated the deployment of police investigative resources. A wide variety of investigative activities may be utilized prearrest in the course of a reactive investigation. These include: (1) the interviewing of victims; (2) the interviewing of witnesses at the crime scene; (3) canvassing the neighborhood for (and interviewing) other witnesses; (4) the interviewing of suspects, which may require a physical stopping of the suspect on the street and a frisking of the suspect (i.e., pat-down of the outer clothing) for possible weapons; (5) the examination of the crime scene and the collection of physical evidence found there; (6) checking departmental records and computer files; (7) seeking information from informants; (8) searching for physical evidence of the crime (e.g., stolen property or weapons) in places accessible to the suspect (e.g., his home or automobile) and seizing any evidence found there; (9) surveillance of a suspect (including electronic surveillance) aimed at obtaining leads to evidence or accomplices; (10) using undercover operatives to gain information from the suspect.

Where the traces of the crime are very weak and the offense is not of an especially serious nature, the police are likely to terminate their investigation after having done little more than interview the victim and any other witnesses available at the scene. Police are aware that, for most crimes, the odds of arresting the offender are slim unless there are witnesses at the scene who can provide information that either specifically identifies the offender or makes that identification readily determinable. While the absence of such information from witnesses will not necessarily lead to an immediate termination of the investigation, it will certainly work against a substantial extension of the investigation (unless further steps are especially fruitful). The end result is that for a great many crimes, including even offenses as serious as burglary, very little is done besides interviewing the person reporting the crime.

On the other side, a prearrest investigation also may be ended without exploring all possible leads because the police feel that they have a sufficiently strong case without the corroboration that might be produced through further investigation. An eyewitness who can identify the offender provides a strong basis for an arrest, although not necessarily a strong case for conviction. The investigating officer in such a case may well seek (though not necessarily prearrest) the corroboration of an additional eyewitness or tangible physical evidence (e.g., the stolen property) that might tie the suspect to the offense. However, corroborating evidence is likely to be sought only up to a certain point. Thus, an officer with two or more eyewitnesses and corroborating physical evidence may well decline to explore further avenues for collecting evidence (e.g., latent fingerprints or secondary witnesses), especially if that would involve considerable effort and the offense is not extremely serious.

While the variation among investigations is far too great to characterize any single combination of investigative procedures as "average," even for a particular type of offense, it is clear that prearrest investigations rarely take on the characteristics of popular depictions of the crime solving process. In general, investigations do not involve the use of scientific methods of investigation, confrontations with crafty criminals, or reliance upon informants. A study of robbery and burglary investigations found, for example, that the interviewing of the victim and the examination of the crime scene were by far the most common steps in the process. Aside from the canvassing for and interviewing of additional witnesses, no other procedure was used in as many as a third of all cases.

(c) Proactive Investigations. General purpose police agencies, who employ over 85% of all full-time police officers in this country, devote the vast majority of their investigative efforts to the solving of known crimes. However, those agencies also have a long tradition of engaging as well in proactive investigations, and in recent years, many local police agencies have sought to make greater use of proactive investigative procedures. Also, many special-function police agencies (such as the federal Drug Enforcement Administration) traditionally have devoted a substantial portion of their resources to proactive investigations.

Proactive investigations are aimed at uncovering criminal activity that is not specifically known to the police. The investigation may be aimed at placing the police in a position where they can observe ongoing criminal activity that otherwise would both be hidden from public view and not reported (as typically is the case with offenses that prohibit the possession of contraband or proscribe transactions between willing participants). It may be aimed at inducing persons who have committed crimes of a certain type, including many unknown to the police, to reveal themselves (as in a "fencing sting"). Proactive investigations also often are aimed at anticipating future criminality and placing police in a position to intercept when the crime is attempted. Here, the investigative technique may be designed simply to gain information that will permit the police to predict when and where a crime is likely to be committed, or it may be designed to "instigate" or "induce" the criminal attempt at a particular time and place by creating a setting likely to spur into action those prone to criminality.

While deception is a common element of many proactive procedures, other proactive techniques rely on intrusive confrontations designed to place police in a position where they can observe what otherwise would be hidden or to elicit nervous or unthinking incriminatory responses that will provide a legal grounding for taking further investigative action (e.g., an arrest or stop). Thus, police following an aggressive motorized patrol strategy will fully utilize traffic laws to maximize stops of motorists, thereby gaining greater opportunity to peer into car windows, to ask questions, and to request consent to a search of the vehicle. Similarly, under a practice of heavy field interrogation, police will frequently approach pedestrians and initiate questions to determine who they are and what they are doing. Such intrusive confrontations are most often used on a selective basis, with police concentrating their efforts on those characteristics of the social environment that suggest to them possible criminality (e.g., high-crime neighborhood, suspicious class of persons, unusual behavior).

(d) Prosecutorial Investigations. For certain types of crimes, and with certain types of traces of crime, the best investigatory tool is the subpoena—a court order directing a person to appear in a particular proceeding for the purpose of testifying and presenting specified physical evidence (e.g., documents) within his possession. The subpoena authority generally is available for the investigation of crime only through the grand jury, which has authority to conduct investigations into the possible commission of crimes within the judicial district in which it sits. In carrying out this function, the grand jurors, being a group of laypersons with no special expertise in investigation, quite naturally rely heavily on the direction provided by their legal advisor, who is the prosecutor. Thus, grand jury investigations become, for all practical purposes, investigations by the prosecutor.

Compared to police investigations, grand jury investigations are expensive, time consuming, and logistically cumbersome. Accordingly, the grand jury investigation ordinarily is used by the prosecutor only in those special settings where a grand jury investigation has a distinctive advantage over a police investigation. Such an advantage is present: (1) where witnesses will not cooperate with the police (as they can be compelled by subpoena to testify before the grand jury and given immunity to replace their self-incrimination privilege should they refuse to testify on that ground); (2) where the critical

evidence of the crime is likely to be a "paper trail" buried in voluminous records of business dealings (as the subpoena can be used to require production of such records where the police lack the necessary probable cause predicate for obtaining those documents through a search); and (3) where the area of investigation is especially sensitive, reflecting a strong need to keep the ongoing investigation from the public gaze (an objective facilitated by grand jury secrecy requirements) or to ensure public confidence in the integrity of the investigation (an objective facilitated by the participation of the lay grand jurors). Criminal investigations imposing such special needs are likely to deal with crimes of public corruption (e.g., bribery), misuse of economic power (e.g., price-fixing), and widespread distribution of illegal services or goods (e.g., organized crime operations).

Step 3. Arrest. Once a police officer has obtained sufficient information to justify arresting a suspect (i.e., probable cause to believe the person has committed a crime), the arrest ordinarily becomes the next step in the criminal justice process. This involves the detention of the suspect (by force if necessary) for the purpose of first transporting him to a police facility and then requesting that charges be filed against him. As an alternative to such a "full custody" arrest, many jurisdictions authorize the officer in some situations to briefly detain the suspect and then release him upon issuance of an official document (commonly titled a "citation," "notice to appear" or "appearance ticket") which directs the suspect to appear in court on a set date to respond to the charge specified in the document. This release-on-citation alternative commonly is authorized only for minor offenses, with the choice between the release procedure and the custodial arrest then lying in the discretion of the individual officer. In many localities the standard practice is to use the citation alternative for a wide range of minor offenses, while in others, police generally prefer arrests and largely confine their regular use of the citation alternative to a few minor offenses, primarily regulatory in character. Where citations regularly are used for even a handful of the more common minor offenses, the number of citations issued can readily equal a quarter or a third of the total number of misdemeanor arrests.

Where there is no immediate need to arrest a suspect, an officer may seek to obtain an arrest warrant (a court order authorizing the arrest) prior to taking the person into custody. Arrest warrants are issued by magistrates on probable cause to believe that the prospective arrestee committed the crime for which he will be arrested. The showing of probable cause may be made by affidavits or live testimony of either the investigating officer or a witness (usually the victim). Arrests also can be made without a warrant, and that is the predominant practice even where the investigating officer, after establishing probable cause, expects a lapse of a day or more before making an arrest.

Officers obtain a warrant instead only where the special setting makes a warrant legally necessary or otherwise advantageous. The most common of those settings are: (1) cases in which the offender is located in another jurisdiction (as a warrant is needed to utilize procedures for having the person arrested by officers of another state and later extradited); (2) cases in which the person cannot be found and his name therefore will be entered into the computerized state or local law enforcement information network as someone who is subject to an arrest on the basis of an outstanding warrant; (3) cases in which there will probably be a need to enter into a dwelling without consent in order to make the arrest (a situation that requires a warrant); (4) cases in which the offense was a misdemeanor not committed in the officer's presence (a situation requiring a warrant in some states); and (5) cases in which the police have sought the advice of the prosecutor before deciding to proceed (where the prosecutor responds affirmatively, a complaint typically will be filed immediately, with a warrant then obtained prior to the arrest).

The vast majority of arrests (60–80%) will be for misdemeanors. Among felony arrests, property offenses will account for roughly a third, and drug offenses for 25–30%, and crimes of violence for another 25%. A substantial percentage of all of the persons arrested

(e.g., 10–20%) will be juveniles, with that percentage varying considerably with the offense. Ordinarily, juvenile arrestees will be separated from adult arrestees shortly after they are taken into custody, and will be processed through the juvenile justice system, although some will later be returned to the regular criminal justice process and be prosecuted as adults.

Step 4. Booking. Immediately after arrest, the arresting officer usually will search the arrestee's person and remove any weapons, contraband, or evidence relating to a crime. If the arrested person was driving a vehicle, the officer may also search the passenger compartment of the vehicle for the same items. The arrestee will then be taken, either by the arresting officer or other officers called to the scene, to the police station, a centrally located jail, or some similar "holding" facility. It is at this facility that the arrestee will be taken through a process known as "booking." Initially, the arrestee's name, the time of his arrival, and the offense for which he was arrested are noted in the police "blotter" or "log." This is strictly a clerical procedure, and it does not control whether the arrestee will be charged or what charge might be brought. As part of the booking process, the arrestee also will be photographed and fingerprinted.

In many jurisdictions, an arrestee booked on a minor misdemeanor will be given the opportunity to obtain his immediate release by posting what is described as "stationhouse bail." This involves posting a specified amount of cash, as prescribed for the particular offense in a judicially approved bail schedule, and agreeing to appear in court on a specified date. Persons arrested for more serious offenses and those eligible to post stationhouse bail but lacking the resources will remain at the holding facility until presented before a magistrate (see step 9). Ordinarily they will be placed in a "lockup," which usually is some kind of cell. Before entering the lockup, they will be subjected to another search, more thorough than that conducted at the point of arrest. This search is designed primarily to inventory the arrestee's personal belongs and to prevent the introduction of contraband into the lockup.

Step 5. Post-Arrest Investigation. The initial post-arrest investigation by the police consists of the search of the person (and possibly the interior of the automobile) as discussed above. The extent of any further post-arrest investigation will vary with the fact situation. In some cases, such as where the arrestee was caught "red-handed," there will be little left to be done. In others, police will utilize many of the same kinds of investigative procedures as are used before arrest (e.g., interviewing witnesses, searching the suspect's home, and viewing the scene of the crime). Post-arrest investigation does offer one important investigative source, however, that ordinarily is not available prior to the arrest—the person of the arrestee. Thus, the police may seek to obtain an eyewitness identification of the arrestee by placing him in a lineup, having the witness view him individually (a "showup"), or taking his picture and showing it to the witness (usually with the photographs of several other persons in a "photographic lineup"). They may also require the arrestee to provide handwriting or hair samples that can be compared with evidence the police have found at the scene of the crime. The arrest similarly facilitates questioning the arrestee at length about either the crime for which he was arrested or other crimes thought to be related (although warnings must be given prior to the custodial interrogation).

Step 6. The Decision to Charge. The decision to charge a person with a crime has four components: (1) the decision of the investigating officer to arrest and charge; (2) the police review of that decision prior to filing charges; (3) prosecutorial review prior to filing; and (4) ongoing prosecutorial review after the filing. The first component has already been noted in step 3; the others are considered here.

(a) Pre-Filing Police Screening. Sometime between booking and the point at which the arrestee is to be taken before the magistrate, there will be an internal police review of a

warrantless arrest. When the arresting officer prepares an arrest report to be given to his or her supervisor, the supervisor may approve the bringing of charges at the level recommended in the police report, raise or reduce the level of the recommended charges, or decide against bringing charges. A decision not to bring charges ordinarily will be based on the supervisor's conclusion either that the evidence is insufficient to charge or that the offense can more appropriately be handled by a "stationhouse adjustment" (e.g., in the case of a fight among acquaintances, a warning and lecture may be deemed sufficient). Studies report police decisions to release arrestees and forego prosecution in the range of 4% to 10%; the percentage of misdemeanor arrestees released by the police without charging is likely to be somewhat higher.

(b) Pre–Filing Prosecutor Screening. Prosecutors' offices vary substantially in their approach to pre-filing review of the decision to charge. In many jurisdictions, all arrests, both for misdemeanors and felonies, will be screened, and no charges will be filed except upon approval of the prosecutor. In many others, however, particularly in urban districts, police often file charges on their own initiative for at least some types of offenses. Typically, prosecutors here will screen the vast majority of the felony charges, but there will be districts in which prosecutors review only the most serious felony charges before they are filed. In those districts, the initial prosecutorial screening of most felony charges occurs sometime between the first appearance and the preliminary hearing or grand jury review (see steps 9 and 10 infra). Prosecutors are more likely to permit police to file misdemeanor charges without advance prosecutorial screening. When that occurs, prosecutors may not review a misdemeanor charge until it is scheduled for trial (and thus may never screen those charges that result in a guilty plea at the first appearance).

Prosecutorial decisions not to proceed are based upon: (1) insufficient evidence; (2) witness difficulties (e.g., where the victim was acquainted with the offender and does not desire to proceed, the victim fears reprisal and is reluctant to pursue prosecution, or the victim cannot be located); (3) due process problems (e.g., critical evidence was obtained illegally and will not be admissible at trial); (4) adequate disposition will be provided by other criminal proceedings (e.g., prosecution by another jurisdiction, probation revocation, or prosecution for another offense); (5) the "interests of justice"; and (6) anticipated use of a diversion program.

A diversion program offers the arrestee the opportunity to avoid conviction if he or she is willing to perform prescribed "rehabilitative steps" (e.g., making restitution to the victim, undertaking a treatment program). The diversion agreement operates, in effect, to place the arrestee on a probationary status without conviction. In many jurisdictions, this is achieved by the prosecutor promising not to file charges if the arrestee complies with the prescribed conditions. In others, charges initially are filed with the court, then held in abeyance for the period during which the arrestee is to meet the prescribed conditions, and dismissed with prejudice once the arrestee meets those conditions. If the arrestee fails to meet the prescribed conditions, the prosecution against the arrestee proceeds (with the charges filed, if that had not been done previously). Pretrial diversion tends to be used mostly with first-offense, non-violent misdemeanor arrestees.

Where the prosecutor decides to charge, pre-filing screening involves another important prosecutorial decision—setting the level of the charge. Although an arrest was made on a felony charge, the prosecutor may decide to go forward on a lesser charge. Prosecutors most often reduce the recommended charge because they believe that the evidence only supports a lower charge, but reductions also may be based on the prosecutor's determination that the penalty for the higher charges is too severe for the nature of the crime or that

the additional process costs involved in proceeding on a felony (rather than a misdemeanor) are not justified.

(c) Post–Filing Prosecutorial Screening. Post-filing prosecutorial review of the charging decision is inherent in the many post-filing procedures that require the prosecutor to review the facts of the case. If the prosecutor should determine that the charge is not justified, a dismissal can be obtained through a nolle prosequi motion (noting the prosecutor's desire to relinquish prosecution), which ordinarily will be granted in a perfunctory fashion by the court. Similarly, if the prosecutor considers the charge to be too high, a motion can be entered to reduce the charges. In deciding whether to make such motions, the prosecutor will look to basically the same grounds that might justify a pre-filing rejection or reduction of the charge recommended by the police. Even where a charge was carefully screened and approved prior to filing, post-filing review can readily lead to a contrary conclusion as circumstances change (e.g., evidence becomes unavailable) or the prosecutor learns more about the facts of the case. Of course, where the charge was not previously screened or was screened only on a skimpy arrest report, post-filing review is even more likely to lead to a decision to drop or reduce the charges.

What is the end product of the combined pre-filing screening by police and prosecutor and post-filing screening by the prosecutor? The best source on that question is a series of studies on the attrition of felony arrests. A 1988 study, using a dozen urban prosecutorial districts, found that those districts screened out of the criminal justice system from 31% to 46% of all felony arrests, with a jurisdictional mean of 39%. When diversions were added, no jurisdiction removed from prosecution less than 33% of their felony arrests, all but three removed in excess of 40%, and one removed 50%. A 1992 study, drawing information from 11 states, provides data suggesting removal by screening (including diversion) fell in the range of 31–36% for those states as a group. The end product of screening on misdemeanor arrests is more difficult to measure, but it is likely that prosecutorial screening of misdemeanor arrest cases equals (or even exceeds) the impact of prosecutorial screening of felony cases, particularly if the heavier use of diversion for misdemeanor cases is taken into account.

Step 7. Filing the Complaint. Assuming that the pre-charge screening results in a decision to prosecute, the next step is the filing of charges with the magistrate court. Typically, the initial charging instrument will be called a "complaint." In misdemeanor cases, which are triable before the magistrate court, the complaint will serve as the charging instrument throughout the proceedings. In felony cases, on the other hand, the complaint serves to set forth the charges only before the magistrate court; an information or indictment will replace the complaint as the charging instrument when the case reaches the general trial court.

For most offenses, the complaint will be a fairly brief document. Its basic function is to set forth concisely the allegation that the accused, at a particular time and place, committed specified acts constituting a violation of a particular criminal statute. The complaint will be signed by a "complainant," a person who swears under oath that he or she believes the factual allegations of the complaint to be true. The complainant usually will be either the victim or the investigating officer. When an officer-complainant did not observe the offense being committed, but relied on information received from the victim or other witnesses, the officer ordinarily will note that the allegations in the complaint are based on "information and belief." With the filing of the complaint, the person accused in the complaint will have become a "defendant" in a criminal proceeding. The formal charge

initiates a judicial record keeping procedure that puts his case on the docket and follows it through to its termination.

Step 8. Magistrate Review of the Arrest. Following the filing of the complaint and prior to or at the start of the first appearance (see step 9), the magistrate must, if the accused was arrested without a warrant and remains in custody, determine that there exists probable cause for the continued detention of the arrestee for the offense charged in the complaint. This ordinarily is an ex parte determination, similar to that made in the issuance of an arrest warrant and relying on the same sources of information. If the magistrate finds that probable cause has not been established, he will direct the prosecution to promptly produce more information or release the arrested person. Such instances are exceedingly rare, however.

Step 9. The First Appearance. Once the complaint is filed, the case is before the magistrate court, and the accused must appear before the court within a specified period. This appearance of the accused is usually described as the "first appearance," although the terminology varies, with jurisdictions also using "preliminary appearance," "initial presentment," "preliminary arraignment," "arraignment on the warrant," and "arraignment on the complaint." The timing of the first appearance varies with the custodial status of the accused. Where the accused was not taken into custody, but was released on issuance of a citation, there is likely to be a gap of at least several days between the issuance of the citation and the first appearance date as specified in the citation. The same is often true also of the first appearance set for the arrestee who gained his release by posting stationhouse bail.

Almost all felony arrestees and many misdemeanor arrestees will have been held in custody following their arrest, however, and here the time span between the arrest and the first appearance is much shorter. All jurisdictions require that an arrestee held in custody be brought before the magistrate court in a fairly prompt fashion. Ordinarily, the time consumed in booking, transportation, limited post-arrest investigation, reviewing the decision to charge, and preparing and filing the complaint makes it unlikely that the arrestee will be presented before the magistrate until at least several hours after his arrest. Thus, if the magistrate court does not have an evening session, a person arrested in the afternoon or evening will not be presented before the magistrate until the next day. Many jurisdictions do not allow much longer detention than this, as they impose a 24 hour limit on pre-appearance detention, requiring both the filing of the complaint and the presentation of the detained arrestee within that period. Others, desiring to limit weekend sessions of the court, allow up to 48 hours of pre-appearance detention.

The first appearance often is a quite brief proceeding. Initially, the magistrate will make certain that the person before him is the person named in the complaint. The magistrate then will inform the defendant of the charge in the complaint and will note various rights that the defendant may have in further proceedings. The range of rights mentioned will vary from one jurisdiction to another. Commonly, the magistrate will inform the defendant of his right to remain silent and warn him that anything he says in court or to the police may be used against him at trial. Further advice as to rights may depend upon whether the defendant is charged with a felony or misdemeanor. In felony cases, the magistrate will advise the defendant of the next step in the process, the preliminary hearing, and will set a date for that hearing unless the defendant desires to waive it. If the defendant is charged with a misdemeanor, he will not be entitled to a preliminary hearing or a subsequent grand jury review (see steps 10 and 11).

At least where the defendant is not represented by counsel at the first appearance, the magistrate will inform the defendant of his right to be represented by retained counsel, and, if indigent, his right to court-appointed counsel. The scope of the right to appointed counsel may vary with the level of the offense. In some jurisdictions, appointed counsel will not be available for defendants who are charged with low-level misdemeanors if they will not be sentenced to incarceration if convicted. Where there is a right to appointed counsel, which will be the case in all jurisdictions for indigent defendants charged with felonies and serious misdemeanors, the magistrate usually will have the responsibility for at least initiating the appointment process. This involves first determining that the defendant is indigent and that he desires the assistance of counsel. The magistrate then will either directly appoint counsel or notify a judge in charge of appointments that an appointment should be made.

Appointed counsel will be required for a substantial percentage of all felony defendants. Three basic systems are used to provide counsel for indigent defendants. In counties containing roughly 70% of the country's population, counsel is provided primarily through a state or county public defender service. In counties containing roughly 25% of the population, reliance is placed primarily upon an assigned counsel system. Here private attorneys are selected from a list of available attorneys, either on an ad hoc basis (with individual judges choosing attorneys as they please) or through a coordinated selection system (with selection by a single administrator according to established guidelines). A smaller group of counties, containing less than 10% of the population, rely primarily upon contract systems under which a private law firm, a group of private practitioners, or a nonprofit organization (such as a bar association) contracts to provide representation for the bulk of the indigent defendants for an extended period of time.

Since a misdemeanor charge will be triable to the magistrate court, the magistrate at the first appearance may also ask the misdemeanor defendant to enter a plea to the charge contained in the complaint. Indeed, at one time, it was the common practice to dispose of almost all misdemeanor cases at the first appearance in a fashion similar to that still prevailing in traffic courts. With the general recognition of the misdemeanor defendant's right to the assistance of counsel at trial, however, that practice has largely been discarded.

One of the most important first-appearance functions of the magistrate is to set bail (i.e., the conditions under which the defendant can obtain his release from custody pending the final disposition of the charges against him). In many misdemeanor cases, there will be no need to set bail. The defendant will already have been released on the police issuance of a citation or on the posting of stationhouse bail or the defendant will enter a guilty plea at the first appearance and be promptly sentenced. However, a bail determination ordinarily must be made in all felony and serious misdemeanor cases and in a substantial portion of the lesser misdemeanor cases.

At one time, bail was limited almost entirely to the posting of cash or a secured bond purchased from a professional bondsman. Today, those are only two of several alternatives available to the magistrate. Others are: (1) release upon a promise to appear (release on "personal recognizance"); (2) release on making a personal promise to forfeit a specified dollar amount upon a failure to appear (an "unsecured" personal bond); (3) release upon the imposition of one or more nonfinancial conditions (e.g., restrictions on defendant's associations or travel); and (4) the posting with the court of a percentage of the bail forfeiture amount (commonly 10%), which will be returned to the defendant if he appears as scheduled. In a few states, the 10% alternative has basically replaced the secured bond, resulting in the elimination of professional bondsmen.

In general, the magistrate is directed to impose such bail conditions as appear reasonably needed to assure that the defendant will make court appearances as scheduled throughout the proceedings. In making that determination, the magistrate looks to a variety of factors that might indicate a likelihood of flight (e.g., severity of possible punishment if convicted). Most jurisdictions also direct the magistrate to consider community safety in setting bail conditions, and approximately half of our fifty-two jurisdictions authorize preventive detention—a procedure under which the magistrate orders that the accused be detained because no bail condition will provide satisfactory assurance against his commission of an offense posing danger to the community.

In misdemeanor cases, magistrates most commonly utilize release on personal recognizance or personal bonds, and even where a secured bond is required, the amount is sufficiently low so that only a small percentage of defendants fail to gain their release. As a result, studies that cover both misdemeanor and felony arrestees report overall release rates of 85% or higher, with the vast majority of defendants released on nonfinancial conditions.

Step 10. Preliminary Hearing. Following the first appearance, the next scheduled step in a felony case ordinarily is the preliminary hearing (sometimes called a preliminary "examination"). All but a few jurisdictions grant the felony defendant a right to a preliminary hearing, to be held within a specified period (typically, within a week or two if the defendant does not gain pretrial release and within a few weeks if released). This hardly means, however, that the preliminary hearing will be held in almost all or even most cases. Post-arrest prosecutorial screening of charges in the period prior to the scheduled preliminary hearing results in dismissal of 15–30% of the felony cases. Where the charges are not dismissed, two additional decisions—one by the prosecutor and one by the defense—can sharply reduce the number of preliminary hearings.

In almost all jurisdictions, if the prosecutor obtains a grand jury indictment prior to the scheduled preliminary hearing, the preliminary hearing will not be held, as the grand jury's finding of probable cause has rendered irrelevant any contrary finding that the magistrate might make at the preliminary hearing. Prosecutorial bypassing of the preliminary hearing by immediately obtaining a grand jury indictment is most likely to occur in those twenty jurisdictions that require prosecution by indictment (see step 11 infra). In some of these jurisdictions, prosecutors make such frequent use of the bypass option as to preclude preliminary hearings in 50–80% of the felony cases that reach the felony trial court. In many others, however, the bypass procedure is used sparingly, and this is the norm in jurisdictions that ordinarily prosecute by information.

Finally, where the preliminary hearing is made available to the defendant, there nonetheless may not be a preliminary hearing because the defendant prefers to waive the hearing and move directly to the trial court. That is often the strategy employed where the defendant intends to plead guilty. Thus, a number of jurisdictions report a waiver rate exceeding 50%, although there also are jurisdictions in which defendants ask for the hearing in the vast majority of cases.

Where the preliminary hearing is held, the magistrate must determine whether, on the evidence presented, there is probable cause to believe that defendant committed the crime charged. Jurisdictions vary in the evidentiary rules applicable to the preliminary hearing, but most require that the parties rely primarily on live witnesses rather than affidavits. Typically, the prosecution will present its key witnesses and the defense will limit its response to the cross-examination of those witnesses. The defendant has the right to

present his own evidence at the hearing, but traditional defense strategy advises against subjecting defense witnesses to prosecution cross-examination in any pretrial proceeding.

If the magistrate concludes that the evidence presented establishes probable cause, he will "bind the case over" to the next stage in the proceedings. In an indictment jurisdiction (see step 11), the case is bound over to the grand jury, and in a jurisdiction that permits the direct filing of an information (see step 12), the case is bound over directly to the general trial court. If the magistrate finds that the probable cause supports only a misdemeanor charge, he will reject the felony charge and allow the prosecutor to substitute the lower charge, which will then be set for trial in the magistrate court. If the magistrate finds that the prosecution's evidence does not support any charge, he will order that the defendant be released.

Step 11. Grand Jury Review. Although almost all jurisdictions still have provisions authorizing grand jury screening of felony charges, such screening is mandatory only in those jurisdictions requiring felony prosecutions to be instituted by an indictment, a charging instrument issued by the grand jury. In a majority of the states, the prosecution is now allowed to proceed either by grand jury indictment or by information at its option. Because prosecutors in these states most often choose to prosecute by information, the states providing this option commonly are referred to as "information" states. Eighteen states, the federal system, and the District of Columbia currently require grand jury indictments for all felony prosecutions. These jurisdictions commonly are described as "indictment" jurisdictions. Four additional states are "limited indictment" jurisdictions, requiring prosecution by indictment only for their most severely punished offenses (capital, life imprisonment, or both).

Indictment and limited indictment jurisdictions commonly make prosecution by indictment an absolute mandate only for capital offenses. As to other offenses, the defendant may waive the right to be proceeded against by indictment, thereby allowing the prosecution to proceed by information. As in the case of the preliminary hearing, defendants may prefer to waive when intending to plead guilty. Waiver rates vary from one jurisdiction to another but waivers are likely to be made by at least 10% of all felony defendants. Where a potential charge is brought to the grand jury for its possible issuance of an indictment, the grand jury is in no way bound by any prior ruling at a preliminary hearing on that charge. The grand jury may indict even though the magistrate dismissed the charge at the preliminary hearing, and may refuse to indict even though the magistrate bound over to the grand jury.

The grand jury is composed of a group of private citizens who are selected to review cases presented over a term that may range from one to several months. Traditionally the grand jury consisted of 23 persons with the favorable vote of a majority needed to indict. Today, many states use a somewhat smaller grand jury (e.g., 12) and some require more than a simple majority to indict. As in the case of the magistrate at the preliminary hearing, the primary function of the grand jury is to determine whether there is sufficient evidence to justify a trial on the charge sought by the prosecution. The grand jury, however, participates in a screening process quite different from the preliminary hearing. It meets in a closed session and hears only the evidence presented by the prosecution. The defendant has no right to offer his own evidence or to be present during grand jury proceedings. If a majority of the grand jurors conclude that the prosecution's evidence is sufficient, the grand jury will issue the indictment requested by the prosecutor. The indictment will set forth a brief description of the offense charged, and the grand jury's

approval of that charge will be indicated by its designation of the indictment as a "true bill." If the grand jury majority refuses to approve a proposed indictment, the charges against the defendant will be dismissed. In indictment jurisdictions, grand juries typically refuse to indict in less than 10% of the cases presented before them.

Step 12. The Filing of the Indictment or Information. If an indictment is issued, it will be filed with the general trial court and will replace the complaint as the accusatory instrument in the case. Where grand jury review either is not required or has been waived, an information will be filed with the trial court. Like the indictment, the information is a charging instrument which replaces the complaint, but it is issued by the prosecutor rather than the grand jury. In most information states, the charge in the information must be supported by a preliminary hearing bindover (unless the preliminary hearing was waived).

Step 13. Arraignment on the Information or Indictment. After the indictment or information has been filed, the defendant is arraigned—i.e., he is brought before the trial court, informed of the charges against him, and asked to enter a plea of guilty, not guilty, or, as is permitted under some circumstances, nolo contendere. In the end, most of those felony defendants whose cases reach the trial court will plead guilty.

At the arraignment, however, they are likely to enter a plea of not guilty. Where there has not been a preliminary hearing, defense counsel probably will not be fully apprised of the strength of the prosecution's case at this point in the proceedings. Also, in most jurisdictions, guilty pleas in felony cases are the product of plea negotiations with the prosecution, and in many places, that process does not start until after the arraignment. When the defendant enters a plea of not guilty at the arraignment, the judge will set a trial date, but the expectation generally is that the trial will not be held.

Between the arraignment and the scheduled trial date, three possible dispositions can result in the termination of the case without trial. Although there will have been extensive prosecutorial screening by this point, changed circumstances and new information typically will lead to dismissals on a prosecutor's nolle prosequi motion in roughly 5–15% of the cases. A smaller percentage of the informations or indictments will be dismissed on motion of the defense, as discussed in step 14. The vast majority of the dispositions without trial will be the product of guilty pleas.

Guilty pleas in felony cases commonly will be entered in response to a plea agreement under which the prosecution offers certain concessions in return for the defendant's entry of the plea. Those concessions may take the form of a reduction of the charges (sometimes to a misdemeanor and sometimes to a lesser felony charge), a dismissal of related charges where the defendant faces multiple charges, a recommendation on sentence, or a specific sentence (when agreed to by the trial court). Prosecutors' offices vary in the concessions they offer and their willingness to bargain over concessions (as opposed to presenting a take-it-or-leave-it offer). The guilty plea remains the primary mode of disposition for felony indictments and informations in all jurisdictions; most jurisdictions appear to fall within the range of 60–85%. The guilty plea rate is as high or higher as to misdemeanor charges in the magistrate court, although there tends to be less plea negotiation on charges originally filed as misdemeanors.

Step 14. Pretrial Motions. In most jurisdictions, a broad range of objections must be raised by a pretrial motion. Those motions commonly present challenges to the institution of the prosecution (e.g., claims regarding the grand jury indictment process), attacks upon the sufficiency of the charging instrument, requests for disclosure of evidence within the government's possession that has not been made available through discovery, and requests for the suppression of evidence allegedly obtained through a constitutional violation. While some pretrial motions are made only by defendants who intend to go to trial, other motions (e.g., discovery) may benefit as well defendants who expect in the end to plead guilty. Nevertheless, pretrial motions are likely to be made in only a small portion of the felony cases that reach the trial court. Their use does vary considerably, however, with the nature of the case. In narcotics cases, for example, motions to suppress are quite common. In the typical forgery case, on the other, pretrial motions of any type are quite rare.

As a group, pretrial motions are unlikely to result in the dismissal of more than 5% of the felony cases before the trial court, and quite often will produce a dismissal rate of less than 2.5%. The pretrial motion most likely to produce a dismissal is the motion to suppress. Quite frequently, if the defendant gains suppression of unconstitutionally obtained evidence, there will be insufficient remaining evidence to continue with the prosecution. In misdemeanor cases before the magistrate court, motions tend to be made only in cases slated for trial and even there, they are uncommon. Thus, the percentage of cases dismissed on the basis of a successful defense motion probably will fall below two percent.

Step 15. The Trial. Assuming that there has not been a dismissal and the defendant has not entered a guilty plea (or a nolle contendere plea), the next step in the criminal process is the trial. In most respects, the criminal trial resembles the civil trial. There are, however, several distinguishing features that are either unique to criminal trials or of special importance in such trials. These include (1) the presumption of defendant's innocence, (2) the requirement of proof beyond a reasonable doubt, (3) the right of the defendant not to take the stand, (4) the exclusion of evidence obtained by the state in an illegal manner, and (5) the more frequent use of incriminating statements of defendants. In most jurisdictions, the misdemeanor trial will be almost indistinguishable from a felony trial. In some jurisdictions, however, misdemeanor trials tend to be less formal, with rules of evidence applied in a rather loose fashion.

As noted previously, most felony and misdemeanor cases are likely to be disposed of either by a guilty plea or by a dismissal. Typically, only 4% to 8% of all felony complaints are resolved by a trial. Because a substantial portion of felony complaints are likely to be resolved at the magistrate level, the percentage of trials will be somewhat higher for the disposition of the smaller group of felony informations or indictments filed in the general trial court, but even so, that percentage will not ordinarily exceed 15%. For misdemeanor cases resolved at the magistrate level (including both cases originally filed as misdemeanors and felony complaints reduced to misdemeanors) the percentage of trials is likely to fall in the range of 3% to 7% on a statewide basis. The median time frame from the arrest of the defendant to the start of the felony trial can exceed a year in judicial districts with slow moving dockets, but for most judicial districts, it is likely to fall within the range of 5–8 months.

The trial itself tends to be relatively short. Misdemeanor trials typically last less than a day. Felony jury trials are somewhat longer, but most will be completed within 2–3 days. One variable will be the local practice governing voir dire (the questioning of prospective jurors, either by judge or counsel), as some jurisdictions tend to spend considerably more time on jury selection than others. Another will be the type of case, as certain types of

offense (e.g., complex white collar offenses and capital homicide cases) produce trials substantially longer than the typical felony. In general trials to the bench are considerably shorter, and unlikely to last more than a day.

The defendant has a right to a jury trial for all felony offenses and for misdemeanors punishable by more than 6 months imprisonment. Most states also provide a jury trial for lesser misdemeanors as well (although that right may exist only through the opportunity to seek a trial de novo in the general trial court after an initial bench trial before the magistrate court). Juries traditionally were composed of 12 persons, but most states now utilize 6 person juries in misdemeanor cases and several use the smaller juries in non-capital felony cases as well. Of course, the right to a jury trial can be waived, and in most jurisdictions, a significant number of defendants will waive the jury in favor of a bench trial. Over the country as a whole, roughly 70% of all felony trials are tried to a jury. In misdemeanor cases, in contrast, bench trials, typically predominate (often accounting for 95% or more of all trials). In all but a few jurisdictions, the jury verdict in both misdemeanor and felony cases, whether for acquittal or conviction, must be unanimous. Where the jurors cannot agree, no verdict is entered and the case may be retried. For most communities, such "hung juries" occur in only a very small percentage of all jury trials (e.g., 3–6%).

Whether a criminal case is tried to the bench or the jury, the odds favor conviction over acquittal. A fairly typical ratio for felony charges will be 3 convictions for every acquittal. That ratio may vary significantly, however, with the nature of the offense. In some jurisdictions, the rate of conviction at trial tends to be substantially lower (though still well above 50%) for some crimes (e.g., rape and murder) than for others (e.g., drug trafficking).

Step 16. Sentencing. In all but a few jurisdictions (which allow for jury sentencing, even apart from capital punishment), the sentence determination is the function of the court. Basically three different types of sentences may be used: financial sanctions (e.g., fines, restitution orders); some form of release into the community (e.g., probation, unsupervised release, house arrest); and incarceration in a jail (for lesser sentences) or prison (for longer sentences). The process applied in determining the sentence is shaped in considerable part by the sentencing options made available to the court by the legislature. For a particular offense, the court may have no choice. The legislature may have prescribed that conviction automatically carries with it a certain sentence and there is nothing left for the court to do except impose that sentence. Most frequently, however, legislative narrowing of options on a particular offense does not go beyond eliminating the community release option (by requiring incarceration) and setting maximums (and sometimes mandatory minimums) for incarceration and financial sanctions.

The sentence of incarceration for a felony offense probably presents the widest diversity of approach to judicial sentencing authority. Initially, jurisdictions divide on the use of determinate and indeterminate sentences. In states utilizing indeterminate sentences, the sentencing structure calls for a maximum and minimum term of imprisonment, with the parole board determining the actual release date within the span set by those the two terms. The legislature always sets the outer limit for the maximum term, but beyond that point, division of sentencing authority between the court and the legislature varies with the jurisdiction and the offense. Possibilities include: judicial authority to set both the maximum term (within the legislatively prescribed outer-limit) and the minimum term; judicial authority to set only the minimum (with the maximum and sometimes a mandatory minimum prescribed by the legislature); and judicial authority to set only a maximum

within the prescribed outer-limit (with the minimum then set by law as certain percentage of the judicially set maximum).

The federal system and roughly a dozen states largely utilize determinate sentences. Those jurisdictions have eliminated for all or most offenses the discretionary release authority of the parole board. The sentence imposed by the court sets a fixed term which the prisoner will serve (subject to gaining earlier release through credits earned for "good time"). In all determinate sentencing jurisdictions, as in all indeterminate sentencing jurisdictions, the legislature sets the maximum sentence possible. In a few, the legislature sets a presumptive prison term (or narrow range of terms) which the sentencing judge is directed to use for the typical offense of a particular character (e.g., burglary), absent a finding of specific aggravating or mitigating factors calling for upward and downward adjustments. Typically, however, the setting of the specific sentence within the maximum is left either to unfettered judicial discretion or to judicial discretion operating within the restraints of guidelines formulated by a sentencing commission.

A second major division in felony sentencing structures relates to the use of legislatively mandated penalties. The legislature may mandate a specific penalty, as where it specifies that conviction for a specific crime automatically carries a sentence of life imprisonment. More frequently, however, the mandatory penalty consists of a mandated sentence of at least a certain term of incarceration. The judge in an indeterminate sentencing jurisdiction then must set a minimum term at least equal to the mandatory penalty and the judge in a determinate sentencing jurisdiction must set a fixed term at least equal to the mandatory penalty. All fifty-two jurisdictions make some use of mandatory penalties, but there is substantial variation in the frequency of their use.

Insofar as the legislature leaves the judge authority to choose, a third major division is found in felony sentencing structures. Most states do not seek to direct the trial court in its choice of a sentence that would fit within statutorily prescribed limits, but the federal system and a growing number of states are relying on sentencing guidelines promulgated by a sentencing commission to channel the exercise of such discretion. Those guidelines serve to establish a presumptively correct sentence of incarceration for a particular offense in accordance with the circumstances of the offense and the criminal history of the offender. Where the jurisdiction utilizes determinate sentences, the guideline presumption sets the fixed sentence; where the jurisdiction uses indeterminate sentences, the guideline ordinarily sets the minimum sentence. Typically, the guidelines also specify where a sentence other than incarceration would be appropriate, although they do not direct that such a sentence be used. In some states, the guidelines are "voluntary," and the court is free to disregard them. In most guideline jurisdictions, however, the court can depart from the guidelines only if it finds good reason to do so. Jurisdictions vary in their toleration of "departures" from the guidelines, but even where most lenient in this regard, a substantial majority of the sentences (e.g., in excess of 80%) are likely to fit within the guidelines.

The process utilized in felony sentencing varies to some extent according to whether judicial discretion is broad or is channeled or limited by guideline or legislative reference to specific sentencing circumstances. In all jurisdictions, the process is designed to obtain for the court information beyond that which will have come to its attention in the course of trial or in the acceptance of a guilty plea. The primary vehicle here is the presentence report prepared by the probation department, although the prosecution and defense commonly will be allowed to present additional information and to challenge the information contained in the presentence report. The presentation of this information is not subject to the rules governing the presentation of information at trial. The rules of evidence do not apply, and neither the prosecution nor the defense has a right to call

witnesses or to cross-examine the sources of adverse information presented in the presentence report or in any additional documentation presented by the opposing side. However, where the sentencing authority of the judge is restricted by guidelines or legislatively set presumptive sentences that require findings of fact as to specific factors, the sentencing process tends to be more formal. Here, the court often will find it necessary to hold an evidentiary hearing and utilize trial-type procedures if the presence of a critical factor is controverted.

The sentencing structure and procedure for misdemeanor offenses is far less complex and varied. Ordinarily the court is free to choose among financial sanctions, conditional release, incarceration within the maximum term set by the legislature. A sentence of incarceration will be to fixed term (i.e., a specified number of days) and will be served in jail. In assessing the sentence, the court will ordinarily seek some background information, but presentence reports of the type used in felony sentencing commonly are utilized only for the most serious misdemeanors. Evidentiary hearings on sentencing matters are even more unusual. Indeed, the sentence commonly is set immediately upon conviction.

Although the length of the prison sentence set by the court has quite different significance in different sentencing structures, nationwide sentence lengths are usually assessed by reference to the maximum term that can be served under the court's sentence. Under this standard, in 1992, the nationwide mean prison sentence was 164 months for persons convicted in state courts of rape, 117 months for persons convicted of robbery, 76 months for persons convicted of burglary, 53 months for persons convicted of larceny, and 55 months for persons convicted of drug possession. Since most of those terms merely set the maximum length in an indeterminate sentencing structure, the more important measurement is the minimum term that determines when the individual becomes eligible for parole. Moreover, many jurisdictions provide for extensive "good time credits" that will reduce that minimum term or the fixed term of a determinate sentence. As a result, prisoners nationwide tend to serve between 40% and 60% of the mean maximum sentence, with the percentage varying with the nature of the offense. Thus, while the mean term for rape is 164 months, the mean time actually served is likely to be in the range of 91 months, and while the mean term for larceny is 53 months, the mean time actually to be served will be about 17 months.

Step 17. Appeals. For criminal cases disposed of in the general trial court, the initial appeal is to the intermediate appellate court. If the state has no intermediate appellate court, then the initial and final appeal within the state system is to the state's court of last resort. Initial appeals in cases disposed of by the magistrate court will be to the general trial court. In some jurisdictions, the appeal procedure from a conviction in the magistrate court is a trial de novo before the general trial court, rather than that court exercising appellate review of the lower court record.

Although all convicted defendants are entitled to appeal their convictions, appeals are taken predominantly by convicted defendants who were sentenced to imprisonment on a felony conviction. Imprisoned defendants convicted pursuant to a guilty plea are included in this group, but they account for only a narrow slice of all appeals. Though the trial court's acceptance of a guilty plea may be challenged on appeal, such appellate challenges are limited to exceptional cases, so that appeals by guilty plea defendants tend to be sentencing challenges, which usually are significant only in jurisdictions that use sentencing guidelines or legislatively mandated presumptive sentences. In those jurisdictions, challenges to the sentence can constitute a substantial portion (e.g., 15–30%) of all appeals.

Appeals challenging the conviction itself come primarily from imprisoned defendants who are seeking review of a trial conviction. Indeed, in some jurisdictions, as many as 90%

of the defendants who were convicted after trial and sentenced to prison will appeal their convictions. Even with almost automatic appeal by this group, however, the total number of appeals to the intermediate appeals court is likely to amount to less than 10% of all convictions entered by the state's general trial court. Of course, where the jurisdiction provides for extensive appellate review of sentencing, the overall percentage of appeals is likely to be somewhat higher. Appeals from misdemeanor convictions before the magistrate courts, on the other hand, can very well amount to less than 1% of the number of convictions entered in the magistrate courts.

Appeals challenging convictions raise a wide range of issues, usually relating to some action or inaction of the trial judge. The court's admission of evidence challenged as unconstitutionally obtained stands out in several jurisdictions as by far the most frequently raised appellate objection, but in others, that objection is raised no more frequently than several other claims, such as the alleged insufficiency of the evidence and incompetency of counsel.

Step 18. Postconviction Remedies. After the appellate process is exhausted, imprisoned defendants may be able to use postconviction remedies to challenge their convictions on limited grounds. In particular, federal postconviction remedies are available to state as well as federal prisoners to challenge their convictions in the federal courts on most constitutional grounds. The federal district courts currently receive roughly 18,000 such postconviction applications. Relief is granted on less than 3 percent of these petitions, however, and the relief often is limited to requiring a further hearing. In the state system, annual postconviction challenges typically fall below 5% of all felony filings.

Shelley Grant (New York)

Shelley Grant was charged in the Supreme Court of New York County with assault in the first degree, assault in the second degree, and criminal facilitation in the third degree. She pleaded guilty to assault in the second degree.

Assault in the first degree requires that a person cause serious physical injury with a deadly weapon, intentionally cause permanent disfigurement, or recklessly cause serious physical injury. The penalty for this Class C violent felony is a mandatory minimum term of 1 1/2 years and up to 15 years. A fine of up to $5,000 may be imposed.

Assault in the second degree requires that a person intentionally cause physical injury or cause physical injury with a deadly weapon. Assault in the second degree is a Class D violent felony punishable by up to 7 years imprisonment. A fine of up to $5,000 may also be imposed.

Criminal facilitation involves providing another with the means to commit an offense. It is a misdemeanor which carries a maximum term of 12 months in jail.

NEW YORK CITY DEPARTMENT OF PROBATION

COURT: SUPREME COUNTY: NEW YORK

REPORT: PRE-SENTENCE ☒ PRO FORMA ☐ PRE-PLEADING ☐

PROBATION OFFICER: P. BOYLE

DOCKET / INDICTMENT # (S)	DATE(S) FILED	COURT CONTROL # (S)	PROBATION CASE # / NYSID # / F.B.I. #
4479/83	7/15/84	08766687M	NS84C2260 / 5087880Y /

RE:	LAST NAME	FIRST	MIDDLE	DATE OF BIRTH	CITIZEN OF
A.K.A.	GRANT,	SHELLEY	M.	7/26/62	U.S.
				PLACE OF BIRTH: New York	

RESIDENCE: 435 East 105th Street, New York, N.Y. 283-6747

LIVES WITH	MARITAL STATUS	HEIGHT	WEIGHT	SEX	RACE	SOCIAL SECURITY NUMBER / STATUS
Mother	Single	5'6"	179	F	White	086-56-0064

CO-DEFENDANTS / ACCOMPLICES

None

DATE(S) OF OFFENSE	DATE(S) OF ARREST	DATE(S) OF CONVICTION/ARREST	LIBERTY ☒ CUSTODY ☐ / PLEA ☒ TRIAL
3/25/83	7/6/83	3/30/84	

FINAL CHARGE / CONVICTED OF:	DOCKET / INFORMATION / INDICTMENT CHARGES
Assault 2°	Assault 1° - Assault 2° Criminal Facilitation 3°

COVERED CHARGES

OTHER PENDING CHARGES? YES ☐ NO ☒ DRUGS: Not Examined EXAM DATE CERTIFIED ADDICT ☐ NON-ADDICT

YOUTHFUL OFFENDER: REQUIRED YES ☐ NO ☒ ELIGIBLE YES ☐ NO ☒ CERTIFICATE OF RELIEF FROM DISABILITIES: ELIGIBLE YES ☒ NO

JUDGE	PART	DATE(S) OF SENTENCE / PLEADING HEARING
A.D.A. GAYNOR	39	5/11/84

COUNSEL AND ADDRESS: A. HARRINGTON LAS 732-

DISPOSITION

PSI DELIVERED TO CLERK OF COURT MAY 9 1984 TRANSMITTED BY

LEGAL HISTORY

PREVIOUS COURT RECORD

JUVENILE

None Known

ADULT

None Known

PENDING CHARGES

None Known

PRESENT OFFENSE

The following account is based upon the Court papers and the files of the ADA.

On 6/25/83, at about 8:00 PM, at a street playground, located at 435 East 105th Street, in Manhattan, the defendant was watching her son, Earl, age 5, at play with another child. Suddenly, the other child, Marcus Watson, age 6, began to fight with Earl. After the fight, Earl returned to his mother, the defendant. She then reached into her handbag, and took out a scalpel, and gave it to her son, who then ran over to the victim, and stabbed him once in the abdomen. He then came back to his mother with the scalpel, and she passed it to her brother, who disposed of it in an incinerator at that address. The victim, Marcus Watson, of the same address as the defendant, was taken by ambulance to Metropolitan Hospital for a stab wound in his abdomen. Following an investigation of this offense Detective Gaines, of HPD-5, placed the defendant under arrest, on 7/6/83, at 7:00 PM, at 1385 Fifth Avenue, in Manhattan.

Arrested on 7/6/83, the defendant was subsequently paroled, and has since remained at liberty.

STATUS OF CO-DEFENDANTS AND ACCOMPLICES

None

SUMMARY OF OFFENDER'S STATEMENT

The defendant readily admits her guilt in the present offense and states that she indeed did give a scalpel to her son, to use on the other boy. She claims that this fight among the children was larger than just two children, and that others engaged in the fight and were picking on her son. Nevertheless, she expressed remorse for the offense, and stated, "I'm sorry, I learned my lesson."

VICTIM IMPACT STATEMENT

When contacted by this department, the parents of Marcus Watson expressed anger at the present offense and the defendant, and simply stated that the defendant should be sentenced to a period of incarceration.

ANALYSIS OF OFFENSE AND CRIMINAL HISTORY

This is the defendant's first known arrest and conviction, for a serious offense, involving the giving of a scalpel to her child, and the subsequent stabbing of another child. It should be noted, however, that the defendant expresses great remorse for the present offense and claims to have "learned her lesson." In addition, she manifests insight into her criminal acts, and states that she would certainly not repeat this offense.

The victim, Marcus Watson, age 6, of the same address as the defendant's, was, as noted above, taken to Metropolitan Hospital for treatment. The child suffered a stab wound in the left flank, and was discharged on 6/27/83, with two follow-up examinations needed. He has sustained no permanent physical injury. His medical treatment was verified by chart #58505, of Metropolitan Hospital.

SOCIAL HISTORY

FAMILY AND ENVIRONMENT

Information on this section, is derived solely from this department's interview with the defendant.

The defendant states that she was born on 7/26/62, the fifth of 6 children born to the union of Lawrence Grant, age 44, a native of New York City, and a high school graduate, whose present whereabouts and occupation is unknown, and Betty Terry, age 48, a native of New Orleans, Louisianna, also a high school graduate and currently a housewife. The defendant states that her parents separated when she was 11 years of age, though she mentions that she sees her father occasionally. Of her five siblings, she states that she is close to only 1 sibling, her sister Tina, age 26, and a clerical worker, residing at 211 West 151st Street, Apartment 1C, in Manhattan. One brother, Tony, age 31, is hospitalized for life, having been born with a birth defect. The other three siblings, reside at home with the defendant and her mother. The defendant states that she was raised by her mother in reduced circumstances, but says of her parents, "I still love both of them." She denies any periods of institutionalization as either a child or an adolescent. The defendant, to a paramour relationship, with a certain Robert E. Williams, whose given age is 25, a native of Little Rock, Arkansas, with an 11th grade education, and whose occupation is unknown. The defendant stated to this department that, "he's a bad influence on me." By this relationship she has one son, Robert Earl, whose age is given as 5, born in New York City, and currently going to the East River Day Care Center on First Avenue, in Manhattan. The defendant states that she has resided at the above address with her family for some 21 years, in a 5 bedroom apartment, with a rent of $74 bi-monthly. She states that the surrounding neighborhood is, "good." The defendant denies having any other children.

EDUCATION AND EMPLOYMENT

The defendant states that she last attended Benjamin Franklin H.S., on 116th Street and Pleasant Avenue, in Manhattan, completing the 12th grade, but leaving in 1982, a graduate, but reports that she failed the regents exam in social studies, and is currently attempting to pass it a second time.

The defendant states that she is currently employed, at the Manhattan Psychiatric Center, of 600 East 125th Street, on Wards Island, as a nurse in training, for which she is paid $196 semi-monthly, and that she has held this employment for 4½ years.

She states that she got this job through her high school. The defendant states that she works 20 hours per week. We are currently attempting to verify her employment, through speaking to her supervisor. The defendant denies receiving public assistance, and also denies any periods of service in the armed forces.

PHYSICAL AND MENTAL HEALTH

The defendant states that she is in good physical health.

The defendant was not referred to the Psychiatric Clinic of this Court, as the need for such a referral did not seem indicated at the time of the initial interview.

The defendant denies the use or abuse of any drug substances.

EVALUATIVE SUMMARY

This is the first known arrest and conviction for this defendant, for the stabbing of a child by her own son, armed, by her, with a scalpel. She expresses great remorse for this offense.

The defendant, the product of a broken home, and raised by her mother in reduced circumstances, has both verifiable education and employment, and seems self motivated enough to not again fall into criminal pursuits. Prognosis is fair.

Attested by: P. Boyle Smith
PETER BOYLE
PROBATION OFFICER

Reviewed by: Weisbord
LARRY WEISBORD
SUPERVISING PROBATION OFFI

Submitted by: _____
ROBERT RENDELL
BRANCH CHIEF

PB:bl
D- 5/4/84
T- 5/7/84

NEW YORK CITY DEPARTMENT OF PROBATION

MAT - F BRANCH

To: 5/8/84 PROBATION CASE NUMBER:

JUDGE [redacted] PART

COURT COUNTY

LAST NAME, FIRST, MIDDLE Grant, Shirley DOCKET/INDICTMENT NUMBER 4479-83

DEPARTMENTAL SENTENCE RECOMMENDATION WITH SUPPORTING REASONS

Convicted of: Felony (Class) Misd. (Class)

Assault 2° D

Truthful Offender recommended ? ( )Yes ( )No (X)NA

Certificate of Relief from Disabilities recommended ? ( )Yes ( )No ( )NA

The offense is extremely serious. It involved the def's giving a scalpel to her 5 year old child for the purpose of inflicting injury upon another child. Such injury did occur.

Considering the circumstances of this offense, it is our feeling that the def's should undergo psychiatric examination by the clinic of the court prior to sentence.

Supervising Prob. Officer

A Healing Circle in the Innu Community of Sheshashit

Justice as Healing (Native Law Centre of Canada), Summer 1997

[During the fall of 1994 Gavin Sellon, while attending a clinic for alcohol and substance abuse, disclosed to counsellors that he had committed a sexual assault the year before. On his return to Sheshashit, Labrador, Mr. Sellon went to the Royal Canadian Mounted Police detachment and gave a cautioned statement admitting to having intercourse with L. without her consent. The police then began to investigate the incident.

The accused first appeared in provincial court on June 12, 1995, where he elected to be tried in the Newfoundland Supreme Court, Trial Division, waiving

the preliminary inquiry. On August 9, 1995, in the supreme court, the accused indicated that he wished to plead guilty and to make an application for a sentencing circle. The Crown opposed the motion and the matter was set over to December 18, 1995, for argument, at which time the application for a sentencing circle was withdrawn. Counsel for the accused indicated that he intended to pursue an informal healing circle outside the courtroom setting and in the community of Sheshashit, and asked Judge O'Regan to give strong consideration to viewing the sentencing of Sellon with a restorative approach rather than a punitive approach. Counsel for the Crown argued that the accused, being a non-native, should be treated using the traditional methods of sentencing. Judge O'Regan indicated to both counsel that if they wished to attend the healing circle they could do so and he would place what he deemed to be appropriate weight on the results of the healing circle.]

On Sunday January 21, 1996 a circle was held in the Alcohol Centre in Sheshashit. This circle was unique because unlike previous circles that have been held, the participants of this circle were aware in advance of the circle that a written report about the circle would be completed to share with the court. The following is a report of that circle.

Much thought and discussion went into the planning and preparation for this circle. Initially Innu Nation workers in health and justice were involved in this planning. Workers all began by referring to this circle as a "sentencing" circle. Workers discussed what needs and whose needs were to be met with this circle and how best to try and meet these varied needs. There was a great deal of concern expressed that the circle needed to be witnessed by members of the justice system so that Innu would not be open to seemingly inevitable criticism that we had something to hide or fear in the circle process. The same concern was raised should we not have witnesses from the Innu public.

Those involved in planning the circle were all able to agree that as the service provider, Innu Nation has a real need to demonstrate, both to Innu and the non Innu public and justice system, that Innu can develop and deliver services best suited to meet the needs of Innu. . . . We knew that this particular circle, with its direct connection to the court, would have a bearing on any future circles, court related or not . . .

Therefore a conscious decision was made to be clear and specific about what needs and whose needs we were trying to meet through this process. We could then evaluate the effectiveness of the circle based clearly on what we set out to do. It was decided to tailor the circle to meet L.'s need for an opportunity to be heard within a supportive circle of those most directly affected by and involved with what happened between Gavin and her.

We also made a deliberate decision that it was not suitable or accurate to call this planned circle a "sentencing" circle. Sentencing is a justice system process to be done in court by court participants and the Judge. This circle would be held as a circle of concern and support for L. and Gavin. Included in the circle as part of the process would be recommendations made by the participants which would be shared with the court to be used by the Judge as he saw fit. . . .

We are able to determine the purpose of this circle as twofold:

1. to provide Gavin an opportunity to acknowledge responsibility for his actions and

2. to provide L. an opportunity to say what needed to happen for her to feel that the situation was being made more right.

Several weeks prior to the circle Jack Penashue met with L. to ask if she would be willing and able to participate in a circle with Gavin and others to deal with the incident which had resulted in a charge of sexual assault against Gavin. L. said she was willing and able to participate. After this, separate meetings were held with her father and then her mother to determine their support for their daughter's decision to participate as well as their own willingness to participate. They said they supported their daughter in her decision and were themselves willing to participate if asked by L.

Another meeting was then held with L. and Lyla Andrew [the facilitator]. Again she was asked if she felt comfortable about participating and was asked who she wanted to have participate in the circle. She said she wanted to have her sisters and parents be present. The names of other possible participants, Innu and non Innu. . . , were given to L. and she indicated that "it was fine" if they wanted to attend. More information was shared with L. about the purpose of the circle and about the way it was thought the circle would happen. L. again indicated her willingness to participate. Her only request was that the circle take place soon. When she was told that her Dad would be working in Davis Inlet and not able to attend anytime soon, L. asked that the circle go ahead anyway and so the January 21 date was set.

Once this date was set Lyla met with Gavin Sellon to invite his participation in the circle. He was told who L. had invited and was asked if there were people he wanted to invite. He requested his mother, stepfather and his spouse. L. had already agreed to their participation and Gavin was told this. He also asked if Jack Penashue could attend and was informed that Jack would be a facilitator of the circle. . . .

Sunday there were 10 participants: L., G. (L.'s mom), R.N. (L.'s sister), Gavin Sellon, Patricia Nuna (Gavin's spouse), Lynne Gregory (Gavin's mom), Apenam Pone (Gavin's stepfather), Germaine Benuen [Labrador Legal Services court liaison in Sheshashit], Jack Penashue (facilitator) and Lyla Andrew (facilitator).

The participants had coffee and tea prior to the circle starting. Then all participants moved into the large meeting room and sat in a circle on the floor. With joined hands a prayer was shared. Jack then explained to the participants the symbolism of burning sweetgrass and smudging. If participants found it meaningful, they were invited to smudge and Jack went around the circle. He spoke Innuaimen first and then in English. When this was completed, Jack asked Lyla to explain the process.

It was explained to participants that what happened in the circle should be guided by the participants' acceptance and use of four principles: honesty, kindness, sharing and respect. Each person in turn would have the chance to speak uninterrupted. If they chose not to speak, they would pass the small "talking stone" on to the next person because no one would be forced to speak. There were four rounds of the circle so there were four opportunities for speaking.

The first round of the circle was for each participant to explain why they were present in the circle. The second round was a chance for each participant to speak directly to L., to share concern, support and encouragement. The third

round was for each participant to speak directly to Gavin, to share with him directly feelings about him. The fourth round was the chance for each participant to make recommendations to those in the circle, and especially to Gavin, about what could or should be done at this point in time to help bring about resolution to this situation.

Before the facilitators began the rounds, the possible need for interpretation between Innuaimum and English was discussed. It was agreed that participants would speak the language of their choice and anyone could request interpretation. Jack Penashue agreed to provide the interpretation. . . .

When the fourth and final round was completed . . . participants joined hands and closed the circle with a shared prayer.

It is very difficult to put into words an assessment of the effectiveness and power of this circle. Participants in circles learn the power of the circle through their active participation and learn that equally important to what is said by the participants is the atmosphere or feeling created within the circle by the participants. The comments which follow are those of the facilitators and Germaine Benuen in relation to their impressions about the intangibles of the circle process, about why it was effective and powerful.

As the participants began arriving at the building there was a noticeable tension among some. L. arrived with her mom and was quiet, almost sad, speaking little, standing off to the side while others chatted in twos or threes. All the participants seemed to be nervous. The facilitators had to be very direct to get participants into the room to start the circle. L.'s mother (G.) was the third participant to speak and she said directly that she was scared. The tension noticeably lessened and participants explained why they were present. It seemed to help that all participants had equal opportunity to say something. Even when L. did not speak in the first round, she began to appear less tense and less pressured, perhaps because she was not put on the spot to speak. We felt that in a way the process, and the participants in the process, showed respect to L. by not forcing her to speak. . . . When the circle started L. was seated in between her mom and Gavin's mom. She sat herself in such a way that she could look at her mom and at her cousin, but she had her back to almost everyone else in the circle. By the fourth round she had shifted around so that she could see and be seen by all the participants. She was smiling sometimes and by the end of the circle was laughing when appropriate with the other participants.

Another important aspect of the circle process was the expression of emotion by participants. Facilitators had no way to know what emotions, whether anger, sadness or frustration, might be voiced and or displayed by the participants. Facilitators knew from previous experiences that the process of the circle was powerful because honesty and emotion are an integral part of the process. How people spoke would in many ways be just as important to the impact of the circle as what people had to say.

There were two occasions when participants broke down weeping. Both L. and Gavin's mom wept. The other circle participants remained seated without speaking and waited for the person to compose themselves and then proceed when they were able. . . . G. commented that if she had been crying and someone had asked that there be a break to give her time to stop crying that it would feel like a rejection of her and her genuine feelings. She felt it was respectful of people to let them show emotion in a setting that was safe. If participants had

taken a break, it would have been more because of participants' discomfort than anything else. Participants had been asked to try and be honest and respectful, and accepting the expression of emotion seemed very much a part of that honesty and respect. . . .

An assumption is made that the recommendations of the circle participants in the final round are of most importance to the court. Prior to the circle meeting, participants had been asked in preparation for the circle to think about recommendations they would want to make to be shared with the court. However, it is important to stress that what was said in the earlier three rounds and how that was expressed, had great influence on, indeed shaped the recommendations which eventually were made.

Probably the single most important comments made by any participant affecting the recommendations finally offered, were the comments made by Gavin. In the first round Gavin spoke in a clear voice, in a direct way that he had come to the circle to apologize to everyone that he had hurt for what he had done. He said that he wanted to find out what people wanted from him, what they expected from him and he repeated that he had come to apologize and to say that he was sorry for his behaviour. In the round when everyone was invited to speak to L. Gavin spoke emphasizing that L. was in no way to blame for what had happened, that he took full responsibility for his actions. He explained that when he had gone to the Brentwood Treatment Centre that he had shared a lot of things that had happened in his life and that one of those things was what had happened between him and L. He said the reason he shared that at treatment was because of his shame. He told us that he knew that what he had done was wrong and he thought that if he shared how he felt about what he had done that it might help him to get better. He also thanked people for coming to the circle.

Because of the seating, L. had the opportunity in each round to speak before Gavin. She didn't speak in the first or second rounds but she spoke in the third round to Gavin and said that she was happy that he had opened up about what had happened between them. She said she would not have been strong enough to open up to others about what happened but she was glad he had. She also told participants she was happy to be a part of the circle. After this when Gavin spoke he said he wanted L. to know that what had happened was his fault. He also wanted his family to know that he was not blaming them in any way, that his actions were his own and he was responsible for his behaviour. . . .

Jack began the final round by saying that he felt what needed to be said had been said. He said he saw what had happened in the circle and he felt what had happened and he felt honoured to have been a part of the process where participants who cared about each other were able to say the things they needed to say. Jack spoke about his hesitation to say anything more but on a very personal note he said that he wanted to say what he felt should now happen, what could now happen. He said he thought that L. and Gavin should start talking to one another if they were not already doing so, that they both needed to accept what had happened because it was his experience that people sometimes "over say things and over think things." He said maybe it wouldn't happen right now but what needed to happen was for L. and Gavin to start having contact again maybe to try and hug each other. . . .

Lyla then began speaking and said she too found the last round the most difficult even though she knew that the earlier rounds had been difficult

because what was said and expressed was more painful. The difficulty with making recommendations came with a sense of having to satisfy someone or [some] group outside the circle, someone who hadn't experienced what had happened in the circle.

She then shared the same concern as Jack that where there had been friendships and family ties connecting Gavin and L. and Gavin's spouse and children, and where those connections had been broken or damaged, that through Gavin's actions, with the permission and agreement of others, that he needed to try and mend those connections. . . .

One recommendation was shared with L. This was that she accept and use . . . the caring that her family clearly has for her . . . to grow into being her own person. As a young mother L. was encouraged to remember the people who care for her deeply and to go to them for support and help when needed. . . .

Another specific recommendation was made about Gavin. If he were to be placed on probation, and obviously we couldn't know this, but if he was, it was recommended that rather than being supervised directly by the adult probation office, that he be made accountable through a period of probation to people in the community to whom he is connected and who know why he would be on probation and who would have real concern about how he was going to do while on probation. Both Jack and Germaine were suggested as a team who might be able to take on this responsibility. If the "system" is going to be keeping an eye on Gavin it should be done through people who can offer support and guidance based on a real knowledge of Gavin and the circumstances and who would be able to challenge Gavin to do the things which he himself acknowledges he needs to do in order to be healthier. . . .

Through interpretation L.'s mom G. said that she was really happy that Gavin had come to the circle and shared what he had with the participants. It was her opinion that Gavin was a strong young man because he had shared so much and taken responsibility. . . .

Apenam [Gavin's stepfather] recommended to Gavin that he continue to work at what Apenam knew Gavin had learned from going to the Brentwood treatment program. Apenam recommended this because he himself had gone to Brentwood many years before Gavin to change his own behaviour. . . .

Apenam said he wanted to say openly that he loves Gavin. Apenam said he doesn't always know how to show his love and that this is one of the biggest problems in his own life. He said he knows Gavin has a birth father but that he still wants to continue to be a father to Gavin as he has tried to be for many years, and if Gavin needs his help, Apenam offers it to him. . . .

In Innuaimun, L. was asked by Jack if she understood and she made a reply right away. . . . Jack . . . interpreted that L. had made a very broad statement and what she meant was that she had no problems or difficulties talking with Gavin or sharing with Gavin or anything like that. She would like to do that in fact and she had no worries or difficulties about doing that. Jack checked with L. if this was accurate and she replied it was. . . . Everyone agreed to close the circle and stood up with hands joined and together repeated the "serenity prayer."

At this point the tape was turned off and participants embraced one another at their own choosing. It is noted that L.'s mom went over to Gavin and embraced him and most significantly that L. and Gavin embraced one another. . . .

[A report of the circle was prepared and attached . . . to the decision of Judge O'Regan of the Newfoundland Supreme Court, Trial Division. In considering sentencing, Judge O'Regan found that "the concern of the Crown" that Gavin was non Inuit was "a non-issue," especially since Gavin "did grow up in the community of Sheshashit and was exposed to the Innu Culture and thus can benefit from the community's involvement in such things as a 'healing circle' which he attended." Judge O'Regan accepted the recommendations of the healing circle and imposed a noncustodial sentence.]

8. *Selective enforcement.* It is Pittsburgh in 1948 in Pulitzer Prize playwright August Wilson's powerful play, Seven Guitars (1996). Canewell, a harmonica player, explains why he was once jailed:

> I ain't done nothing. Ask Floyd. Singing. That's all I did. I was right down there on Maxwell Street waiting on Floyd. I started fiddling with my harmonica. I said if I'm gonna stand here and play I may as well throw my hat down * * * somebody might put something in it. The police said I was disturbing the peace. * * * Loitering. * * * [D]isrespecting the Law. They rolled all that together and charged me with laziness and give me thirty days. (Act I, Scene 3.)

Later, Floyd, a guitarist, explains what a police officer told him when Floyd was arrested: "I'm arresting you in advance. You gonna do something." (Act I, Scene 4.)

This fictional dialogue gets at an important point: Vague and overbroad statutes not only are of constitutional concern because they fail to give the law-abiding individual adequate notice of prohibited conduct, but also because such laws can be applied in a selective or discriminatory manner by the police and other legal institutions. In particular, ordinances that prohibit "vagrancy" and "loitering" have been attacked on constitutional grounds.

Consider, for example, the following Jacksonville, Florida vagrancy ordinance:

> Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offenses.

The Supreme Court, in classic language written by Justice William Douglas, declared the ordinance unconstitutional in Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972). As you will see, the Court worried that such ordinances are overly broad—thus, they potentially punish "innocent" conduct—and, because their vagueness allows for arbitrary and discriminatory law enforcement. Here is a taste of the Court's reasoning:

> The Jacksonville ordinance makes criminal activities which by modern standards are normally innocent. "Nightwalking" is one. * * * We know * * * from experience that sleepless people often walk at night, perhaps hopeful that sleep-inducing relaxation will result. * * *
>
> "[P]ersons able to work but habitually living upon the earnings of their wives or minor children"—like habitually living "without visible

means of support"—might implicate unemployed pillars of the community who have married rich wives.

"[P]ersons able to work but habitually living upon the earnings of their wives or minor children" may also embrace unemployed people out of the labor market, by reason of a recession or disemployed by reason of technological or so-called structural displacements.

Persons "wandering or strolling" from place to place have been extolled by Walt Whitman and Vachel Lindsay. * * * Persons "neglecting all lawful business and habitually spending their time by frequenting * * * places where alcoholic beverages are sold or served" would literally embrace many members of golf clubs and city clubs.

Walkers and strollers and wanderers may be going to or coming from a burglary. Loafers or loiterers may be "casing" a place for a holdup. Letting one's wife support him is an intra-family matter, and normally of no concern to the police. Yet it may, of course, be the setting for numerous crimes.

The difficulty is that these activities are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence. * * *

Another aspect of the ordinance's vagueness appears when we focus, not on the lack of notice given a potential offender, but on the effect of the unfettered discretion it places in the hands of the Jacksonville police. * * *

Those generally implicated by the imprecise terms of the ordinance—poor people, nonconformists, dissenters, idlers—may be required to comport themselves according to the lifestyle deemed appropriate by the Jacksonville police and the courts. Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." It results in a regime in which the poor and the unpopular are permitted to "stand on a public sidewalk * * * only at the whim of any police officer." * * *

A presumption that people who might walk or loaf or loiter or stroll or frequent houses where liquor is sold, or who are supported by their wives or who look suspicious to the police are to become future criminals is too precarious for a rule of law.

Papachristou effectively invalidated vagrancy and similar statutes. While the Court took an almost light-hearted view of the subject, cities in more recent times have encountered genuinely serious dangers, such as public "loitering" by gang members intent on causing future violent harm. Cities

have encountered difficulties drafting legislation that conforms with constitutional demands. In this regard, consider the next case.

CITY OF CHICAGO v. MORALES

Supreme Court of the United States, 1999.
527 U.S. 41, 119 S.Ct. 1849, 144 L.Ed.2d 67.

JUSTICE STEVENS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and V [in which JUSTICES O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER join], and an opinion with respect to Parts III, IV, and VI, in which JUSTICE SOUTER and JUSTICE GINSBURG join.

In 1992, the Chicago City Council enacted the Gang Congregation Ordinance, which prohibits "criminal street gang members" from "loitering" with one another or with other persons in any public place. The question presented is whether the * * * ordinance violates the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.

I

Before the ordinance was adopted, the city council's Committee on Police and Fire conducted hearings to explore the problems created by the city's street gangs, and more particularly, the consequences of public loitering by gang members. Witnesses included residents of the neighborhoods where gang members are most active, as well as some of the aldermen who represent those areas. Based on that evidence, the council made a series of findings that are included in the text of the ordinance and explain the reasons for its enactment.

The council found that a continuing increase in criminal street gang activity was largely responsible for the city's rising murder rate, as well as an escalation of violent and drug related crimes. It noted that in many neighborhoods throughout the city, "the burgeoning presence of street gang members in public places has intimidated many law abiding citizens." Furthermore, the council stated that gang members "establish control over identifiable areas * * * by loitering in those areas and intimidating others from entering those areas; and * * * members of criminal street gangs avoid arrest by committing no offense punishable under existing laws when they know the police are present * * *." It further found that "loitering in public places by criminal street gang members creates a justifiable fear for the safety of persons and property in the area" and that "aggressive action is necessary to preserve the city's streets and other public places so that the public may use such places without fear." Moreover, the council concluded that the city "has an interest in discouraging all persons from loitering in public places with criminal gang members."

The ordinance creates a criminal offense punishable by a fine of up to $500, imprisonment for not more than six months, and a requirement to perform up to 120 hours of community service. Commission of the offense

EXCERPT:

Lydia H. Grotti, Appellant A/K/A Lydia Grotti v. State of Texas

Court of Appeals of Texas, Second District, Fort Worth

209 S.W.3d 747

November 17, 2006

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Because a homicide requires the death of an "individual" and the Texas Penal Code defines an "individual" as one "who is alive," the State was required to show that McGhee was alive at the time Grotti allegedly caused her death. *See TEX. PENAL CODE §§ 1.07(a)(26), 19.01(a).* However, the Texas Penal Code does not define the term "death" other than with respect to unborn children, [15] and the trial court did not include a definition of death in its charge to the jury.

> 15 The penal code provides that "'[d]eath,' includes, for an individual who is an unborn child, the failure to be born alive." *TEX. PENAL CODE ANN. § 1.07(a)(49).*

The record demonstrates that both of the parties presented evidence under the assumption that *section 671.001(a) of the Texas Health and Safety Code* was the applicable and appropriate definition of death to be used during trial. Titled, "Standards Used in Determining Death," *section 671.001* provides in part the following:

> (a) A person is dead when, according to ordinary standards of medical practice, there is irreversible cessation of the person's spontaneous respiratory and circulatory functions.
>
> (b) If artificial means of support preclude a determination that a person's spontaneous respiratory and circulatory functions have ceased, the person is dead when, in the announced opinion of a physician, according to ordinary standards of medical practice, there is irreversible cessation of all spontaneous brain function. Death occurs when the relevant functions cease.

TEX. HEALTH & SAFETY CODE ANN. § 671.001(a), (b) (Vernon 2003). [16] *Section 671.001(a)* addresses cardiopulmonary death, and *section 671.001(b)* addresses brain death. *Id.* During his questioning, Grotti's counsel studiously asked numerous witnesses, without objection by the State, to assume that the following definition of death be applied, which tracks the language of *section 671.001(a)* verbatim:

> A person is dead when, according to ordinary standards of medical practice, there is an irreversible cessation of the person's spontaneous respiratory and circulatory functions.

The charge included no specific instruction on the definition of death, and none was requested by either the State or appellant. There is, however, no evidence in the record that the jury considered any alternative definition of death, and neither party challenged in this appeal the definition of death used at trial nor its omission from the charge given by the trial court. *See TEX. CODE CRIM. PROC. ANN. art. 36.14* (Vernon Supp. 2006) (requiring defendant to specifically object in writing to jury charge).

> 16 *Section 671.001* provides guidance to physicians, and others relying on those physicians' pronouncements, as to when death legally occurs in this state. *See TEX. HEALTH & SAFETY CODE ANN. § 671.001*; *Tarrant County v. Dobbins, 919 S.W.2d 877, 883 (Tex. App.--Fort Worth 1996 writ denied)* (holding that medical investigator was entitled to rely on doctors' pronouncement of death under *section 671.001*); *see also TEX. HEALTH & SAFETY CODE ANN. § 671.002(b)* (providing that "person who acts in good faith in reliance on a physician's or registered nurse's determination of death is not liable for civil damages or subject to criminal prosecution for the person's actions.").

While the court of criminal appeals instructs us that words not statutorily defined should be given their ordinary meanings, *Garcia v. State, 887 S.W.2d 846, 859 (Tex. Crim. App. 1994), cert. denied, 514 U.S. 1005, 115 S. Ct. 1317, 131 L. Ed. 2d 198 (1995)*, the penal code provides that "unless a different construction [of a statutory term] is required by the context," *sections 311.011, 311.012, 311.014-.015*, and *311.021-.032* of the government code, known as the Code Construction Act, apply to the construction of the term. *TEX. GOV'T CODE ANN. §§ 311.011, .012, .014-.015, .021-.032* (Vernon 2005); *TEX. PENAL CODE ANN. § 1.05(b). Government code section 311.011* provides that "[w]ords and [*761] phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." *TEX. GOV'T CODE ANN. § 311.011.* Moreover, in determining what definition to apply to the term "death" in this case, we may look to sources outside the code in which the offense itself is defined. *See Ex parte Matthews, 892 S.W.2d 208, 210-11 (Tex. App.--Houston [1st Dist.] 1995)* (op. on reh'g), *aff'd, 933 S.W.2d 134 (Tex. Crim. App 1996), overruled in part on other grounds by Proctor v. State, 967 S.W.2d 840, 844 (Tex. Crim. App. 1998).*

Section 671.001 was enacted to provide guidance to medical professionals and those relying on them in determining when death occurs. *See* note 16, *supra*. Thus, "death" has acquired a legislatively defined, technical meaning, and--in the context of a homicide prosecution of a medical professional who has been accused of causing the death of a patient in the course of performing a medical procedure--we are compelled to construe the term "death" in *penal code section 19.01(a)* according to this technical definition. Therefore, we hold that a hypothetically correct jury charge in this case would have included the definition of death codified in *section 671.001(a) of the Texas Health and Safety Code. See Gollihar, 46 S.W.3d at 253; Malik, 953 S.W.2d at 240.* Accordingly, we will use *section 671.001(a)*'s cardiopulmonary definition of "death" in conducting our sufficiency review. *See Gollihar, 46 S.W.3d at 253; Malik, 953 S.W.2d at 240.*
17

17 Grotti argues in her brief, and we agree, that *section 671.001(a)*, not *section 671.001(b)*, is the appropriate definition of death by which to examine the sufficiency of the evidence because this is a case of cardiopulmonary death, not brain death, and because we are restrained by the theories and definitions used at trial when conducting our sufficiency reviews. *See Gollihar, 46 S.W.3d at 253; Malik, 953 S.W.2d at 240.*

ANTHONY JAMES REED, Appellant v. THE STATE OF TEXAS

NO. 1410-01

COURT OF CRIMINAL APPEALS OF TEXAS

117 S.W.3d 260; 2003 Tex. Crim. App. LEXIS 86

May 14, 2003, Delivered

NOTICE: PUBLISH.

SUBSEQUENT HISTORY: On remand at, Remanded by *Reed v. State, 2004 Tex. App. LEXIS 1178 (Tex. App. Dallas, Feb. 6, 2004)*

PRIOR HISTORY: ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE FIFTH COURT OF APPEALS DALLAS COUNTY. *Reed v. State, 2001 Tex. App. LEXIS 3263 (Tex. App. Dallas, May 21, 2001)*

DISPOSITION: Reversed and remanded.

COUNSEL: FOR APPELLANT: ROBERT H. ROGERS, DALLAS.

FOR STATE: KATHERINE A. DREW, ASSIST. DA, DALLAS.

JUDGES: Meyers, J., delivered the opinion of the Court, in which Price, Johnson, Keasler, and Holcomb, J.J., joined. Keller, P.J., and Womack and Hervey, J.J., concurred in the judgment. Johnson, J., filed a concurring opinion. Cochran, J., dissented.

OPINIONBY: Meyers

OPINION:

Appellant was convicted of aggravated assault. *TEXAS PENAL CODE § 22.02(a)(2)*. The jury assessed punishment at 20 years confinement and a $ 10,000 fine. Appellant appealed the conviction stating that the trial court improperly charged the jury by including the mental state of recklessness when the indictment alleged only the mental states of intentionally and knowingly. The Court of Appeals affirmed the trial court's judgment. We granted review to determine whether the trial court improperly broadened the indictment by including "recklessly" in the jury instructions when the indictment alleged "intentionally" and "knowingly." In addition to the aggravated assault charge that is the subject of this appeal, appellant was also charged with and convicted of murder arising from the same shooting incident. n1 Testimony indicates that on June 20, 1999, Sheree Allen, Anita Gaitlin, and her sister, Corrina Gaitlin, were walking down the street with their friend, Coartne Robinson, when appellant came from behind a fence and began shooting. Robinson was struck 14 times and died of multiple gunshot wounds at the scene. Allen and the Gaitlin sisters ran, but Anita Gaitlin was struck in the leg by a bullet as she was running away. Anita Gaitlin stated that she was not sure whether or not appellant meant to shoot her. Testimony also indicated that Anita Gaitlin had a previous sexual relationship with appellant and that she and her sister were able to recognize him and identify him as the shooter. As a result of the identification, appellant was arrested and charged with the murder of Coartne Robinson and the aggravated assault of Anita Gaitlin. Omitting the formal parts, the indictment for the aggravated assault stated that the defendant did "unlawfully then and there intentionally and knowingly cause bodily injury to ANITA GAITLIN, hereinafter called complainant, by shooting said complainant, and said defendant did use and exhibit a deadly weapon to-wit: a firearm, during the commission of the assault."

n1 The jury assessed punishment of 50 years' confinement and a fine of $ 10,000 in the murder case.

At the end of the guilt phase of the trial, the trial judge briefly excused the jury while he drafted the instructions. He then stated:

THE COURT: Let's get something on the record. In the aggravated assault case, the lesser mental state is recklessly. And I'm going to put in the charge intentionally, knowingly or recklessly caused the bodily injury. That's going to be in there.

Appellant objected to the inclusion in the charge of the lesser mental state of recklessly that was not alleged in the indictment.

[APPELLANT]: We would object to the charge that's going to be - to the proposed charge being submitted to the jury on the aggravated assault offense, in that it includes a culpable mental state that was not alleged by the State in the charging instrument.

The instructions were presented to the jury including the lesser mental state of recklessly. The relevant portion says:

Now, if you find from the evidence beyond a reasonable doubt that on or about the 20th day of June, A.D., 1999, in Dallas County, Texas, the defendant, ANTHONY JAMES REED, did then and there intentionally or knowingly or recklessly cause bodily injury to ANITA GAITLIN, hereinafter called complainant by shooting said complainant, and said defendant did use or exhibit a deadly weapon, to-wit: a firearm, during the commission of the offense, then you will find the defendant guilty of Aggravated Assault with a deadly weapon as charged.

The jury found appellant guilty of the offense of aggravated assault with a deadly weapon. Appellant appealed arguing that the trial court improperly charged the jury by including the mental state of recklessness.

The Court of Appeals held that "because 'recklessly' is included in the mental states of 'knowingly' and 'intentionally,' the trial court could properly charge the jury to convict appellant of aggravated assault if it found he acted intentionally, knowingly, or recklessly." *Reed v. State*, 2001 Tex. App. LEXIS 3263, *11, No. 05-00-00472-CR (Tex. App.-Dallas May 21, 2001) (not designated for publication). The Court relied on *Rocha v. State, 648 S.W.2d 298, 302 (Tex. Crim. App. 1982)*, which held that it was not error to submit a charge authorizing conviction of the lesser included offense of aggravated assault upon a finding of the lower culpable mental state of "reckless" even though the indictment alleged the higher culpable mental states of "intentional" and "knowing" for the greater offense of attempted murder. The court also cited *Zuliani v. State, 903 S.W.2d 812, 816 (Tex. App.-Austin 1995, pet. ref'd)*, as holding that the jury was authorized to convict the appellant for recklessly causing serious bodily injury to a child when he was charged by indictment with intentionally and knowingly causing serious bodily injury to a child because "reckless" is a lesser culpable mental state than "intentionally" or "knowingly." n2

n2 *Texas Penal Code Section 6.02(d) and (e)*

Appellant argues that the Court of Appeals erred in relying on *Rocha* because *Rocha* involved the submission of a lesser included offense instruction to the jury. In this case, however, there were no lesser included offenses, as determined by *Texas Code of Criminal Procedure Article n3 37.09*, n4 and the jury charge did not contain a lesser included offense instruction. Rather, the jury instruction added to the charged offense a lesser culpable mental state than what was included in the indictment. Appellant contends that this case is controlled by *Wilson v. State, 625 S.W.2d 331 (Tex. Crim. App. 1981)*, instead because *Wilson* addresses the issue of errors in the jury instructions for the charged offense rather than errors in the lesser included offense instructions covered in *Rocha*.

n3 Unless otherwise specified, all future references to Articles refer to Texas Code of Criminal Procedure.

n4 An offense is a lesser included offense if:

(1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged;

(2) it differs from the offense charged only in the 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 or an otherwise included offense.

The State argues that the Court of Appeals did not err by affirming the trial court's inclusion of "reckless" in the jury instructions. Because recklessly is a lesser culpable mental state than intentionally and knowingly, the State contends that it is analogous to a lesser included offense. In a post-submission amicus brief submitted by the State Prosecuting Attorney, the State contends that aggravated assault committed with a reckless culpable mental state is a lesser included offense of aggravated assault committed intentionally or knowingly. n5 Thus, because the offense charged in the indictment impliedly includes lesser included offenses, if the evidence shows that a defendant committed a lesser included offense then the instructions to the jury can include the lesser included offense even if it was not the offense listed in the indictment. The State admits that the way the charge in this case was worded did not follow the usual manner by which the issue of a lesser included offense is submitted to the jury. A charge containing a lesser included offense usually says that the jury can consider a lesser included offense if the defendant is acquitted of the charged offense. However, in this case, no lesser included offense instructions were requested by the parties. n6

n5 The State Prosecuting Attorney states that *Article 37.09* "makes no mention, much less requires, that either (1) a lesser-included offense must differ in name or designation from the charged offense, or (2) a lesser-included offense must be subject to a lesser range of punishment than the charged offense."

n6 However, this opinion does not resolve the issue of whether a lesser included offense instruction would be available in an appropriate case.

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 the 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)*, this Court 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 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. We 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 indictment. In *Little v. State, 659 S.W.2d 425, 426 (Tex. Crim. App. 1983)*, we 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 culpable 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 at 301; Zuliani, 903 S.W.2d at 816.*

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 at 333*, where the defendant was indicted for aggravated robbery with the culpable mental states of intentionally and knowingly. We found error because the applica-

tion paragraph of the jury charge allowed him to be convicted of aggravated robbery if the jury found that he acted intentionally, knowingly, or recklessly.

The issue in *Wilson* is identical to the case before us. Appellant was charged in the indictment with intentionally and knowingly causing bodily injury to Anita Gaitlin by shooting her and by using and exhibiting a deadly weapon during the commission of the assault. This constitutes aggravated assault under *Texas Penal Code Section 22.02(a)(2)* which states:

(a) A person commits an offense if the person commits assault as defined in Section 22.01 and the person:

(2) uses or exhibits a deadly weapon during the commission of the assault.

Section 22.01 refers to assault and states:

(a) A person commits an offense if the person:

(1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;

So, the statute allows conviction of aggravated assault if the person recklessly caused bodily injury to another and used or exhibited a deadly weapon during the assault. However, this was not charged in the indictment. The indictment charged appellant only with intentionally and knowingly causing bodily injury to another and using or exhibiting a deadly weapon during the assault. Thus, while the jury instructions authorized conviction of an offense that is allowed under the statute, it was not an offense for which appellant was indicted.

The cases relied on by the Court of Appeals can be distinguished from the case before us. In *Little*, this Court recognized the difference between *Wilson* and *Rocha*. We noted that in *Wilson*, the defendant was convicted of the charged offense. Because the jury was instructed on a lesser culpable mental state than those alleged in the indictment, we found error. In *Rocha*, however, we held that it was not error to submit a charge authorizing conviction of the lesser included offense upon a finding of the lower culpable mental state of recklessness. *Little, 659 S.W.2d at 426*. Thus, the difference between the two cases is that *Wilson* deals with the charged offense while *Rocha* deals with a lesser included offense. Because *Little* dealt with a lesser included offense, *Rocha* controlled in that situation. *Zuliani* also covers a lesser included offense because the injury to a child statute provides different punishment ranges for each culpable mental state. Therefore, although the indictment charged the defendant with intentionally and knowingly causing serious bodily injury to a child, the jury instructions allowed the jury to find him guilty of the lesser included offense of recklessly causing serious bodily injury to a child. This lowered the offense from a first degree felony, as charged in the indictment, to a third degree felony. *Zuliani, 903 S.W.2d at 816*.

The State argued that the Court of Appeals did not err by relying on *Rocha* and *Zuliani* because the current case could also be treated as a lesser included offense. However, because neither party requested a lesser included offense jury instruction and the lesser included offense issue was not raised at trial, we will not decide this case based on an issue that was not presented to the trial court or preserved for appeal. The failure to request a lesser included offense instruction in the jury charge precludes the State's use of *Articles 37.08* and *37.09(3)* to now bring in the culpable mental state of recklessness that was not alleged in the indictment. *Article 37.09* determines whether an offense is a lesser included offense. It states in part that an offense is a lesser included offense if it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission. This must be read in conjunction with *Article 37.08* which says: "In a prosecution for an offense with lesser included offenses, the jury may find the defendant not guilty of the greater offense, but guilty of any lesser included offense." Thus, a conviction for a lesser included offense requires not only a lesser included offense instruction to the jury, but also an acquittal for the charged offense, neither of which are present in this case. Because this issue was not presented to the trial court as a lesser included offense, *Rocha* was incorrectly relied upon by the Court of Appeals. Instead, the reasoning in *Wilson* applies to the case before us.

Similarly, the State's failure to allege recklessness in the indictment and subsequent failure to allege the act or acts relied upon to constitute recklessness preclude the inclusion of recklessness in the jury charge. Under *Article 21.15*,

Whenever recklessness or criminal negligence enters into or is a part or element of any offense, or it is charged that the accused acted recklessly or with criminal negligence in the commission of an offense, the complaint, information, or indictment in order to be sufficient in any such case must allege, with reasonable certainty, the act or acts relied upon to

constitute recklessness or criminal negligence, and in no event shall it be sufficient to allege merely that the accused, in committing the offense, acted recklessly or with criminal negligence.

Article 21.15 does not keep the parties from submitting a lesser included offense with a reckless culpable mental state to the jury. However, when recklessness is left out of the indictment for the charged offense, and no lesser included offense is submitted to the jury (as in this case and in *Wilson*) then *Article 21.15* precludes the inclusion of recklessness or criminal negligence in the jury instructions for the charged offense.

Section 6.03 of the Texas Penal Code separately defines the culpable mental states and the conduct described by each is different. Reckless conduct is different from knowing conduct and from intentional conduct, as indicated by *section 6.03* and as defined in the instructions to the jury. Although appellant was charged with intentionally and knowingly shooting Anita Gaitlin, the jury instructions allowed him to be convicted for recklessly disregarding the risk that one of the shots he fired at Robinson may have hit someone else. Therefore, the jury instructions expanded the indictment. It is possible that the jury found appellant guilty of recklessly causing the bodily injury, which is conduct that was not alleged in the indictment.

We are not holding that appellant was charged with a different or separate offense than that which he was possibly convicted of, rather we are saying that either the indictment should have accurately listed the applicable mental states or the charge should have limited the jury instructions to the mental states alleged in the indictment.

We hold that the trial court improperly broadened the indictment by including "recklessly" in the jury instructions ... when the indictment alleged "intentionally" and "knowingly." Accordingly, the judgment of the Court of Appeals is reversed and the case is remanded to the Court of Appeals to determine harm.

Meyers, J.

Johnson, J., *filed a concurring opinion.*

CONCUR BY: Johnson

CONCUR:

In the Penal Code, there are a number of offenses that differ only in the required mental state, and because of the required mental state, have different ranges of punishment. E.g., murder under *section 19.02(b)(1)* (intentionally and knowingly causes the death of an individual; 1st degree felony) and manslaughter under *section 19.04* (recklessly causes the death of an individual; 2nd degree felony); criminal mischief under *section 28.03* (intentionally and knowingly damages or destroys property of another without consent; Class A, B, or C misdemeanor, depending on amount of damage) and reckless damage or destruction under *section 28.04* (recklessly damages or destroys property of another without consent; Class C misdemeanor regardless of amount of damage). Other offenses have no required mental state, such as intoxication offenses (*section 49.11*). For other offenses, such as sexual assault under *sections 22.011 or 22.021*, "reckless" commission borders on the absurd. For other offenses, such as the one here, mental state is more similar to "manner and means" than to "lesser-included offense."

By the very use of the word "lesser," the term connotes an act that is less blame-worthy and, therefore, subject to lesser censure and a lesser punishment. If this were not so, we would use the term "included offense" instead. Texas statutes bear this out: misdemeanor theft involves a smaller loss than the higher felony charge; misdemeanor assault involves lesser injury than the felony, aggravated assault. While the statute says that "lesser-included offense" includes an offense that "differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission . . .," to say that a less culpable mental state is sufficient, in and of itself, leads to absurd results.

The offense alleged by the indictment in this case, aggravated assault, *Penal Code § 22.02(a)*, defines the elements of that offense as:

1) an assault as defined in § 22.01 ("intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse"); and

2) "causes serious bodily injury to another, including the person's spouse . . .."

In this case, the indictment alleged only intentionally and knowingly, thereby restricting the elements of the offense to "intentionally and knowingly causes serious bodily injury to another." It cannot be denied that bodily injuries which cause death are serious. If we are to determine whether an offense is a lesser-included one based *solely* on whether it requires a less culpable mental state, then, under this indictment, manslaughter, *Penal Code § 19.04* ("A person commits an offense if he recklessly causes the death of an individual.") is a lesser-included offense of aggravated assault. It is at least arguable that, under the indictment at issue here, murder under *§ 19.02(b)(2)*("intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual") is also a lesser-included offense of aggravated assault.

The Legislature has shown itself able to explicitly delineate what behavior shall constitute an offense and what shall not. In the statute at issue here, the legislature-decreed that recklessly causing injury is an offense, while recklessly threatening injury is not:

Section 22.01 Assault.

[*267] (a) A person commits an offense if the person:

(1) intentionally, knowingly, or recklessly causes bodily injury to another . . .

(2) intentionally or knowingly threatens another with imminent bodily injury . . . or

(3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

Section 22.02. Aggravated Assault

(a) A person commits an offense if the person commits assault as defined in Section 22.01 and . . ..

The prescribed punishment ranges appear to be based on harm to another, rather than on mental state. An offense under *§ 22.01(a)(1)* requires physical injury and is punishable as a Class A misdemeanor, while *(a)(2)* and *(a)(3)* do not involve physical injury and are punishable by fine only. Clearly, *(a)(2)* and *(a)(3)* are lesser-included offenses of *(a)(1)*, because they are proved by less than all the facts required to prove *(a)(1)*, specifically, physical injury. Subsection *(a)(1)* however, prescribes the same punishment for all three included mental states, indicating that the gravamen of assault under *(a)(1)* is injury, not the manner in which it was inflicted, whether intentionally, knowingly, or recklessly. Notice requirements mandate that manner and means be plead in the indictment so that the defendant has an adequate opportunity to prepare and present a defense. The state cannot allege murder by knife, prove murder by slow poison, and still obtain a valid conviction. Here, the state gave notice that the manner of commission was knowingly and intentionally. It may not now rely on recklessly. Indeed, that reliance is foreclosed by the state's failure to comply with the specific notice requirements of *Code of Crim. Proc. Art. 21.15*.

I join the judgment of the Court.

Johnson, J.

Identifying the Elements in Criminal Statutes

Instructions: Identify the material elements in each of the following statutes. (You should identify the conduct, attendant circumstances, and result (if one is required). Can you identify any issues of statutory interpretation on which the prosecution and defense might disagree? Are there other provisions in the TPC that might provide some guidance on how the statutes should be interpreted?

TPC 22.10 Leaving a Child in a Vehicle:

A person commits an offense if he intentionally or knowingly leaves a child in a motor vehicle for longer than five minutes knowing that the child is:

(1) younger than seven years of age; and

(2) not attended by an individual in the vehicle who is 14 years of age or older.

TPC 22.01(a)(1) Assault:

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

TPC 30.02(a)(3) Burglary:

A person commits an offense if, without the effective consent of the owner, the person enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.

TPC 10.02(b)(1) Murder:

A person commits an offense if he intentionally or knowingly causes the death of an individual.

TPC 15.02(a) Conspiracy:

A person commits criminal conspiracy if, with intent that a felony be committed:

(1) he agrees with one or more person that they or one or more of them engage in conduct that would constitute the offense; and

(2) he or one or more of them performs an overt act in pursuance of the agreement.

RODERIC JOHNSON, Appellant v. THE STATE OF TEXAS

NO. 1399-96

COURT OF CRIMINAL APPEALS OF TEXAS

967 S.W.2d 848; 1998 Tex. Crim. App. LEXIS 39

March 25, 1998, Delivered

PRIOR HISTORY: Petition For Discretionary Review from the Second Court of Appeals. (Tarrant County).

DISPOSITION: Affirmed.

COUNSEL:

Allan K. Butcher, Allan K. Butcher, Jr., Fort Worth.

Danielle A. LeGault, Assist. DA, Fort Worth.

JUDGES: McCORMICK, Presiding Judge delivered the opinion of the Court joined by MANSFIELD, KELLER, HOLLAND, and WOMACK, JJ. PRICE, J., filed a concurring opinion joined by MEYERS, MANSFIELD and WOMACK, JJ. BAIRD, J., filed a dissenting opinion. OVERSTREET, J., dissented.

OPINIONBY: McCormick

OPINION: OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

Appellant was convicted by a jury of the offense of indecency with a child and the jury assessed punishment at confinement for two years, probated for a period of five years. In an unpublished opinion, the Court of Appeals affirmed appellant's conviction. *Johnson v. State*, No. 02-95-384-CR (Tex.App.--Fort Worth July 18, 1996 pet. granted)(not designated for publication). This Court granted review to determine whether the offense of indecency with a child requires a culpable mental state relating to the child's age. We will affirm.

The statute relevant to this issue is *Section 21.11 of the Texas Penal Code*. Section 21.11(a)(1) and (2) states in pertinent part that:

"(a) A person commits an offense if, with a child younger than 17 years and not his spouse, whether the child is of the same or opposite sex, he:

"(1) engages in sexual contact with the child; or

"(2) exposes his anus or any part of his genitals, knowing the child is present, with intent to arouse or gratify the sexual desire of any person."

Appellant argues that touching the anus, breasts, or genitals is only a crime if the circumstances of the act make it a crime. He claims that indecency with a child is a circumstances of the conduct crime which is different when compared to the nature of the conduct or result of the conduct crime; as evidenced in the offenses of gambling and murder respectively. In the instant case, appellant contends that his culpable mental state attaches to the circumstances surrounding the conduct, the child's age. Appellant relies on *McQueen v. State, 781 S.W.2d 600 (Tex.Cr.App. 1989)*, where this Court held that unauthorized use of a vehicle is a circumstances of conduct crime, and that the culpable mental state attaches not only to the conduct of the operating the vehicle, but also to the circumstances surrounding the conduct, that the operation is without the consent of the owner. Appellant therefore argues that a defendant must intentionally operate the vehicle, knowing the operation is without the owner's consent. Appellant compares *McQueen* with the instant case in

that he should not be guilty unless he knew the victim was under age 17. He contends that the rationale used in *McQueen* should be applied to indecency with a child.

However, this Court has previously held that in cases involving the sexual assault of a child, such as rape of a child or indecency with a child, the State is not required to show that appellant knew the victim to be younger than 17 years of age. In fact, this Court held in *Vasquez v. State, 622 S.W.2d 864, 866 (Tex.Cr.App. 1981)* that, "It follows that to require the State to allege and prove the appellant know the prosecutrix to have been under the age of 17 would establish ignorance or mistake as a defense in contravention of the clear legislative intent." *Vasquez v. State, 622 S.W.2d 864, 866 (Tex.Cr.App. 1981).* Had the Legislature intended to make a provision regarding the knowledge of the victim's age it would have expressly included that requirement within *Section 21.11 of the Texas Penal Code*. Absence of such express language proves otherwise.

This Court in *Roof v. State, 665 S.W.2d 490, 492 (Tex.Cr.App. 1984)* again concludes that, "Given our case law and legislative tradition running squarely against appellant's notion that the State must prove his knowledge of the victim's age, and given the failure of the Legislature to specifically require such knowledge when it required knowledge of the victim's presence, appellant's position must fail." In case after case, this Court has held that the State is not required to show that appellant knew the victim to be under the age of 17. n1 This rule is well established and we therefore find that it is dispositive of the issue in the case at bar.

n1 *See Clark v. State, 558 S.W.2d 887 (Tex.Cr.App. 1977)*(this Court rejected an accused's contention that the indictment under V.T.C.A. *Penal Code, Sec. 21.11(a)(1)*,(which prohibits engaging in sexual contact with a child younger than 17), failed to allege all the elements of the offense when it failed to allege the defendant's knowledge that the victim was a child); *Green v. State, 571 S.W.2d 13 (Tex.Cr.App. 1978)*(the defendant contended that the indictment under which he was charged failed to allege an offense under Sec. 21.11(a)(2), this Court found the indictment sufficient even though it did not allege that the defendant know his victim was under 17 years of age).

For the reasons stated above, appellant's sole ground of review is overruled. The judgment of the Court of Appeals is affirmed.

McCormick, Presiding Judge

(Delivered March 25, 1998)

En Banc

Overstreet, J., dissents

CONCUR BY: Price

CONCUR: CONCURRING OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

I write separately, because although I concur with the judgment of the majority, I believe neither the majority nor the dissent fully address the issues this case presents, in terms of statutory interpretation and constitutionality.

The question presented today is what, if any, culpable mental state is required under *TEX. PEN. CODE § 21.11.* The issue of whether or not a culpable mental state is required for the offense of "statutory rape" has been much debated throughout the country for several decades now. As has been noted, "prior to 1964, it was the universally accepted rule in the United States that a defendant's mistaken belief as to the age of the victim was not a defense to a charge of statutory rape." Colin Campbell, Annotation, *Mistake or Lack of Information as to Victim's Age as Defense to Statutory Rape, 46 A.L.R. 5th 499, 499 (1997).* This court's own case law has long held that such a mistaken belief was not a defense. In what appears to be the first reported case in Texas, we relied primarily on the decisions of other states, as well as on treatises on criminal law and British decisions, for the proposition that mistake of fact as to the victim's age is no defense. *Edens v. State 43 S.W. 89, 89 (Tex. Crim. App. 1897).* Although this "universal rule" was first "broken" by the California Supreme Court more than thirty years ago, *see People v. Hernandez, 61 Cal. 2d 529, 393 P.2d 673, 39 Cal.*

Rptr. 361 (Cal. 1964), such breakage has hardly been universally accepted. Instead, courts around the country have been split, not only as to the results reached, but also as to the reasons relied upon in reaching those results. n1

n1 For the various results reached among the various state and federal courts, *see generally*, Colin Campbell, Annotation, *Mistake or Lack of Information as to Victim's Age as Defense to Statutory Rape, 46 A.L.R. 5th 499 (1997)*. Among the decisions revealing the contentiousness of this issue are *Perez v. State, 111 N.M. 260, 803 P.2d 249 (N.M. 1990)*, in which the court allowed a defense of mistake of fact, reasoning that because the statute at issue distinguished between victims under thirteen and those between thirteen and sixteen and also focused on whether the defendant was at least eighteen or at least four years older than the victim, such statute was a "numbers game...When the law requires a mathematical formula for its application, we cannot say that being provided the wrong numbers is immaterial." *803 P.2d at 251; State v. Elton, 680 P.2d 727 (Utah 1984), vacating upon reconsideration 657 P.2d 1261 (Utah 1982)*, in which the Utah Supreme Court reversed itself two years later on the issue, and declared that mistake of fact with regard to the age of the victim was a defense, while noting *(680 P.2d at 732 n.8)* that the decision was itself limited by legislation which had subsequently been passed by the legislature; *State v. Guest, 583 P.2d 836, 839 (Alaska 1978)*, in which the Alaska Supreme Court construed that state's statutory rape law to allow for a mistake of fact defense, noting that except for "public welfare" types of offenses, that state's constitution requires criminal intent as a part of its criminal laws (this decision was subsequently superseded by statute, *see infra* n.8); and *Garnett v. State, 332 Md. 571, 632 A.2d 797 (Md. 1993)*, perhaps the "inevitable epic" of this long debate, with a majority opinion detailing the legislative intent and constitutional status of the statute at issue *(632 A.2d at 797-805)*, as well as two dissents *(632 A.2d at 805-807* (Eldridge, J., dissenting) & 807-824 (Bell, J., dissenting)) challenging those assertions.

The first consideration in today's case is one of statutory interpretation. An initial reading of § 21.11 might suggest that, in fact, a required element of the offense is knowledge of the victim's age. That is, § 21.11(a)(2) requires that the defendant know that "...the child is present." Whether such knowledge goes only to the victim's presence or to the fact that the victim is a child, i.e., under the age of 17 years, is not clear. This court has held that when the language of a statute is ambiguous, we may consider extratextual factors such as legislative history to determine legislative intent. *Boykin v. State, 818 S.W.2d 782, 785-786 (Tex. Crim. App. 1991)*. Using such legislative history, we have previously determined that the intent of the legislature was that the knowledge element of § 21.11(a)(2) applies only to the presence of the victim, rather than the victim's age. *Roof v. State, 665 S.W.2d 490, 491-492 (Tex. Crim. App. 1984)*.

The next consideration is the interaction of *TEX. PEN. CODE § § 6.02* and 21.11. *TEX. PENAL CODE § 6.02*, titled "Requirement of Culpability," states in relevant part:

(a) Except as provided in Subsection (b), a person does not commit an offense unless he intentionally, knowingly, recklessly or with criminal negligence engages in conduct as the definition of the offense requires.

(b) If the definition of an offense does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition *plainly dispenses* with any mental element. (emphasis added)

The issue of when an offense "plainly dispenses" with a mental element is not itself plainly evident. That is, does mere silence as to a mental element mean that the legislature intended to "plainly dispense" with any mental element, or must the text of the statute explicitly state the legislature's intent to do away with any mental element? If mere silence is not, in and of itself, sufficient to "plainly dispense" with a mental element, then under *Boykin, supra*, courts may be required to go outside of the text of the statute and consider legislative history, public policy, etc., to determine legislative intent.

Judicial interpretation of § 6.02 has varied, depending on the specific statute at issue. n2 However, with regard to *TEX. PENAL CODE § 21.11*, several factors lead to the conclusion that the legislature intended that no mental element be required as to the age of the victim.

n2 In a large number of cases, this court and several lower courts have asserted that when the statute is merely silent as to a mental element, it has not plainly dispensed with one, and so one is nevertheless required. *See, e.g., Crawford v. State, 646 S.W.2d 936, 937 (Tex. Crim. App. 1983)* ("endless chain"/pyramid promotional scheme); *Goss v. State, 582 S.W.2d 782 (Tex. Crim. App. 1979)* (failure to stop and render aid); *West v. State, 567 S.W.2d 515, 516* (Tex. Crim. App. [Panel Op.] 1978) (criminal trespass); *Zachery v. State, 552 S.W.2d 136, 137 (Tex. Crim. App. 1977)* (attempted rape); *Tew v. State, 551 S.W.2d 375, 376 (Tex. Crim. App. 1977)* (unlaw-

ful possession of firearm by felon); *Ex Parte Winton, 549 S.W.2d 751, 752 (Tex. Crim. App. 1977)* (burglary); *Rodriquez v. State, 548 S.W.2d 26, 28-29 (Tex. Crim. App. 1977)* (felony murder); *Baldwin v. State, 538 S.W.2d 109 (Tex. Crim. App. 1976)* (credit card abuse); *Hazel v. State, 534 S.W.2d 698, 700 (Tex. Crim. App. 1976)* (unlawful possession of firearm by felon); *Braxton v. State, 528 S.W.2d 844, 846 (Tex. Crim. App. 1975)* (rape); *Aguirre v. State, 1998 Tex. App. LEXIS 654*, No. 08-97-00408-CR, (Tex. App.-El Paso Jan. 29, 1998, no pet. h.) (municipal ordinance prohibiting conducting business in a nude live entertainment club located within 1,000 feet of a school); *Pollard v. State, 687 S.W.2d 373, 374* (Tex.App.-Dallas 1985, pet. ref'd) (city ordinance prohibiting sleeping and dozing in public place); *Franklin v. State, 682 S.W.2d 426, 427* (Tex.App.-Houston [1st Dist.] 1984, no pet.) (illegal use of shrimping equipment); *Clayton v. State, 652 S.W.2d 810, 811-812* (Tex. App.-Amarillo 1983, no pet.) (driving with suspended license); *Diggles v. State, 641 S.W.2d 667, 668* (Tex. App.-Dallas. 1982, pet. ref'd)(illegal voter assistance); *Hang On, Inc. v. City of Arlington, 65 F.3d 1248, 1254-1255 (5th Cir. 1995)* (city ordinance prohibiting touching between customers and nude employees at adult cabarets); *Howard Gault Co. v. Texas Rural Legal Aid, Inc., 848 F.2d 544, 563 (5th Cir. 1988)* (statute prohibiting picketing accompanied by slander, libel or public misrepresentation). *But see Zulauf v. State, 591 S.W.2d 869, 872-873* (Tex. Crim. App. [Panel Op.] 1979) (holding that phrase "no person *shall* drive a vehicle on the highway at a speed greater than is reasonable and prudent under the circumstances then existing..." is clear command that legislature intended to make speeding a strict liability offense).

In other circumstances, courts have found that when the terms of the statute require a mental element that is not prescribed within the penal code, a mental state is not plainly dispensed with, so that a mental state specifically prescribed within the penal code (i.e., intentional, knowing, reckless, or criminally negligent) is required. *See, e.g., Honeycutt v. State, 627 S.W.2d 417, 424* (Tex. Crim. App. [Panel Op.] 1981) (municipal offense of prohibiting negligent collision); *Bocanegra v. State, 552 S.W.2d 130, 132 (Tex. Crim. App. 1977)* (welfare fraud).

Sometimes, courts have gone outside of the text of the statute and examined legislative history to determine whether a culpable mental state is required. *See, e.g., American Plant Food Corp. v. State, 587 S.W.2d 679, 684-686 (Tex. Crim. App. 1979)* (en banc) (water pollution--no culpable mental state required); *Ex Parte Ross, 522 S.W.2d 214 at 218 (Tex. Crim. App. 1975), cert. denied, 423 U.S. 1018, 96 S. Ct. 454, 46 L. Ed. 2d 390 (1975)* (driving while intoxicated--no culpable mental state required); *Exxon Co., U.S.A. v. State, 646 S.W.2d 536, 537-538* (Tex. App.-Houston [1st Dist.] 1982, pet. ref'd)(air pollution--no culpable mental state required).

Finally, public policy has been occasionally considered in determining if a culpable mental state is required. *See, e.g., Aguirre v. State, 1998 Tex. App. LEXIS 654*, No. 08-97-00408-CR (Tex. App.-El Paso Jan. 29, 1998, no pet. h.) (municipal ordinance prohibiting conducting business in a nude live entertainment club located within 1,000 feet of a school); *Baggett v. State, 691 S.W.2d 779, 782* (Tex. App.-Beaumont 1985), *rev'd on other grounds, 722 S.W.2d 700 (Tex. Crim. App. 1987)* (refusal to allow inspection by proper official of certain aquatic products in possession of licensed wholesale fish dealer--no culpable mental state required); *Exxon Co., U.S.A. v. State, 646 S.W.2d 536, 538* (Tex. App.-Houston [1st Dist.] 1982, pet. ref'd) (air pollution--no culpable mental state required).

Recently in *Long v. State, 931 S.W.2d 285 (Tex. Crim. App. 1996)*, we declared the stalking provision of a harassment statute unconstitutional. In doing so, we noted that particular subdivisions of that statute prescribed a culpable mental state. From this, we reasoned that the legislature intended only those subdivisions of the statute, and no others, to require a culpable mental state. *Id. at 291.* In the present case, the relevant portion of § 21.11 reads as follows:

(a) A person commits an offense if, with a child younger than 17 years and not his spouse, whether the child is of the same or opposite sex, he:

(1) engages in sexual contact with the child; or

(2) exposes his anus or any part of his genitals, *knowing* the child is present, with *intent* to arouse or gratify the sexual desire of any person. (emphasis added)

Thus, it can be implied, similar to the reasoning in *Long*, that since § 21.11(a)(2) contains the mental elements "knowing" and "intent," and since those same mental elements are apart from the provision of § 21.11(a), which specifies the age of the victim, the intent of the legislature was to dispense with a culpable mental state as to the victim's age. The dissent states that I am "...unable to point to any language in the statute which 'plainly dispenses' with a culpable mental state." *Johnson v. State, 967 S.W.2d 848, 855 (1998).* But, it is precisely the *absence* of a culpable mental state as to the

victim's age, when the legislature has prescribed mental elements as to other portions of the offense, that makes the legislative intent clear.

This conclusion is further bolstered by comparing the previous versions of § 21.11 with its current enactment. Prior to the enactment of the current penal code, the offense at issue here was codified, in part, by the following provisions:

It shall be unlawful for any person with lascivious *intent* to *knowingly and intentionally* expose his or her private parts or genital organs to any other person, male or female, under the age of sixteen (16) years. (emphasis added)

Acts 1950, 51st Leg., 1st C.S., p. 50, ch. 9, *repealed by* Acts 1973, 63rd Leg., p. 991, ch. 399, § 3(a), effective January 1, 1974.

It shall be unlawful for any person with lascivious *intent* to *intentionally* place or attempt to place his or her hand or hands, or any portion of his or her hands upon or against a sexual part of a male or female under the age of fourteen (14) years, or to in any way or manner fondle or attempt to fondle a sexual part of a male or female under the age of fourteen (14) years, or to *intentionally* place or attempt to place his or her hands or any part of his or her hands upon the breast of a female under the age of fourteen (14) years, or to in any way or manner fondle or attempt to fondle the breast of a female under the age of fourteen (14) years. (emphasis added)

Acts 1950, 51st Leg., 1st C.S., p. 52, ch. 12, *repealed by* Acts 1973, 63rd Leg., p. 991, ch. 399, § 3(a), effective January 1, 1974.

In these previous versions of § 21.11, it is not clear exactly "how far down" the italicized mental states are meant to "travel," i.e., whether or not they are meant to modify the age of the victim. However, it is notable that when redrafting these provisions for the current penal code, the legislature chose to break the offense down into several separate parts and to clearly remove the mental elements from the portion of the statute having to do with the victim's age. This further suggests that there was no intent on the part of the legislature for there to be any mental element as to the victim's age.

Finally, it is notable that since it was first passed by the legislature as part of the penal code in 1973, § 21.11 has been amended several times. n3 In two of these amendments, the legislature made substantial changes as to the affirmative defenses available within the statute itself. n4 The fact that neither of these changes relates to the issue of culpable mental state and the defense of mistake of fact (*TEX. PEN. CODE § 8.02*), coupled with the context in which these issues have been hotly debated around the country by both legislatures and courts, reinforces the conclusion that, with regard to § 21.11, the legislative intent is to "plainly dispense" with any mental element as to the victim's age.

n3 *See TEX. PEN. CODE ANN. § 21.11* credits & historical notes (Vernon 1994) [Acts 1973, 63rd Leg., p. 883, ch. 399, § 1, eff. Jan. 1, 1974. Amended by Acts 1981, 67th Leg., p. 472, ch. 202, § 3, eff. Sept. 1, 1981; Acts 1987, 70th Leg., ch. 1028, § 1, eff. Sept. 1, 1987; Acts 1993, 73rd Leg., ch. 900, § 1.01, eff. Sept. 1, 1994].

n4 *See* Acts 1981, 67th Leg., p. 472, ch. 202, § 3, eff. Sept. 1, 1981; Acts 1987, 70th Leg., ch. 1028, § 1, eff. Sept. 1, 1987.

Furthermore, although the United States Supreme Court has never specifically ruled on the constitutionality of prohibiting a defense of mistake of fact as to the victim's age in cases of "statutory rape," that court has repeatedly suggested over the years that such a prohibition is not constitutionally infirm. This can be inferred from the following: (1) in a 1994 decision construing a federal child pornography statute, in which the court held that the term "knowingly" applied to the minority of the performers and noted that if it were not to construe the statute that way, the statute might be unconstitutional, it noted in passing that "...we do not think the common law treatment of sex offenses militates against our construction of the present statute." *United States v. X-Citement Video, Inc., 513 U.S. 64, 78 & 72 n.2, 115 S. Ct. 464, 472 & 469 n.2, 130 L. Ed. 2d 372 (1994)* n5 ; (2) in 1982, the Supreme Court declined to hear an appeal of a decision by the Supreme Court of Pennsylvania holding that a denial of the defense of mistake of fact as to the victim's age did not violate the U.S. Constitution, on the grounds of lack of a "substantial federal question." *Robinson v. Pennsylvania, 457 U.S. 1101, 102 S. Ct. 2898, 73 L. Ed. 2d 1310 (1982), dismissing appeal Commonwealth v. Robinson, 497 Pa. 49, 438 A.2d 964 (Pa. 1981).* n6 Given these facts, as well as Texas' long tradition of refusing to recognize the de-

fense of mistake of fact as to the victim's age, n7 I believe that neither the United States Constitution nor the Texas Constitution mandate that such a defense be allowed. n8 Therefore, I concur with the judgment of the majority. n9

n5 The dissent cites *X-Citement Video* as authority in support of its position that § 21.11 requires a *mens rea* as to the age of the victim. *Johnson v. State, 967 S.W.2d 848, 856-859 (1998).* However, as noted above, and as one of our intermediate appellate courts has previously stated, that decision specifically distinguished common law sex offenses from the reasoning used by the Supreme Court in that decision. *Duron v. State, 915 S.W.2d 920, 922* (Tex. App.-Houston [1st Dist.] 1996) (citing *X-Citement Video, 513 U.S. at 72 n.2, 115 S. Ct. at 469 n.2), aff'd on other grounds, 956 S.W.2d 547 (Tex. Crim. App. 1997).*

n6 Unlike denials of certiorari, dismissals for want of a substantial federal question do carry some, albeit limited, precedential weight. *See Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 180-183, 99 S. Ct. 983, 988-989, 59 L. Ed. 2d 230 (1979); Mandel v. Bradley, 432 U.S. 173, 176-177, 97 S. Ct. 2238, 2240-2241, 53 L. Ed. 2d 199 (1977).*

n7 The dissent cites to *McQueen v. State, 781 S.W.2d 600 (Tex. Crim. App. 1989)* in support of its position that § 21.11 requires a culpable mental state as to the age of the victim. *Johnson v. State, 967 S.W.2d 848, 857-859 (1998). McQueen*, however, dealt with a statute prohibiting unauthorized use of a vehicle. § 21.11 is distinguishable from that statute for the simple reason that it codifies a common law sex offense which has traditionally been excepted from the *mens rea* requirement of most criminal offenses. *See Morissette v. United States, 342 U.S. 246, 251 n.8, 72 S. Ct. 240, 244 n.8, 96 L. Ed. 288 (1952).*

n8 The drafters of the Model Penal Code advocate that mistake of fact as to the victim's age be allowed as a defense, at least "when criminality depends on the child's being below a critical age other than 10." MODEL PENAL CODE § 213.6(1) & cmt. 2 (Official Draft). As well, a few state legislatures have made decisions allowing for the defense of mistake of fact, to varying degrees. *See ALASKA STAT. § 11.41.445(b)* (1997); *OR. REV. STAT. § 163.325(1)* & (2) (1996); *WASH. REV. CODE § 9A.44.030(2)* & (3) (1997). These facts suggest that refusing to allow such a defense may be an unwise policy; nevertheless, it is a policy decision, and thus one for the legislature, rather than the courts, to make.

n9 The dissent dramatically characterizes the majority of members of this court as "...believing the legislature intends to punish as a registered sex offender an individual who engages in consensual sexual intercourse with a child even if the child appears to be 17, acts 17, has a fake identification card that represents her age to be 17, has support from friends that she is 17, and convincingly acts 17. Clearly, the law was not designed to punish such an individual." *Johnson v. State, 967 S.W.2d 848, 858 n.4 (1998).* What is clear is that the legislature intended to punish those who engage in conduct proscribed by § 21.11, and to have registered as sex offenders those who violate certain provisions of the penal code, including § 21.11. As the appellant violated the terms of § 21.11 and was found guilty of doing so, he is subject to its punishment, as well as to the mandates of Chapter 62 of the Texas Code of Criminal Procedure.

Price, Judge

Delivered: March 25, 1998

En Banc

DISSENTBY: BAIRD

DISSENT: DISSENTING OPINION

Believing the majority's holding conflicts with the laws of the State of Texas which seek not to criminalize conduct that is without guilt, I dissent.

I.

"The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in the freedom of human will and a conse-

quent ability and duty of the normal individual to choose between good and evil." *Morissette v. United States, 342 U.S. 246, 250, 72 S. Ct. 240, 243, 96 L. Ed. 288 (1952).* The requirement of a culpable mental state descended from the Eighteenth Century common-law theory that to constitute a crime there must be a "vicious will." *Id., 342 U.S. at 251, 72 S. Ct. at 244* (citing 4 Bl. Comm. 21). Speaking of the requirement of mens rea or "vicious will," the Court stated:

> Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil. As the states codified the common law crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation. *Id., 342 U.S. at 251-252, 72 S. Ct. at 244.* n1

> n1 Oliver Wendell Holmes recognized that "criminal liability is founded on blameworthiness" and "a law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear." Oliver Wendell Holmes, The Common Law 50 (Boston, Little, Brown & Co. 1881).

The mandate of Morrissette has been expressly recognized by our Legislature in at least two statutory provisions. First, the Penal Code is to be construed, inter alia, to "safeguard conduct that is without guilt from condemnation as criminal." *Tex. Penal Code Ann. § 1.02(4).* n2 Second, virtually every offense enumerated in the Penal Code prescribes a culpable mental state. And in the rare offense where a culpable mental state is not prescribed, one is nevertheless required. *Tex. Penal Code Ann. § 6.02(b).* n3

> n2 When considering statutory construct, the *Tex. Penal Code Ann. § 1.05(a)*, specifically states: "...The provisions of this code shall be construed according to the fair import of their terms, to promote justice and effect the objectives of the code."

> n3 *Tex. Penal Code Ann. § 6.02(b)* provides:

> If the definition of an offense does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with it.

> All emphasis is supplied unless otherwise indicated.

An offense without a prescribed culpable mental state creates strict criminal liability. Strict liability offenses are disfavored because:

> ... to punish conduct without reference to the actor's state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by an awareness of the facts making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventative or retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of mens rea.

Wayne R. LaFave and Austin W. Scott, Jr., Substantive Criminal Law, Vol. I, p. 348. This stigma is especially severe in the case of a rape conviction. Herbert Packer, Mens Rea and the Supreme Court, *1962 Sup.Ct.Rev. 107, 109 (1962).*

II.

The question presented by the instant case is whether the offense of indecency with a child requires a culpable mental state as to the age of the complainant. At the times relevant to the instant case, *Tex. Penal Code Ann. § 21.11* (West 1994) provided:

> (a) A person commits an offense if, with a child younger than 17 years and not his spouse, whether the child is of the same or opposite sex, he:
>
> (1) engages in sexual contact with the child.

Tex. Penal Code Ann. § 21.01 (2) (West 1994) defined sexual contact as "any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person."

The concurring judge concludes the statute has plainly dispensed with a culpable mental state. However, that conclusion is not reached after considering the clear language of the statute. Rather that conclusion is reached only after consulting a twisted trail of legislative history, bolstered by previous versions of the statute, and suggestions as to the intent of the legislature when redrafting the law. Exhausting as his argument may be, he is unable to point to any language in the statute which "plainly dispenses" with a culpable mental state. And his footnote detailing myriads of cases where "this court and several lower courts have asserted that when the statute is merely silent as to a mental element, it has not plainly dispensed with one, and so one is nevertheless required," undermines his conclusion. *Johnson v. State, 967 S.W.2d 848, 851-852, n.2 (1998)*. In addition, the concurring judge's opinion that "it is precisely the *absence* of a culpable mental state as to the victim's age, when the legislature has prescribed mental elements as to other portions of the offense, that makes the legislative intent clear," renders *Tex. Penal Code Ann. § 6.02* a nullity. *Johnson v. State, 967 S.W.2d 848, 852 (1998)* (emphasis in the original). This "absence" does not elucidate the intent of the legislature, as posited by the concurrence.

Contrary to the concurring judge's position, the legislature has not plainly dispensed with the required culpable mental stated for the offense of indecency with a child. When the legislature has intended to dispense with this requirement, the intent is clear. For example *Tex. Penal Code Ann. § 7.22*: Criminal Responsibility of Corporation or Association, provides:

(a) If conduct constituting an offense is performed by an agent acting in behalf of a corporation or association and within the scope of his office or employment, the corporation or association is criminally responsible for an offense defined:

(1) in this code where corporations and associations are made subject thereto;

(2) by law other than this code in which a legislative purpose to impose criminal responsibility on corporations or associations plainly appears; or

(3) by law other than this code for which strict liability is imposed, unless a legislative purpose not to impose criminal responsibility on corporations or associations plainly appears.

III.

The instant case should be analyzed in light of two cases, one from the United States Supreme Court and the other from this Court.

A.

The first case is *United States v. X-Citement Video, 513 U.S. 64, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994)*, where the defendant's mens rea as to the age of the participant was not a statutory element of the charged crime. Nevertheless, the Supreme Court extended the stated culpable mental state to every element within the offense. The statute in question provided, in relevant part:

(a) Any person who-

(1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if-

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if-

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct.

Id., 115 S. Ct. at 467.

Even though a grammatical reading of the statute suggested the term "knowingly" only modified the surrounding verbs, the Court concluded the statute, when properly read, required the actor know the age of the performer. The Court reasoned:

Our reluctance to simply follow the most grammatical reading of the statute is heightened by our cases interpreting criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them. *Id., 115 S. Ct. at 468.* In reaching their conclusion, the Court held:

A final canon of statutory construction supports the reading that the term "knowingly" applies to both elements. Cases such as *Ferber, 458 U.S. 747, 765, 102 S. Ct. 3348, 3359, 73 L. Ed. 2d 1113* ("As with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant"); *Smith v. California, 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205 (1959); Hamling v. United States, 418 U.S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974);* and *Osborne v. Ohio, 495 U.S. 103, 115, 110 S. Ct. 1691, 1699, 109 L. Ed. 2d 98 (1990),* suggest that a statute completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts. It is therefore incumbent upon us to read the statute to eliminate those doubts so long as such a reading is not plainly contrary to the intent of Congress. *Id., 115 S. Ct. at 472.*

The core of the statute was the age of the performer; "the age of the performers is the crucial element separating legal innocence from wrongful conduct." *Id., 115 S. Ct. at 469.* The Supreme Court could not have more plainly expressed the inherent difficulty with the statute's lack of an intent element by holding the statute would probably not pass constitutional muster. The Court held it was their responsibility to interpret the statute in a way that would first pass constitutional considerations and not plainly dispense with congressional intent.

In Texas, if there is a dispute over the meaning of the statute, the literal text of the statute controls. *Boykin v. State, 818 S.W.2d 782 (Tex.Cr.App. 1991).* As the Boykin Court held, "the statute *is the law* in the sense that it is the only thing actually adopted by the legislators..." *Id., 818 S.W.2d at 785,*(emphasis in the original). The reasons for this type of statutory interpretation were made clear in Boykin:

When attempting to discern this collective legislative intent or purpose, we necessarily focus our intention on the literal text of the statute in question and attempt to discern the fair, objective meaning of that text at the time of its enactment...We focus on the literal text also because the text is the only *definitive* evidence of what the legislators (and perhaps the Governor) had in mind when the statute was enacted into law. There really is no other certain method for determining the collective legislative intent or purpose at some point in the past, even assuming a single intent or purpose was dominant at the time of enactment. Yet a third reason for focusing on the literal text is that the Legislature is *constitutionally entitled* to expect that the Judiciary will faithfully follow the specific text that was adopted. (emphasis in the original). *Boykin, 818 S.W.2d at 785.*

Consequently, the majority is incorrect when they state: "Had the Legislature intended to make a provision regarding the knowledge of the victim's age it would have expressly included the requirement within *Section 21.11 of the Texas Penal Code.*" *Johnson v. State, 967 S.W.2d 848, 849-850 (1998).* This type of interpretation conflicts with *Boykin, supra,* and fails to acknowledge the existence of *Tex. Penal Code Ann. § 6.02.*

B.

The second case is *McQueen v. State, 781 S.W.2d 600 (Tex.Cr.App. 1989),* which considered the culpable mental states associated with the offense of unauthorized use of a motor vehicle. For commission of such an offense, three elements were required to be proven: "(1) that a defendant operated a motor-propelled vehicle; and, (2) that he knew he was operating the vehicle; and, (3) that he did so without the permission of the owner." *Id., 781 S.W.2d at 602.* The McQueen Court held the State was required to prove McQueen operated the motor vehicle knowing such operation was without the owner's effective consent. Ibid. Otherwise, unauthorized use of a motor vehicle would be a strict liability offense because:

... once the State proved that the vehicle was operated at all, the requisite mental state with regard to the nature of conduct would be self-proved, (we cannot foresee any time one would operate a vehicle unintentionally or unknowingly), and the defendant would be held liable regardless of anyone's awareness of the owner's consent or lack thereof. To require culpability only as to the otherwise lawful act of operating a vehicle wholly fails to 'safeguard conduct that is

without guilt from condemnation as criminal." *Id., 781 S.W.2d at 604.* The Court's reasoning for requiring the culpable mental state for each element of the offense was:

... what separates lawful operation of another's motor vehicle from unauthorized use is the actor's knowledge of a "crucial circumstance surrounding the conduct"--that such operation is done without the effective consent of the owner. Accordingly ... we believe Sec. 6.03(b) requires proof of the actor's knowledge of this circumstance.

Further support for this proposition comes from V.T.C.A., *Penal Code, Sec. 1.02(4)*, one of the basic objectives of the Penal Code: 4) to safeguard conduct that is without guilt from condemnation as criminal; *Id., 781 S.W.2d at 604.*

C.

In light of X-Citement Video and McQueen, the law may be stated as follows: If the conduct itself is not illegal, i.e., operating a motor vehicle, then a culpable mental state regarding the circumstances of the offense is required.

IV.

A.

With the foregoing in mind, consider the instant case where the 19 year old appellant engaged in consensual sexual intercourse with the complainant, a 12 year old girl. Appellant was told by the complainant and her friend that the complainant was 17 years old. Several witnesses, including the complainant herself, testified she frequently told people she was older than 12. The evidence also showed the complainant appeared to be older than her chronological age. There was also evidence of several telephone calls by the complainant entreating appellant to engage in sexual intercourse. The day after the sexual intercourse, the complainant informed her mother and appellant was subsequently arrested and charged with aggravated sexual assault of a child and indecency with a child.

At trial, appellant admitted to engaging in sexual intercourse with the complainant but testified that he did not know she was under 17 years of age. Appellant requested a jury charge on mistake of fact. *Tex. Penal Code Ann. § 8.02.* The trial judge denied the requested instruction. During their deliberations, the jury sent out the following note:

Does "intentionally or knowingly" refer to what he did with his penis i.e.: inadvertent contact vs. intentional contact or does "intentionally or knowingly" cause the penetration of the female sexual organ of a child refer to knowing that she was a child? We have to understand the meaning of the law.

The trial judge did not answer the question and appellant was convicted of the lesser charged offense, indecency with a child. The range of punishment for that offense is from two to twenty years imprisonment and a possible fine of up to $ 10,000. *Tex. Penal Code Ann. §§ 21.11 (a)(1)*, (c), and 12.33. The jury assessed the minimum punishment allowed by law, two years probation with no fine.

On appeal, appellant argued that knowledge of the complainant's age was required for conviction and the trial judge erred in denying the mistake of fact charge. The Court of Appeals restated appellant's argument:

Johnson argues that a culpable mental state which does not require knowledge of the complainant's age "misses the whole point of the offense." He notes that the act in question is not criminal unless the complainant is under the age of 17. He then argues that the intent or knowledge that the person is under 17 should be the required culpable mental state which makes the act an offense. We admit that Johnson's logic is reasonable. The current state of the law, however, is not based on a fault in Johnson's logic, but instead on a countervailing public policy.

Johnson v. State, No. 2-95-384-CR, slip op. pp. 8-9 (Tex.App.--Fort Worth July 18, 1996)(not designated for publication). The Court of Appeals affirmed the judgment of the trial court stating: "because we find that a mistake about the age of a child has no bearing on the requisite culpable mental state for indecency with a child, we hold that mistake of fact is not a proper jury charge...."

B.

The instant case should be resolved using the reasoning of *X-Citement Video, supra,* and *McQueen, supra.* Consistent with those holdings, a crime cannot be completed by mere conduct, in this case consensual sexual intercourse, without proving a culpable mental state regarding the circumstances of the offense. This is especially true in light of *Tex. Penal Code Ann. § 1.02(4)*, where the objective of the Code is "to safeguard conduct that is without guilt from condemnation as criminal." n4 If a conviction for the offense of unauthorized use of a motor vehicle cannot rest on the

mere operation of the vehicle, a conviction for indecency with a child cannot rest on the mere act of consensual sexual intercourse.

n4 The majority and concurrence believe the legislature intends to punish as a registered sex offender an individual who engages in consensual sexual intercourse with a child even if the child appears to be 17, acts 17, has a fake identification card that representing her age to be 17, has support from friends that she is 17, and convincingly acts 17. Clearly, the law was not designed to punish such an individual.

Operating a vehicle is not per se illegal and neither is consensual sexual intercourse. The age of the child is "the crucial element separating legal innocence from wrongful conduct." *X-Citement Video, 115 S. Ct. at 469.* Because the gravamen of the offense of indecency with a child is the age of the complainant, the defendant must have knowledge of that age in order to suffer criminal liability.

BAIRD, Judge

(Delivered March 25, 1998)

En Banc

MARKIETH TYRONE GRANGER, Appellant v. THE STATE OF TEXAS

NO. 1651-98

COURT OF CRIMINAL APPEALS OF TEXAS

3 S.W.3d 36; 1999 Tex. Crim. App. LEXIS 105

September 29, 1999, Delivered

PRIOR HISTORY: ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE FIFTH COURT OF APPEALS DALLAS COUNTY.

DISPOSITION: Remanded the case to the Court of Appeals for further proceedings consistent with Almanza.

COUNSEL: For Plaintiff or Petitioner: Sandra Reynolds, Dallas.

For Defendant or Respondent: Libra Lange, Assist. DA, Dallas.

JUDGES: Meyers, J., delivered the opinion of the Court in which Mansfield, Price, Holland, Womack, Johnson and Keasler, JJ ., joined. McCormick, P.J., concurs in the result. Keller, J., concurs with note.

OPINIONBY: MEYERS

OPINION: OPINION

Appellant was convicted of murder and sentenced by a jury to a term of fifty-five years confinement. *See TEX. PENAL CODE ANN. § 19.02(b)(1)* & (2) (Vernon 1994). The Court of Appeals affirmed appellant's conviction in an unpublished opinion. *Granger v. State, 1998 Tex. App. LEXIS 5021,* *12-13, No. 05-96-00926-CR, slip op. at 9 (Tex. App.--Dallas 1998) (opinion on rehearing). We granted review to determine whether the Court of Appeals erred in holding that appellant was not entitled to an affirmative "mistake of fact" instruction pursuant to *§ 8.02 of the Texas Penal Code.*

In the early hours of February 4, 1995, appellant and three companions were ejected from a Dallas nightclub for "dancing dirty." The club's security guard testified that a young man who was with appellant became angry at the prospect of being thrown out of the club and argued with the security guard. The guard escorted the four young people out and then went back inside the club.

A few minutes later, the security guard went back outside to see if the group had left the area. In a parking lot across the street, the guard saw appellant and the other young man walking back toward the club. The security guard stepped back inside. The guard told the doorman that the two men were still out there and that he suspected that "they might be up to something." After about five minutes, the security guard again went outside and immediately heard two or three gunshots. He looked up to see where the shots were coming from and saw appellant and his companion standing on the passenger side of a car parked across the street from the club. The two men were standing on the curb looking down into the car with their arms extended toward the car. The security guard then saw two or three "flashes" accompanied by the sound of additional gunshots. The guard testified that at first he thought they were shooting into an empty car and started to walk toward the men. But when he got about half way across the street, he noticed the victim sitting in the driver's seat of the car. The guard yelled at the men. The two men then looked up and ran down a nearby alley. The victim later died of multiple gunshot wounds.

On March 17, 1995, appellant gave a voluntary written statement in which he said that only his companion had shot into the car and that appellant did not know why he had done so. n1 Five months later, the police arrested appellant, at which time he gave a second written statement. That statement provided:

That night in February when me and Pam, Debbie, and Jerome went to the R. L. Blues Palace, we all got kicked out and walked over to Pam's car. Jerome was mad at the security guard for kicking us out, and he kept arguing with him. I tried to tell him to come on, and let's go but he grabbed a gun from inside Pam's car. I seen him grab his gun so I grabbed mine. It was a .32 or .380 automatic. We walked over across the street towards the security guard but he was already back inside the club. We turned and started walking back to Pam's car. Jerome then saw this car parked on the side of the street and that's when he started saying, "I know that car." We walked right past the car and Jerome started shooting at the car. When he started shooting *I didn't think that anybody was inside the car* so I started shooting at the car also. I fired about four shots. We then ran off and flagged down Pam's car over on the next street. (emphasis added). The State offered both of appellant's written statements into evidence at trial.

n1 Appellant's first statement to the police indicated that the young man named Jerome noticed the victim's car as they walked back toward the club. Jerome allegedly kept repeating, "I know that car." Appellant stated that he walked past the car and that Jerome was behind him. Appellant said that he then heard gunshots and turned around to see Jerome putting something in his waistband. Both men then ran down the alley and flagged down their friend's car on the next street. Appellant said that he was "too scared" to ask Jerome why he had shot at the car and that Jerome did not volunteer why he had done so.

The court's proposed jury charge included an instruction on murder and the lesser included offenses of manslaughter and criminally negligent homicide. Defense counsel objected to the proposed charge inasmuch as it did not contain an instruction on mistake of fact. The trial court overruled the objection. Appellant was convicted of murder.

In the Court of Appeals, appellant claimed the trial court erred in denying his request for an affirmative instruction on mistake of fact. Specifically, appellant argued that the portion of his statement in which he claimed that he thought he was firing into an empty car was sufficient to raise the statutory defense under § 8.02. In an unpublished opinion, the Court of Appeals affirmed appellant's conviction. *Granger, 1998 Tex. App. LEXIS 5021,* *12-13. While the Court of Appeals acknowledged the general rule that an accused has the right to an instruction on any defensive issue raised by the evidence, *Granger, 1998 Tex. App. LEXIS 5021,* *4, the court nevertheless concluded that the defense of mistake of fact was not "raised" by the record because appellant had failed to present any evidence that his mistaken belief was "reasonable." *Granger, 1998 Tex. App. LEXIS 5021,* *4-5. The lower court stated, "appellant's purported mistaken belief that the car was empty was formed not through mistake, but by indifference. Given this, there is also no evidence that appellant's purported mistaken belief that the car was unoccupied was one that a reasonable and prudent person would have had under the same circumstances." *Granger, 1998 Tex. App. LEXIS 5021,* *6. Because appellant's mistake was "unreasonable," reasoned the lower court, he was not entitled to an affirmative instruction under *§ 8.02 of the Penal Code. Id.*

It is well settled that an accused has the right to an instruction on any defensive issue raised by the evidence, whether that evidence is weak or strong, unimpeached or contradicted, and regardless of what the trial court may or may not think about the credibility of the evidence. *Hamel v. State, 916 S.W.2d 491, 493 (Tex. Crim. App. 1996); Miller v. State, 815 S.W.2d 582, 585 (Tex. Crim. App. 1991)* (opinion on rehearing); *Hayes v. State, 728 S.W.2d 804, 807 (Tex. Crim. App. 1987)* (opinion on rehearing); *Dyson v. State, 672 S.W.2d 460, 463 (Tex. Crim. App. 1984); Montgomery v. State, 588 S.W.2d 950, 952-53* (Tex. Crim. App. [Panel Op.] 1979); *Warren v. State, 565 S.W.2d 931, 933-34* (Tex. Crim. App. [Panel Op.] 1978). n2 This rule is designed to insure that the jury, not the judge, will decide the relative credibility of the evidence. *Miller, 815 S.W.2d at 585; see also Woodfox v. State, 742 S.W.2d 408, 410 (Tex. Crim. App. 1987)* ("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"). Therefore, the issue before the appellate court was whether appellant's statement that he did not think anyone was in the car, if believed, raised a mistake of fact defense. *See Dyson, 672 S.W.2d at 463.* If the evidence viewed in a light favorable to appellant does not establish a mistake of fact defense, an instruction is not required. *Id.*

n2 It is also settled that an affirmative instruction may be required whether the evidence raising the defensive issue is presented by the State or by the defense. *Woodfox v. State, 742 S.W.2d 408, 410 (Tex. Crim. App. 1987).*

The general defense of mistake of fact, as codified in *TEX. PENAL CODE ANN. § 8.02 (a)* (Vernon 1994), provides: "It is a defense to prosecution that the actor through mistake formed a reasonable belief about a matter of fact if

his mistaken belief negated the kind of culpability required for the commission of the offense." This case pivots on the phrase "reasonable belief." The question we are faced with is whether the reasonableness requirement is a preliminary issue for the judge to decide in determining whether each element of the defense was "raised" by the evidence, or whether it is a fact issue that should be left to the jury.

The State argues, and the Court of Appeals held, that the reasonableness of an accused's mistaken belief may be evaluated by the trial judge in determining whether the statutory defense is raised. But the appellate court's holding is contrary to this Court's previous decision in *Hayes v. State, 728 S.W.2d 804, 808 (Tex. Crim. App. 1987)* (opinion on rehearing). *Hayes* dealt with a defendant's "reasonable belief" in the related context of a jury instruction involving "Deadly Force in Defense of Person" under *§ 9.32 of the Penal Code*. There, we held that whether the defendant's belief was "reasonable" was a fact issue for the jury to decide. *Id. at 808*. In *Hayes* the appellant, convicted by a jury of aggravated assault, complained on appeal of the trial court's refusal to give an affirmative "deadly force" instruction. *Id. at 807*. Like mistake of fact under § 8.02, the use of deadly force under § 9.32 requires a "reasonable belief" on the part of the actor that deadly force is immediately necessary. *See TEX. PENAL CODE ANN. § 9.32* (Vernon 1994). The State argued that at the time appellant fired his gun, he could not have "reasonably believed" that he was in such immediate peril. *Hayes, 728 S.W.2d at 807*. This Court rejected the State's argument and held:

Whether the appellant's beliefs were reasonable and justifiable and whether or not the appellant used more force than necessary under the circumstances were fact questions for the jury to decide. In denying appellant's requested charge on the use of deadly force the trial judge was denying the jury the opportunity to decide this issue. *Id. at 808* (citation omitted); *see also Sanders v. State, 707 S.W.2d 78, 79-80 (Tex. Crim. App. 1986)* ("It is *not for the trial court to judge the reasonableness or viability of the alleged defense*; such determination is rightfully left to the trier of facts, in this case the jury") (emphasis added), *limited on other grounds, Willis v. State, 790 S.W.2d 307, 313-14 (Tex. Crim. App. 1990); Rodriquez v. State, 544 S.W.2d 382, 384 (Tex. Crim. App. 1976)* ("*[W]hether appellant's beliefs, fears and actions were reasonable as required by statute, were also fact issues for the jury*, but the jury was also deprived of the opportunity to decide those issues because of the failure to instruct the jury on self-defense") (emphasis added).

We see no reason to depart from the *Hayes* holding here. Whether appellant's mistaken belief was "reasonable," so as to comport with the requirements of § 8.02, should have been left for the jury to decide as trier of fact. By failing to give the appropriate instruction, the trial court denied the jury the opportunity to decide this issue.

The State neglects to distinguish, or even mention *Hayes*. Instead, it draws upon dicta to support its argument that the trial court properly evaluated the reasonableness of appellant's mistaken belief. For example, the State cites a footnote in *Graham v. State, 566 S.W.2d 941, 952 n.3 (Tex. Crim. App. 1978)*, as "holding that if no evidence of the applicable standard of reasonableness is proffered to raise [the] fact issue, [the] determination is outside of [the] jury's discretion." State's Brief at 9. The relevant footnote in *Graham* provides:

The limits of many defenses are left to the jury. Such limits are usually expressed in terms that leave to the jury the application of norms that are not readily susceptible to reduction to a concise factual formula. The jury in this sense participates in determining the law as well as the facts. Many defenses exhibit this characteristic through the incorporation of a standard of "reasonable belief." . . . According to the standard and scope of the issue, the degree of discretion accorded to the jury in resolving the issue on undisputed facts will vary. Before such a decision may be overturned on appeal, the fact issue must be undisputed or resolved to one end of the spectrum, *and* that fact determination must be found to lie outside the realm of discretion accorded the jury under the applicable standard, be it "reasonable belief," "reasonable firmness," "likely to cause," or some other. *Id. at 952 n.3* (emphasis in original). By itself, this footnote suggests that while reasonableness is generally a fact issue for the jury, there may be situations where the reasonableness of a defendant's beliefs are properly evaluated by an appellate court. However, *Graham*'s language should not be divorced from its context. *Graham* involved an appeal in which the appellant argued that the jury's verdict on the question of his sanity was against the weight of the evidence because the State had failed to produce any expert witnesses to counter the defense's psychiatric evidence. *Graham, 566 S.W.2d at 950*. The *Graham* Court declined to overturn the jury's findings because the issue of insanity "is not, strictly speaking, one of medical fact." *Id. at 952*. Instead, the Court concluded that the legal defense of insanity also encompassed an "inarticulable ethical component" that was properly left to the jury's discretion. *Id. at 953*. Placed in its proper context, then, the *Graham* footnote merely illustrates how the "limits" of a given defense, and the vagaries that defense might employ, are often left to the jury's discretion. *Id. at 952*. In any case, the *Graham* decision does *not* purport to decide whether a jury instruction is warranted in a given situation. n3

n3 Although not mentioned by the parties, there is also language in *Hamel v. State, 916 S.W.2d at 493-94,* that suggests that a court might properly determine that a defendant's belief is unreasonable as a matter of law. In *Hamel* this Court evaluated the evidence as it pertained to a defendant's request for a self-defense instruction, which also contains an element of reasonableness. The *Hamel* Court did *not* decide whether the reasonableness of the appellant's belief may be evaluated by the trial court in deciding whether to give an affirmative instruction. Nevertheless, the Court did state that on the facts presented it could not say that it was "unreasonable" for appellant to believe that deadly force was necessary. *Hamel, 916 S.W.2d at 494.* This, coupled with its determination that the defense was otherwise raised, led the Court to conclude that it was error to deny the appellant's request for an affirmative instruction. *Id.*

Moreover, a holding in accordance with the State's position would tend to undermine the general rule that the jury should be responsible for gauging the credibility and veracity of the defensive evidence. *See Dyson, 672 S.W.2d at 463* ("The issue before this Court is not the truth of appellant's testimony, for that is for the jury"); *Montgomery, 588 S.W.2d at 952* ("The issue on appeal is not whether appellant's story is true or even believable. That issue is exclusively for the jury as trier of fact"). Trial court judges charged with evaluating the "reasonableness" of an accused's beliefs, no matter how well intentioned, would inevitably be placed in a position in which they were required to make their own decisions about the weight and believability of the defensive evidence. The Court of Appeals' opinion illustrates this dilemma. In reaching its conclusion that there was no evidence to support a "reasonable belief" that the car was empty, the court was forced to engage in its own subjective evaluation of the evidence:

The victim's car was parked on the street in a line of cars directly opposite the front door of a nightclub that was open for business. Photographs admitted into evidence indicate the car's windows were clear and transparent. Photographs and testimony of the security guard indicate the area was well lit with street lights and lights from the club. There is no evidence in the record that appellant looked into the car -- or did anything else -- to determine whether the car was occupied before shooting into it. Given the fact that appellant had walked "right past" the car before he started shooting, he could easily have discovered the victim's presence. Thus, appellant's purported mistaken belief that the car was empty was formed not through mistake, but by indifference.

Granger, 1998 Tex. App. LEXIS 5021, *5-6. But whether appellant had the *opportunity* to correct his mistake is precisely the sort of fact issue properly left to the jury. The condition of the car's windows, the lighting on the street at the time of the shooting and appellant's failure to take advantage of a chance to look inside the car are all details that the State may argue in its closing statement. But the use of those factual details to bolster a court's conclusion that an accused's belief is unreasonable as a matter of law does exactly what the law forbids -- it effectively substitutes the court's judgment on the weight of the evidence for that of the jury. *See Woodfox, 742 S.W.2d at 410.*

"When an accused creates an issue of mistaken belief as to the culpable mental element of the offense, he is entitled to a defensive instruction of 'mistake of fact.'" *Miller, 815 S.W.2d at 585.* Therefore, in the instant case, the issue before the trial court was whether appellant's purported belief, if accepted as true, negated the culpability required for murder. *See, e.g., Hill v. State, 765 S.W.2d 794, 796 (Tex. Crim. App. 1989)* (holding appellant was entitled to instruction on mistake of fact when mistake negated culpability required for the offense). Clearly, it does. *Section 19.02(b) of the Texas Penal Code* provides, in relevant part:

(b) A person commits an offense if he:

(1) intentionally or knowingly causes the death of an individual;

(2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual. . . .

Accepting appellant's statement to the police as true, he could not have "intentionally or knowingly" caused the death of the victim, or "intended to cause serious bodily injury" to the victim if appellant did not know that the victim was in the car. Appellant was therefore entitled to a jury instruction on mistake of fact pursuant to *§ 8.02 of the Penal Code.*

The Court of Appeals erred in denying appellant's request for a mistake of fact instruction. Whether appellant's purported belief that the car was unoccupied was reasonable and credible was a question for the jury in considering the affirmative mistake of fact instruction. Reversal is required if appellant suffered harm as a result of the error. *Almanza v. State, 686 S.W.2d 157 (Tex. Crim. App. 1984).* We therefore remand the case to the Court of Appeals for further proceedings consistent with *Almanza.*

MEYERS, J.

Delivered: September 29, 1999

CONCURBY: KELLER

CONCUR: KELLER, J., *concurs with the following note:*

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

I concur in the Court's judgment.

6. The Case of Julio Marrero (New York, 1977)

A. The Facts

Julio Marrero of the Bronx, New York, is a disabled Viet Nam veteran who previously worked as an undercover agent in a Puerto Rican drug enforcement operation for the Department of Hacienda. He now works as a prison guard at the federal prison in Danbury, Connecticut, and is the father of six: Sonya, 11; Hector Louis, 8; Ricardo, 6; Carina 4; and Joe and Vanessa, 3. Endira and Carlos will be born in a year and two years, respectively.

Figure 13. Julio Marrero, circa 1984 (Family photo)

During his time as a guard at Danbury, Marrero has received death threats, as many guards have, including one from a recently released inmate. He regularly carries a pistol for protection, having received weapons training when he was in the Military Police. At the Military Police armory in Manhattan, Marrero keeps space for several weapons he uses at the MP firing range.

Marrero purchased his pistol from a New York City gun dealer, Eugene DiMayo, who sold it to Marrero knowing Marrero did not have a special New York gun permit, but believing and advising Marrero that, as a federal prison guard, Marrero did not need one. DiMayo knows several federal prison guards who similarly have bought weapons without a special New York gun permit. DiMayo explains to Marrero that "federal corrections officers" are considered "peace officers," under the New York firearms statut and "licenses are not required i proper identification is presented."

On December 19, 1977, while o duty, Marrero visits a social club a 207 Madison Street in New York Cit As he enters the club, he is searche by police officer G. Dugan of the 7 precinct, who finds a loaded .3 caliber pistol. Marrero explains that he does not have a permit but does not need one because is a federal corrections officer. He shows his identification badge. The police call the Danbu prison and confirm that he is a guard there. Marrero nonetheless is arrested and charges are fil Ten days later Marrero is indicted for criminal possession of a weapon.

* * *

Would you convict Marrero? If so, what amount of punishment would you impose?

MARRERO CASE AFTERMATH

Marrero pleads not guilty at trial. The prosecution claims that Marrero violated section 265.02(4) of the Penal Law, a ClassD felony. They concede that he would be exempt from such an offense under section 265.20(A) if he were a "peace officer," as defined by section 1.20 of the Criminal Procedure Law. Under section 1.20, a "peace officer" includes, among other persons, any "guard of any state prison or of any penal correctional institution." But prosecutors read the word "state" as applying not only to the immediately following word "prison" but also to the later phrase, "any penal correctional institution." Thus, Marrero, as a guard at a federal institution, is not a "peace officer" and, therefore, not exempt from the offense.

But the trial court disagrees with that reading of the statute and agrees with Marrero's interpretation that the word "state" only modifies the word "prison," and does not also modify the phrase "any penal correctional institution." The judge dismisses the charge on May 3, 1978.

The prosecution appeals. Two years later, on December 11, 1979, in a 3-2 vote, the Appellate Division, reverses the trial court's dismissal. A majority of the court concludes that when read in its entirety and when harmonized with other sections of the law the statute does not exempt federal prison officers while off-duty. The case is sent back to the lower court for trial.

* * *

When the case comes back to trial court on remand, Marrero argues in his defense that even if he interpreted the law wrong he should be acquitted because he made a reasonable mistake in reading the somewhat misleading statute. Other fellow officers and teachers at the prison have read the statute as he did. So did the gun seller. Indeed, so did the trial judge and two of the five appellate judges. Thus, of the six judges who have heard the case so far, half have agreed with Marrero's interpretation of the law! Given the complexity the statute, does not this level of disagreement among judges itself suggest that Marrero's "mistake" is not only reasonable but, even predictable? But the trial court (a different judge this time, Judge Hornblass) follows the old maxim: "Ignorance or mistake of law is no excuse." Marrero is forbidden to offer his mistake theory to the jury as a defense. At trial Marrero is convicted. On July 9, 1982, he is sentenced to a three-year suspended sentence and a $500 fine. He appeals. The Appellate Division again rules against Marrero and upholds his conviction, this time without issuing a written opinion.

The state's highest court, the New York Court of Appeals, issues its judgment on April 2, 1987, almost 10 years after the offense. The court concludes that public policy encouraging knowledge of and adherence to the law weighs

Figure 18. Formerly a social club, now a Mexican restaurant, 207 Madison Street was where Julio Marrero was arrested on December 19, 1977. (Photograph by the author)

against providing a defense for a reasonable mistake of law. The judgment against Marrero is affirmed on a 4-3 vote.

* * *

Because of his felony conviction, Marrero loses his job and is barred from further work in law enforcement or corrections. (The night club at 207 Madison Street, where the arrest occurred, is now a Mexican restaurant.)

The legislature never fixes the statute of which Marrero is convicted. Today its language remains as misleading as it was at the time of Marrero's case. Exempt from gun possession offense are "correction officers of any state correctional facility or of any penal correctional institution." Is a guard at a non-state "penal correctional institution" exempt then from the offense under the second clause, then?

Lacking a reasonable mistake of law defense, the state has little incentive to clarify its laws. The escape from liability (as in Baker), which commonly prompts legislative action in order to prevent others from a similar escape, the imposition of undeserved liability presents no similar societal danger. One would have hoped that convictions of the blameless would provide as much legislative incentive for action as do escapes from justice.

CHAPTER TWO

THE CHARGING DECISION

The decision of what criminal charges to bring against an accused provides perhaps the best example of the vast discretion held by the prosecutor's office. Many lay persons incorrectly presume that criminal charges are brought by the police. While it is true that the police in certain circumstances have the power to *initiate* the criminal process by making an arrest and applying for a criminal complaint, it is the prosecutor who determines what charges the defendant will ultimately face. The prosecutor may move to amend the original complaint,[1] or in states which utilize the grand jury, the prosecutor may indict the defendant on more serious charges if the initial charge commenced by the police in municipal or district court is deemed to be inadequate. A prosecutor can also move to dismiss a complaint brought by the police where the crime is deemed to be mischarged; in most jurisdictions, the judge has no authority to deny a prosecutor's motion to dismiss unless it is clearly contrary to a manifest public interest.[2] If the prosecutor determines that no charges are warranted, neither a private citizen nor a judge may compel the prosecutor to commence criminal proceedings.[3]

1. *See, e.g.*, Minn. R. Crim. P. 3.04 (2004); Or. Rev. Stat. § 133.069 (2003); Wis. Stat. Ann. § 971.29 (2003).

2. United States v. Gonzalez, 58 F.3d 459, 462 (9th Cir. 1995) ("Separation of powers concerns generally require a district court to defer to the government's decision to seek a dismissal of a criminal charge because a denial of the motion would represent an intrusion upon prosecutorial prerogative."). *See* United States v. Jacobo–Zavala, 241 F.3d 1009, 1013 (8th Cir. 2001); Attorney General v. Tufts, 239 Mass. 458, 537, 132 N.E. 322 (1921).

3. *See* Inmates of Attica v. Rockefeller, 477 F.2d 375, 381 (2d Cir. 1973) (court has no authority in mandamus

The prosecutor's vast power in the charging area is heightened by the reality that legislatures often enact criminal statutes that overlap. The complexity and breadth of criminal codes frequently lead to situations where a defendant's conduct may be construed to violate more than one provision of the criminal laws. A barroom brawl may give rise to charges of assault and battery or disorderly conduct, or both. A bogus tax return may be considered tax evasion, or it may be deemed to be filing a false statement with the government. The Supreme Court has ruled that the due process clause is not violated where two criminal statutes, acting independently of each other, provide for different penalties for the same conduct.[4] Where the prosecutor has the discretion to choose between two or more charges carrying differing penalties, the selection of charge dictates, or at least constrains, the ultimate sentence the defendant will face. The decisions of whether to charge, whom to charge, and what crimes to charge are an awesome source of power for the government lawyer.

In determining whether to charge a particular individual with a crime, the prosecutor must engage in a delicate calculus, having in mind the public's interest in effective law enforcement, the costs and benefits of the prosecution, and the rights of the accused. Among the factors which the prosecutor should consider are 1) the availability and effectiveness of non-criminal dispositions for the conduct at issue; 2) the nature and severity of the offense, and the public safety danger posed by this conduct; 3) the need to deter others from similar behavior; 4) the defendant's criminal history; 5) the recommendations of the victim and law enforcement agents; and 6) the likelihood of conviction.[5]

to order criminal prosecution); United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965) (court without power to order prosecutor to sign indictment voted on by grand jury). While a victim of crime may choose to sue the defendant civilly, in most states and in federal court the victim is powerless to force a criminal prosecution. However, in one state—West Virginia—victims may petition the court to appoint a private prosecutor where the public prosecutor refuses to go forward with criminal charges. W.Va. Code § 7–7–8 (2004).

4. United States v. Batchelder, 442 U.S. 114, 123 (1979).

5. *See* NDAA Standard 43.6 (listing "factors to consider" in making charging decision). *See generally* John Wesley Hall, Jr., PROFESSIONAL RESPONSIBILITY OF THE CRIMINAL LAWYER § 11:12 (2d ed. 1996).

How strong does the government's case against the defendant have to be before a prosecutor may commence criminal charges? It is unethical for a prosecutor to commence or continue criminal proceedings without "probable cause."[6] Probable cause has been defined as reasonably trustworthy information sufficient to warrant a prudent person in believing that the crime at issue was committed by the named defendant.[7] Probable cause is a very low evidentiary threshold, for three reasons.[8] First, it looks at quantity of the government's evidence only, without regard to the possible defenses which may be raised. Second, it does not take into account the relative credibility of witnesses, which is believed to be a matter for the ultimate fact finder. Third, the probable cause standard permits reliance on legally inadmissible evidence such as hearsay or the fruits of unconstitutional searches. For example, if a witness makes a statement to police at the scene of the crime implicating the alleged perpetrator, this hearsay statement to the police can form the basis for probable cause, even if the witness subsequently recants the statement before charges are filed. If the police seize narcotics from the defendant's person or home without a search warrant, possession of those narcotics provides probable cause to support a drug charge against the defendant, even if the search was patently illegal.

The "probable cause" threshold has been criticized as inadequate to meet the prosecutor's overriding obligations as a minister of justice. A criminal prosecution taxes the resources of the courts, detracts time and energy of law enforcement officials from other matters, and exposes the defendant to loss of reputation and to the serious financial

6. ABA Model Rule 3.8(a). The Model Rule's use of the term "refrain from prosecuting a charge...not supported by probable cause" suggests that it is incumbent upon the prosecutor to dismiss criminal charges if it becomes apparent to him *after charging* that the charges cannot be supported. *Cf.* ABA Model Code of Professional Responsibility 7–103 (a) (former Model Code provision prohibited prosecutor from "instituting or causing to be instituted" charges not supported by probable cause). A number of state rules explicitly prohibit not only the *initiation* of criminal cases without probable cause, but also the *continued* prosecution of meritless charges. *See, e.g.*, Cal. R. Prof. Conduct 5–110; D.C. R. Prof. Conduct 3.8(b).

7. *See* Gerstein v. Pugh, 420 U.S. 103, 111 (1975); Beck v. Ohio, 379 U.S. 89, 91 (1964).

8. H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 MICH. L. REV. 1145, 1156 (1973).

costs associated with defending oneself. A prosecutor who commences charges against a defendant based on hearsay or otherwise inadmissible evidence, with full knowledge that he likely will not be able to prove these criminal charges at trial, is not utilizing public resources properly or taking into account interests of fairness to the defendant.[9] Although the probable cause standard has been subject to widespread criticism, it remains the constitutional and ethical minimum in most jurisdictions for determining when the initiation of criminal charges is warranted.[10]

Two other, more stringent tests for what constitutes an "ethical" prosecution have been proposed. The NDAA Standards and the ABA Standards for Criminal Justice suggest that a prosecutor should not commence a criminal prosecution unless the prosecutor expects that it will have sufficient admissible evidence to convict the defendant.[11] The Justice Department manual suggests that federal prosecutors should not charge a defendant unless the prosecutor believes that an unbiased finder of fact will find the defendant guilty beyond a reasonable doubt.[12] Although each of these nonbinding standards envision a higher quantum and quality of evidence than mere "probable cause," there are substantial differences between the two.

The "sufficient admissible evidence" standard is essentially the threshold for surviving a motion for required finding of not guilty at the end of the government's case (the criminal equivalent of a "directed verdict"). The pertinent question under this standard is whether, viewing the evidence expected to be admitted in the light most favorable to the government, the state will have sufficient evidence at trial to satisfy each element of the crime charged. To meet this standard, the prosecutor may not rely on inadmissible evidence (e.g., hearsay or illegally seized evidence) because such material will not be admissible at trial. However, like the probable cause standard, the prosecutor need not antici-

9. *See* ABA Criminal Justice Standard 3-3.6(c) ("A prosecutor should recommend that the grand jury not indict if he or she believes the evidence presented does not warrant an indictment under governing law.").

10. *See* Carol A. Corrigan, *On Prosecutorial Ethics*, 13 HASTINGS CONST. L. Q. 537, 540 (1986).

11. ABA Criminal Justice Standard 3-3.9(a); NDAA Standard 43.3.

12. U.S. Attorney's Manual, § 9-27.220.

pate the credibility defects of any particular witness, because this credibility determination will be made by the jury as ultimate finder of fact. Moreover, the prosecutor's decision to charge need not be influenced by the strength of any affirmative defenses that he anticipates will be put forth, such as self-defense, entrapment, or insanity.

The "proof beyond a reasonable doubt standard" advocated by the U.S. Attorney's Manual is even more demanding than the directed verdict standard; it requires the prosecutor to anticipate the jury's assessment of credibility, and to charge only those cases where the prosecutor realistically expects to be able to secure a conviction beyond a reasonable doubt after the jury hears from both sides. The difference between the "reasonable doubt" and "sufficient admissible evidence" charging standards is perhaps most starkly illustrated by those cases where it is essentially the victim's word against that of the defendant, with no evidence such as forensic or other proof to corroborate the victim's version of events. In those situations, charging would be considered appropriate under a "sufficient admissible evidence" standard, but perhaps not under a "proof beyond a reasonable doubt standard" if the prosecutor anticipates that the victim's credibility may be severely and justifiably attacked. While the "beyond a reasonable doubt" standard has been criticized because it requires the prosecutor to predict the outcome of credibility determinations to be made by the jury, prosecutors who utilize this benchmark may appropriately be protecting the limited resources of the courts by avoiding costly litigation absent a realistic likelihood of conviction.

Which of these three charging standards a prosecutor chooses to be guided by ("probable cause," "sufficient admissible evidence," or "proof beyond a reasonable doubt") may vary from case to case. There may be exceptional circumstances that warrant charging despite relatively weak evidence (e.g., a serious and imminent public safety danger posed by a defendant with a long record of violent crime, coupled with a need to draw out reluctant or fearful witnesses). There also may be situations where a prosecutor does *not* charge despite relatively strong evidence (e.g., the crime is a low priority for the office, civil remedies are

considered adequate, the victim is reluctant to go forward, the complainant has an improper motive, etc.).[13] Perhaps the fairest conclusions that can be drawn from these competing considerations are that 1) a prosecutor absolutely *may not* charge without probable cause; 2) a prosecutor ordinarily *should not* charge without sufficient admissible evidence to convict; and 3) an individual prosecutor may in his discretion *decline to charge,* or may ask a supervisor to transfer the case to another prosecutor, if he personally is not convinced that the defendant is guilty beyond a reasonable doubt.[14]

The low "probable cause" threshold for charging under Model Rule 3.8, when coupled with the reality of frequently overlapping criminal laws, means that prosecutors often have a wide choice of statutes to choose from in structuring criminal charges. Prosecutors thus have the power to charge a defendant with a more serious offense than may be warranted, with the hope or expectation that the defendant will plead guilty to a lesser charge. For example, a killing provoked by a sudden and heated altercation may in some jurisdictions be charged either as a manslaughter or as murder in the second degree. Does the prosecutor act ethically if he chooses the crime carrying the greater penalty, with the intention to allow the defendant to plead guilty to the lower offense if he waives his right to a trial? ABA Model Rule 3.8 does not address the practice of "overcharging" in order to gain leverage. So long as the charge commenced is supported by probable cause, the special ethical rule applicable to prosecutors does not bar the practice of charging for tactical purposes. However, both the ABA Standards[15] and

13. ABA Criminal Justice Standard 3–3.9(b) provides that "the prosecutor is not obligated to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction.".

14. *See* Uviller, *supra* ch. 2 n.8 at 1156. The ABA Criminal Justice Standards provide that "a prosecutor should not be *compelled* by his or her supervisor to prosecute a case in which he or she has a reasonable doubt about the guilt of the accused." Standard 3–3.9 (c) (emphasis supplied).

15. *See* ABA Criminal Justice Standard 3–3.9(f) ("The prosecutor should not bring or seek charges greater in number or degree than can reasonably be supported with evidence at trial or than are necessary to fairly reflect the gravity of the offense.").

the NDAA standards[16] condemn the practice of "overcharging" solely to gain leverage. A prosecutor looking ahead to the likely disposition of a case must appreciate that a plea bargain sometimes will not be forthcoming. The defendant may insist on asserting his constitutional right to a trial, and may ultimately be convicted of the higher crime which the prosecutor chose to charge for purely tactical reasons. All prosecutors should have confidence that the crime charged fairly and accurately reflects the gravity of the defendant's offense, and be willing to stand by the justness of any conviction resulting from their initial charging decision.

Unlike the decision to charge, there are no ethical constraints whatsoever on the decision to initiate an *investigation* into alleged criminal activity. No threshold of reasonable suspicion or probable cause governs a prosecutor's decision to conduct witness interviews, to engage in non-invasive physical surveillance, or to subpoena persons to appear before the grand jury to testify and/or produce documents.[17] A prosecutor can initiate an investigation into a target at any time, and for any reason, subject only to Fourth Amendment constraints on unreasonable searches and seizures (i.e., physical searches of persons or homes) or statutory constraints on electronic surveillance (i.e., wiretapping telephones).

The currently unchecked authority to commence criminal investigations gives prosecutors the power to "troll for charges"—that is, to investigate a known *person* rather than a known *crime* in order to determine whether the pre-targeted individual has violated any provisions of the criminal laws. This power to troll for charges strikes many citizens as extremely menacing, because criminal laws are so pervasive in our society that all but the most upright and conscientious persons may have violated the law at some point in their lives. Moreover, it is rife with the potential for abuse in the hands of an unscrupulous or vindictive govern-

16. *See* NDAA Standard 43.4 ("The prosecutor should not attempt to utilize the charging decision only as a leverage device in obtaining guilty pleas to lesser charges.").

17. A grand jury subpoena is not a seizure which implicates Fourth Amendment protections. *See* Hale v. Henkel, 201 U.S. 43, 64 (1906). The grand jury "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." United States v. Morton Salt Co., 338 U.S. 632, 642–643 (1950).

ment attorney. While the Model Rules of Professional Conduct do not attempt to curtail prosecutorial discretion in the area of criminal investigations, the non-binding ABA Standards and the Justice Department Manual address the practice somewhat by suggesting that prosecutors should not commence a criminal investigation based upon their personal feelings about the target[18] or based on the personal or political advantages to be gained by a prosecution.[19]

As noted above, prosecutors enjoy tremendous discretion to select their defendants and to select the charges against any particular defendant. To say that there is any constitutional constraint on "selective prosecution" is therefore a misnomer, because by nature *all* prosecutions are selective. However, the Equal Protection guarantee of the Fifth and Fourteenth Amendments provide citizens with some limited protection from prosecutors who exercise their vast discretion in a discriminatory manner.[20] Generally speaking, a prosecutor may not decide whom to investigate or prosecute based on the race, ethnicity, sex, or religion of the accused, or on any arbitrary classification.[21] This constitutional prohibition of *discriminatory* prosecutions is reflected in both the National District Attorneys Association Standards[22] and the U.S. Attorney's Manual for federal prosecutors.[23]

As a practical matter, however, the Supreme Court has made it exceptionally difficult for a defendant to defeat a criminal prosecution on the grounds of invidious discrimination. To make out a selective prosecution claim, a defendant must show both discriminatory *effect* (that is, that persons of other races, religions or genders were equally subject to

18. U.S. Attorney's Manual § 9-27-260.

19. ABA Criminal Justice Standard 3-3.9(d).

20. Yick Wo v. Hopkins, 118 U.S. 356 (1886). *See* Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (Fifth Amendment incorporates some equal protection guarantees).

21. Oyler v. Boles, 368 U.S. 448, 456 (1962). *See* United States v. Davis, 36 F.3d 1424 (9th Cir. 1994) (recognizing gender as impermissible basis for selective prosecution); Commonwealth v. King, 374 Mass. 5, 372 N.E.2d 196 (1977) (same).

22. NDAA Standards § 42.4 (prosecutor should not consider "factors of the accused legally recognized to be deemed invidious discrimination insofar as those factors are not pertinent to the elements of the crime").

23. U.S. Attorney's Manual § 9-27.260 (in making charging decision, attorney for the government should not be influenced by "the person's race, religion, sex, national origin, or political association, activities, or beliefs").

prosecution but were not charged) and discriminatory *purpose* (that is, the prosecutor made his charging decision on the basis of the defendant's race, sex, or religion).[24] Discriminatory effect is difficult to prove without statistical evidence demonstrating that persons of other races, religions, or sexes committed the same offense over time but were not charged. But the Supreme Court has ruled that a defendant will not be allowed discovery from police or prosecutor's files to make out such a statistical claim unless he can first make a threshold showing of discriminatory treatment.[25] This procedural catch-22 makes claims of selective prosecution extremely difficult to prove.

While the Supreme Court has alluded to a constitutional protection against "arbitrary" charging decisions,[26] this theory of selective prosecution has met with extremely limited success. For example, where prosecutors have exercised their discretion to charge only prostitutes and not their clients,[27] or only bookmakers and not persons who place bets with them (gambling),[28] or only adult bookstores and not adult video stores (obscenity),[29] lower courts have upheld each of these charging strategies against constitutional attack. Courts have accepted a wide variety of less-than-convincing enforcement rationales to rebut claims of arbitrariness—including intentional randomness in case selection,[30] simple laxity in enforcement against others,[31] and a scarcity of resources which prevented the prosecutor from charging all

24. Wayte v. United States, 470 U.S. 598, 608 (1985).

25. United States v. Armstrong, 517 U.S. 456, 468 (1996).

26. *Oyler*, 368 U.S. at 456. *Cf.* United States v. Redondo-Lemos, 955 F.2d 1296, 1299 (9th Cir. 1992) (because courts are ill-equipped to review governmental charging decisions, due process protection against "arbitrary and capricious" charging decisions may be a right without a judicial remedy).

27. City of Minneapolis v. Buschette, 307 Minn. 60, 240 N.W.2d 500, 505 (1976); People v. Superior Court (Hartway), 19 Cal.3d 338, 138 Cal. Rptr. 66, 562 P.2d 1315, 1322 (1977).

28. *See* People v. Garner, 72 Cal. App.3d 214, 139 Cal.Rptr. 838, 840 (1977). *Cf.* State v. Baldonado, 79 N.M. 175, 441 P.2d 215 (1968).

29. *See* State v. Holt, 56 Wash.App. 99, 783 P.2d 87, 89 (1989). *Cf.* 227 Book Center, Inc. v. Codd, 381 F.Supp. 1111 (S.D. N.Y. 1974).

30. *See* United States v. Steele, 461 F.2d 1148, 1152 (9th Cir. 1972).

31. Sims v. Cunningham, 203 Va. 347, 124 S.E.2d 221, 226 (1962); Society of Good Neighbors v. Van Antwerp, 324 Mich. 22, 36 N.W.2d 308, 310 (1949).

known offenders.[32] The mere failure to prosecute other perpetrators is not, in and of itself, sufficient to raise a claim of arbitrary or discriminatory enforcement.

A related doctrine of constitutional law which acts as a limited constraint on prosecutorial charging decisions is the doctrine of "vindictiveness." A prosecutor may not charge the defendant with a crime to punish him for the exercise of constitutional or statutory rights. A criminal charge may thus be subject to dismissal under the Due Process Clause of the Fifth and Fourteenth Amendments if it is viewed as impermissible retaliation against the defendant for protected activity. For example, a presumption of vindictiveness will arise where the prosecutor charges the defendant with a more serious offense arising out of the same misconduct after the defendant exercises his right to appeal a conviction.[33] Where a presumption of vindictiveness attaches, the burden shifts to the prosecution to convince the court that reasons independent of the defendant's exercise of a statutory right motivated the prosecutor's discretionary charging decision.[34] Importantly, while the doctrine of vindictive prosecutions has been applied to post-trial exercise of statutory or constitutional rights, it has been severely limited by the Supreme Court in the pre-trial context.[35] Where the prosecutor charges the defendant with a more serious crime after the defendant rejects a plea offer but before the trial itself, the court will not apply a presumption of vindictiveness.[36] The Court declines to apply a presumption of vindictiveness in a pre-trial setting because during the investigatory stage of the proceeding it is more likely that the prosecutor may discover additional evidence that warrants an increased charge.[37] And, because the court has recognized plea bargaining as a legitimate part of the "give and take" of the

32. *See* United States v. Saade, 652 F.2d 1126, 1136 (1st Cir. 1981).

33. Blackledge v. Perry, 417 U.S. 21, 27-28 (1974).

34. *See* North Carolina v. Pearce, 395 U.S. 711, 726 (1969) (presumption of judicial vindictiveness can be rebutted where court articulates independent reasons for imposing higher sentence on defendant after appeal, reversal, and retrial).

35. *See* United States v. Goodwin, 457 U.S. 368 (1982).

36. Bordenkircher v. Hayes, 434 U.S. 357 (1978).

37. *See* Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 436 (2001).

adversarial system,[38] it has been unwilling to curtail the practice of "upping the ante" with more serious charges where the defendant declines to plead guilty and insists on his constitutional right to a jury trial.[39]

Another form of allegedly "vindictive" prosecution is where the prosecutor brings a charge against a defendant to punish him for the exercise of his right to free speech, or his membership in certain political associations. These cases may be considered a hybrid of vindictive prosecution cases and selective enforcement cases, because first amendment rights of speech and association are protected activities that trigger strict scrutiny and limit invidious classification. Where a defendant alleges that the prosecutor has charged him in retaliation for his political views, he bears the burden of proving 1) that he was engaged in protected speech or activity; and 2) that the state's conduct was motivated in part by a purpose to retaliate or deter that protected conduct. If defendant can prove both of these elements, the burden shifts to the prosecution to prove that he would have reached the same charging decision even had the protected activity not been considered.[40]

As can be seen from these narrow constitutional limitations, a presumption of legality attaches to a prosecutor's charging decisions. Courts will presume that the prosecutor has acted in good faith and in accordance with his public trust, in the absence of strong evidence to the contrary. This judicial deference afforded to a prosecutor's charging decisions is based on several considerations. First, judges are ill-suited to second guess a prosecutor's charging decisions, because they entail a host of public policy considerations (e.g., competing law enforcement priorities, public safety

38. *Id.* at 413.

39. Where a prosecutor increases the charges against the defendant after the defendant files certain pre-trial motions, such as a motion to suppress, a motion for speedy trial, or a motion for change of venue, some courts have also been willing to entertain a presumption of vindictiveness. *See* United States v. DeMarco, 550 F.2d 1224, 1227 (9th Cir. 1977); United States v. Groves, 571 F.2d 450, 454 (9th Cir. 1978).

40. United States v. Crowthers, 456 F.2d 1074, 1078 (4th Cir. 1972) (disorderly conduct prosecution brought against Vietnam War protesters who organized "Mass of Peace" in front of Pentagon). *See* Pizzolato v. Perez, 524 F.Supp. 914, 922 (E.D. La. 1981) (voter fraud prosecution brought against district attorney's political opponent); State v. Parrish, 567 So.2d 461, 464 (Fla. Dist. Ct. App. 1990) (tax prosecution brought against political opponent).

demands, perceived deterrence value of the prosecution) that are considered to be in the traditional province of the executive rather than the judicial branch of government.[41] Moreover, judicial review of charging decisions would impose enormous administrative costs on the criminal justice system—including delays in proceeding to trial, and the reduced deterrence value of prosecutions that may result where the government's confidential enforcement policy is exposed.[42] For each of these reasons, so long as the prosecutor acts with the minimum quantum of proof necessary to satisfy the low "probable cause" threshold, a prosecutor's decision to commence criminal proceedings by indictment or complaint is virtually unreviewable.

Problems

1. The police receive a 911 call reporting a domestic disturbance in a multi-unit apartment building in an inner city neighborhood. Neighbors heard occupants of the building arguing and screaming, and other loud noises inside the apartment. When the police arrive they encounter an unmarried couple in partial stages of undress. They separate the couple and interview them in different rooms of the apartment. The woman alleges that the man raped her after she broke up with him and told him to get out of the apartment. The man claims that the two had consensual sex, but that the woman thereafter became enraged after he refused to give her any more money to purchase cocaine to support her drug habit. According to the man, the woman started screaming uncontrollably and throwing furniture, and threatened to have the man "locked up" if he did not give her $200. The police discover a residue of cocaine and drug paraphernalia on the living room coffee table. The apartment is rented by the alleged victim.

The police arrest the man on charges of forcible rape, and take the woman to the hospital for a rape trauma exam. The treating physician at the hospital discovers signs of vaginal penetration, but no evidence of physical trauma. A blood test reveals that the alleged victim had ingested cocaine within the past 10 hours.

Assistant District Attorney Kevan Cunningham is assigned to prosecute the boyfriend on charges of rape. A criminal complaint

41. *Wayte*, 470 U.S. at 607.

42. *Id.* at 607–08.

has issued in district court based on the application of the police. Is the prosecutor obliged to go forward with these charges? How should he proceed if he is not personally convinced of the defendant's guilt?

2. Prosecutor Andrew Lawlor is assigned to prosecute a defendant arrested for larceny of a motor vehicle; a felony punishable by up to five years in prison. The defendant has previously been convicted in the same jurisdiction on separate dates of grand larceny and distribution of cocaine, both also felonies. The state legislature has enacted a "habitual offender" statute which provides that any person convicted of a felony who has previously been convicted of two or more felonies shall be punished by a mandatory term of life in prison. Should the prosecutor seek charges against the defendant for simple larceny of a motor vehicle, or instead commence charges under the habitual offender statute? What factors should the prosecutor take into account in making this determination?

3. Assistant District Attorney Sydney Hanlon is investigating a local public official for receipt of bribes and gratuities relating to his official position. The prosecutor has credibility problems with some of her major witnesses, and a statute of limitations problem with at least one of a number of free trips the politician received from corporate constituents. For a number of legal and evidentiary reasons, she decides to charge the defendant with tax crimes rather than substantive corruption offenses. The prosecutor decides to charge the defendant with tax evasion and filing of false tax returns for each of the relevant tax years in which the defendant received corrupt gifts but did not report them as income on his tax return.

Defendant's wife was a joint signatory on all of the tax returns, and accompanied her husband on all of the junkets paid for by constituents. Should the prosecutor charge the wife with tax crimes as well? Is it permissible for the prosecutor to tell the defense counsel prior to indictment that if defendant pleads guilty to the tax charges, she will forego charges against the wife? Is it permissible for the prosecutor to tell defense counsel after indictment that if the defendant pleads guilty to the tax charges, she will forego any further investigation and/or charging into the corruption allegations?

Ethical Dilemmas for Prosecutors

Ethical Rules for Prosecutors and Defense Attorneys

Model Rules of Professional Conduct:

PREAMBLE: A LAWYER'S RESPONSIBILITIES

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

[4] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of

justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

[8] A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Rule 3.1 Meritorious Claims And Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Rule 3.3 Candor Toward The Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the

tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

(a) unlawfully obstruct another party' s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Rule 3.5 Impartiality And Decorum Of The Tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(d) engage in conduct intended to disrupt a tribunal.

Rule 3.8 Special Responsibilities Of A Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor's jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Rule 4.1 Truthfulness In Statements To Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule 4.2 Communication With Person Represented By Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Rule 4.3 Dealing With Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Rule 8.2 Judicial And Legal Officials

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Rule 8.3 Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

National Prosecution Standards

1. The Prosecutor's Responsibilities

1-1.1 Primary Responsibility

The prosecutor is an independent administrator of justice. The primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth. This responsibility includes, but is not limited to, ensuring that the guilty are held accountable, that the innocent are protected from unwarranted harm, and that the rights of all participants, particularly victims of crime, are respected.

1-1.2 Societal and Individual Rights and Interests

A prosecutor should zealously protect the rights of individuals, but without representing any individual as a client. A prosecutor should put the rights and interests of society in a paramount position in exercising prosecutorial discretion in individual cases. A prosecutor should seek to reform criminal laws whenever it is appropriate and necessary to do so. Societal interests rather than individual or group interests should also be paramount in a prosecutor's efforts to seek reform of criminal laws.

1-2.1 Standard of Conduct

A prosecutor should conduct himself or herself with a high level of dignity and integrity in all professional relationships, both in and out of court. Appropriate behavior includes, but is not limited to, the following:

a. A prosecutor should act with candor, good faith, and courtesy in all professional relations.

b. A prosecutor should act with integrity in all communications, interactions, and agreements with opposing counsel. A prosecutor should not express personal animosity toward opposing counsel, regardless of personal opinion.

c. A prosecutor should at all times display proper respect and consideration for the judiciary, without foregoing the right to justifiably criticize individual members of the judiciary at appropriate times and in appropriate circumstances.

d. A prosecutor should be punctual for all court appearances. When absence or tardiness is unavoidable, prompt notice should be given to the court and opposing counsel.

e. A prosecutor should conduct himself or herself with proper restraint and dignity throughout the course of proceedings. Disruptive conduct or excessive argument is always improper.

f. A prosecutor should treat witnesses fairly and professionally and with due consideration. In questioning the testimony of a witness, a prosecutor should not engage in a line of questioning intended solely to abuse, insult or degrade the

witness. Examination of a witness's credibility should be limited to legally permitted impeachment techniques.

g. A prosecutor should avoid obstructive and improper tactics. Examples of such tactics include, but are not limited to, knowingly:

- Making frivolous objections, or making objections for the sole purpose of disrupting opposing counsel;
- Attempting to proceed in a manner that is obviously inconsistent with a prior ruling by the court;
- Attempting to ask clearly improper questions or to introduce clearly inadmissible evidence;
- Engaging in dilatory actions or tactics; and
- Creating or taking unlawful advantage of prejudicial or inflammatory arguments or publicity.

2-6.1 Judicial Respect
A prosecutor shall display proper respect for the judicial system and the court at all times.

2-6.2 Respect in the Courtroom
A prosecutor should vigorously pursue all proper avenues of argument. However, such action must be undertaken in a fashion that does not undermine respect for the judicial function.

2-6.3 Improper Influence
A prosecutor should not seek to unfairly influence the proper course of justice by taking advantage of any personal relationship with a judge, or by engaging in any ex parte communication with a judge on the subject matter of the proceedings other than as authorized by law or court order.

2-6.4 Suspicion of Criminal Misconduct
When a chief prosecutor has a reasonable suspicion of criminal conduct by a member of the judiciary, the prosecutor should take all lawful investigatory steps necessary to substantiate or dispel such suspicions and, if substantiated, should initiate prosecution or refer the case to another prosecutor's office for review or appoint a special prosecutor in the case.

2-6.5 Responsibility to Report Misconduct
When a prosecutor has knowledge of conduct by a member of the judiciary that may violate the applicable code of judicial conduct and/or that raises a substantial question as to the judge's fitness for office, the prosecutor has the responsibility to report that knowledge to his or her supervisor or if the chief prosecutor, directly to the relevant judicial conduct authority in his or her jurisdiction.

2-6.6 Application for Recusal
When a prosecutor reasonably believes that it is warranted by the facts, circumstances,

law, or rules of judicial conduct, the prosecutor may properly seek that judge's recusal from the matter.

2-7.1 Communications with Represented Persons
A prosecutor should respect a suspect's and defendant's constitutional right to the assistance of counsel. A prosecutor should also take steps to ensure that those persons working at his or her direction respect a suspect's and defendant's constitutional right to the assistance of counsel. Notwithstanding the foregoing:

a. A prosecutor may communicate with a defendant or suspect in the absence of his counsel when either (1) counsel has consented to the communication or (2) the communication is authorized by law or court rule or order.

b. A prosecutor may communicate with a witness who is also charged as a defendant in an unrelated criminal matter about the witness's upcoming testimony without the advance permission of the witness's attorney so long as the prosecutor does not discuss the criminal charges pending against the witness.

2-7.2 Communication with Unrepresented Defendants
When a prosecutor communicates with a defendant charged with a crime who is not represented by counsel, the prosecutor should make certain that the defendant is treated with honesty, fairness, and with full disclosure of his or her potential criminal liability in the matter under discussion.

a. A prosecutor should identify himself or herself to the defendant as a prosecutor and make clear that he or she does not represent the defendant. If legally required under the circumstances, the prosecutor should advise the defendant of his or her rights.

b. If a prosecutor is engaged in communications with a charged defendant who is not represented by counsel and the defendant changes his or her mind and expresses a desire to obtain counsel, the prosecutor should terminate the communication to allow the defendant to obtain counsel or to secure the presence of counsel. When appropriate, the prosecutor should advise the defendant on the procedures for obtaining appointed counsel.

2-7.3 Unsolicited Communications
A prosecutor may receive, accept and use unsolicited written correspondence from defendants, regardless of whether the defendant is represented by counsel. If the prosecutor does not know that the defendant is represented by counsel, a prosecutor may receive unsolicited oral communications from defendants, of which he or she has no advance notice, without any duty of first ascertaining whether or not there is a valid reason for the communication or whether or not the defendant is represented by counsel. However, the situation may arise where a defendant who has been charged with a crime is represented by counsel, but requests to communicate with a prosecutor on the subject of the representation out of the presence of his or her counsel. Before

engaging in such communication, the prosecutor should first ascertain whether the defendant has expressed a valid reason to communicate with the prosecutor without the presence of his or her attorney, and if so should thereafter communicate with the defendant only if authorized by law or court order.

2-7.4 Plea Negotiations
If a prosecutor enters into a plea negotiation with a defendant who is not represented by counsel, he or she should seek to ensure that the defendant understands his or her rights, duties, and liabilities under the agreement. When possible, the agreement should be reduced to writing and a copy provided to the defendant. The prosecutor should never take unfair advantage of an unrepresented defendant. The prosecutor should not give legal advice to a defendant who is not represented by counsel, other than the advice to secure counsel.

2-7.5 Right to Counsel
If a prosecutor is engaged in communications with a defendant who is not represented by counsel or whose counsel is not present, and the defendant changes his mind and expresses a desire to obtain counsel or to have counsel present, the prosecutor should terminate the communication in order to allow the defendant to obtain counsel or to secure the presence of his or her counsel. When appropriate, the prosecutor should advise the defendant on the procedures for obtaining appointed counsel.

2-7.6 Communications with Represented Persons During Investigations
A prosecutor performing his or her duty to investigate criminal activity should neither be intimidated nor discouraged from communicating with a defendant or suspect in the absence of his or her counsel when the communication is authorized by law or court rule or order. A prosecutor may advise or authorize a law enforcement officer to engage in undercover communications with an uncharged, represented suspect in the absence of the suspect's counsel, provided such a communication is authorized by law or court order.

8. Relations with Defense Counsel

2-8.1 Standards of Professionalism
The prosecutor should comply with the provisions of professionalism as identified in Standard 1-2.1 in his or her relations with defense counsel, regardless of prior relations with or animosity toward the attorney. The prosecutor should attempt to maintain a uniformity of fair dealing among different defense counsel.

2-8.2 Propriety of Relations
In all contacts with members of the defense bar, the prosecutor should strive to preserve proper relations.

2-8.3 Cooperation to Assure Justice
The prosecutor should cooperate with defense counsel at all stages of the criminal process to ensure the attainment of justice and the most appropriate disposition of each

case. The prosecutor need not cooperate with defense demands that are abusive, frivolous, or made solely for the purpose of harassment or delay.

2-8.4 Disclosure of Exculpatory Evidence
The prosecutor shall make timely disclosure of exculpatory or mitigating evidence, as required by law and/or applicable rules of ethical conduct.

2-8.5 Suspicion of Criminal Conduct
When a prosecutor has reasonable suspicion of criminal conduct by defense counsel, the prosecutor has a responsibility to take such action necessary to substantiate or dispel such suspicion.

2-8.6 Responsibility to Report Ethical Misconduct
When an assistant or deputy prosecutor has knowledge of ethical misconduct by defense counsel that raises a substantial question as to the attorney's fitness to practice law, the prosecutor should report such conduct to his or her supervisor. A chief prosecutor who has knowledge of ethical misconduct by defense counsel which raises a substantial question as to the attorney's fitness to practice law should report such conduct directly to the appropriate bar disciplinary authority in his or her jurisdiction. When such misconduct occurs during the course of litigation, the prosecutor should also report it to the judge presiding over the case or to his or her supervisor, if required by office policy, and may seek sanctions as appropriate.

2-8.7 Avoiding Prejudice to Client
When the prosecutor believes that the defense counsel has engaged in misconduct, remedial efforts should be directed at the attorney and not at his or her client. The prosecutor should at all times make efforts to ensure that a defendant who is not involved in misconduct is not prejudiced by the unlawful or unethical behavior of his or her attorney.

9. Relations with Victims

2-9.1 Information Conveyed to Victims
Victims of violent crimes, serious felonies, or any actions where it is likely the victim may be the object of physical or other forms of retaliation should be informed of all important stages of the criminal justice proceedings to the extent feasible, upon request or if required by law, including, but not limited to, the following:

a. Acceptance or rejection of a case by the prosecutor's office, the return of an indictment, or the filing of criminal charges;

b. A determination of pre-trial release of the defendant;

c. Any pre-trial disposition;

d. The date and results of trial;

e. The date and results of sentencing;

f. Any proceeding within the knowledge of the prosecutor which does or may result in the defendant no longer being incarcerated, including appellate reversal, parole, release, and escape, unless a legal obligation to inform the victim of such proceeding is imposed by law on another governmental entity; and

g. Any other event within the knowledge of the prosecutor that may put the victim at risk of harm or harassment.

14. Prosecutors and the Media

2-14.1 Media Relations

The prosecutor should seek to maintain a relationship with the media that will facilitate the appropriate flow of information to and from the public. An appropriate and professional relationship with the media is necessary to promote public accountability and transparency in government.

2-14.2 Balancing Interests

The prosecutor should strive to protect both the rights of the individual accused of a crime and the needs of citizens to be informed about public dangers and the conduct of their government. The prosecutor may provide sufficient information to the public so that citizens may be aware that the alleged perpetrator of a crime has been arrested and that there exists sufficient competent evidence with which to proceed with prosecution. Subject to Standard 2-14.4 and applicable rules of ethical conduct, information may be released by the prosecution if such release will aid the law enforcement process, promote public safety, dispel widespread concern or unrest, or promote confidence in the criminal justice system. The prosecutor should refrain from making extrajudicial comments before or during trial that promote no legitimate law enforcement purpose and that serve solely to heighten public condemnation of the accused.

2-14.3 Information Appropriate for Media Dissemination by Prosecutors

Prior to and during a criminal trial the prosecutor may comment on the following matters:

a. The accused's name, age, residence, occupation, family status, and citizenship;

b. The substance or text of the charge such as the complaint, indictment, information, and, where appropriate, the identity of the complainant;

c. The existence of probable cause to believe that the accused committed the offense charged;

d. The identity of the investigating and arresting agency, the length and scope of the investigation, the thoroughness of the investigative procedures, and the diligence and professionalism of the law enforcement personnel in identifying and

apprehending the accused;

e. The circumstances immediately surrounding the arrest, including the time and place of arrest, the identity of the arresting officer or agency, resistance, pursuit, possession and use of weapons, and a description of items seized at the time of arrest or pursuant to a search warrant; and

f. Information contained in a public record, the disclosure of which would serve the public interest.

2-14.4 Restraints on Information
Prior to and during a criminal trial the prosecutor should not make any public, extrajudicial statement that has a substantial likelihood of materially prejudicing a judicial proceeding. In particular, from the commencement of a criminal investigation until the conclusion of trial, the prosecutor should not make any public, extrajudicial statements about the following matters, unless the information is part of the public record of the criminal proceeding:

a. The character, reputation, or prior criminal conduct of a suspect, accused person or prospective witness;

b. Admissions, confessions, or the contents of a statement or alibi attributable to a suspect or accused person;

c. The performance or results of any scientific tests or the refusal of the suspect or accused to take a test;

d. Statements concerning the credibility or anticipated testimony of prospective witnesses;

e. The possibility of a plea of guilty to the offense charged or to a lesser offense, or the contents of any plea agreement.

2-14.5 Public Responses
The prosecutor may make a reasonable and fair reply to comments of defense counsel or others. A public comment made by a prosecutor pursuant to this paragraph shall be limited to statements reasonably necessary to mitigate the effect of undue prejudice created by the public statement of another. In no event should a prosecutor make statements prohibited by Standard 2-14.4 or applicable rules of ethical conduct.

2-14.6 Law Enforcement Policy on Information
The prosecutor should assist law enforcement and other investigative agencies in understanding their statutory responsibilities with respect to the release of criminal justice information. The prosecutor should also assist in the training of law enforcement agencies within his or her jurisdiction on subject matters to avoid when discussing pending criminal investigations or prosecutions with the media.

2-14.7 Judicial Decisions
The prosecutor may inform the public of judicial decisions that are contrary to law, fact, or public interest, but a prosecutor should not make any public statement that he or she knows to be false, or with reckless disregard for its truth or falsity, as to the integrity or qualifications of a judge.

2-14.8 Verdicts
A prosecutor should not make any public statement after trial that is critical of jurors, but may express disagreement with or disappointment in the jury verdict.

Part IV. Pre-Trial Considerations

1. Screening

4-1.1 Prosecutorial Responsibility
The decision to initiate a criminal prosecution should be made by the prosecutor's office. Where state law allows criminal charges to be initiated by law enforcement or by other persons or means, prosecutors should, at the earliest practical time, decide whether thecharges should be pursued.

4-1.2 Prosecutorial Discretion
The chief prosecutor should recognize and emphasize the importance of the initial charging decision and should provide appropriate training and guidance to prosecutors regarding the exercise of their discretion.

4-1.3 Factors to Consider
Prosecutors should screen potential charges to eliminate from the criminal justice system those cases where prosecution is not justified or not in the public interest. Factors that may be considered in this decision include:

a. Doubt about the accused's guilt;
b. Insufficiency of admissible evidence to support a conviction;
c. The negative impact of a prosecution on a victim;
d. The availability of adequate civil remedies;
e. The availability of suitable diversion and rehabilitative programs;
f. Provisions for restitution;
g. Likelihood of prosecution by another criminal justice authority;
h. Whether non-prosecution would assist in achieving other legitimate goals, such as the investigation or prosecution of more serious offenses;
i. The charging decisions made for similarly-situated defendants;
j. The attitude and mental status of the accused;
k. Undue hardship that would be caused to the accused by the prosecution;
l. A history of non-enforcement of the applicable law;
m. Failure of law enforcement to perform necessary duties or investigations;
n. The expressed desire of an accused to release potential civil claims against

victims, witnesses, law enforcement agencies and their personnel, or the prosecutor and his personnel, where such desire is expressed after having the opportunity to obtain advice of counsel and is knowing and voluntary;
o. Whether the alleged crime represents a substantial departure from the accused's history of living a law-abiding life;
p. Whether the accused has already suffered substantial loss in connection with the alleged crime;
q. Whether the size of the loss or the extent of the harm caused by the alleged crime is too small to warrant a criminal sanction;

4-1.4 Factors Not to Consider
Factors that should not be considered in the screening decision include the following:
a. The prosecutor's individual or the prosecutor's office rate of conviction;
b. Personal advantages or disadvantages that a prosecution might bring to the prosecutor or others in the prosecutor's office;
c. Political advantages or disadvantages that a prosecution might bring to the prosecutor;
d. Characteristics of the accused that have been recognized as the basis for invidious discrimination, insofar as those factors are not pertinent to the elements or motive of the crime;
e. The impact of any potential asset forfeiture to the extent described in Standard 4-7.4.

2. Charging

4-2.1 Prosecutorial Responsibility
It is the ultimate responsibility of the prosecutor's office to determine which criminal charges should be prosecuted and against whom.

4-2.2 Propriety of Charges
A prosecutor should file charges that he or she believes adequately encompass the accused's criminal activity and which he or she reasonably believes can be substantiated
by admissible evidence at trial.

4-2.3 Improper Leveraging
The prosecutor should not file charges where the sole purpose is to obtain from the accused a release of potential civil claims.

4-2.4 Factors to Consider
The prosecutor should only file those charges that are consistent with the interests of justice. Factors that may be relevant to this decision include:
a. The nature of the offense, including whether the crime involves violence or bodily injury;
b. The probability of conviction;
c. The characteristics of the accused that are relevant to his or her

blameworthiness or responsibility, including the accused's criminal history;
d. Potential deterrent value of a prosecution to the offender and to society at large;
e. The value to society of incapacitating the accused in the event of a conviction;
f. The willingness of the offender to cooperate with law enforcement;
g. The defendant's relative level of culpability in the criminal activity;
h. The status of the victim, including the victim's age or special vulnerability;
i. Whether the accused held a position of trust at the time of the offense;
j. Excessive costs of prosecution in relation to the seriousness of the offense;
k. Recommendation of the involved law enforcement personnel;
l. The impact of the crime on the community;
m. Any other aggravating or mitigating circumstances.

3. Diversion

4-3.1 Prosecutorial Responsibility
The decision to divert cases from the criminal justice system should be the responsibility of the prosecutor. The prosecutor should, within the exercise of his or her discretion, determine whether diversion of an offender to a treatment alternative best serves the interests of justice.

4-3.2 Diversion Alternatives
A prosecutor should be aware and informed of the scope and availability of all alternative diversion programs. The prosecutor's office should take steps to help ensure that all diversion programs are credible and effective.

4-3.3 Need for Programs
In jurisdictions in which diversion programs are deemed insufficient by the chief prosecutor, the prosecutor's office should urge the establishment, maintenance, and enhancement of such programs as may be necessary.

4-3.4 Information Gathering
The prosecutor should have all relevant investigative information, personal data, case records, and criminal history information necessary to render sound and reasonable decisions on diversion of individuals from the criminal justice system. The chief prosecutor should take steps to ensure the enactment of appropriate legislation and court rules to enable the prosecutor to obtain such information from appropriate agencies.

4-3.5 Factors to Consider
The prosecutor may divert individuals from the criminal justice system when he or she considers it to be in the interest of justice and beneficial both to the community and to the individual. Factors which may be considered in this decision include:
a. The nature, severity, or class of the offense;
b. Any special characteristics or difficulties of the offender;
c. Whether the defendant is a first-time offender;
d. The likelihood that the defendant will cooperate with and benefit from the

diversion program;
e. Whether an available program is appropriate to the needs of the offender;
f. The impact of diversion and the crime on the community;
g. Recommendations of the relevant law enforcement agency;
h. The likelihood that the defendant will recidivate;
i. The extent to which diversion will enable the defendant to maintain employment or remain in school;
j. The opinion of the victim;
k. Provisions for restitution;
l. The impact of the crime on the victim; and
m. Diversion decisions with respect to similarly situated defendants.

4. Pretrial Release

4-4.1 Prosecutorial Responsibility

A prosecutor should request that bail be set at an appropriate amount to ensure that the defendant appears at all required court proceedings, and, where allowed by law, does not pose a danger to others or to the community. Where permitted by law, a prosecutor should request that the defendant be held without bail if the prosecutor reasonably believes the accused:
a. Would present a danger to others or the community if he or she were released prior to trial;
b. Is likely to tamper with evidence, attempt to improperly influence witnesses, or otherwise interfere with the orderly resolution of the criminal case; or
c. Is a substantial flight risk.

4-4.2 Bail Amount Request

A prosecutor should take steps to gather adequate information about the defendant's circumstances and history to request an appropriate bail amount. Among the factors a prosecutor may consider in determining the proper amount to request are:
a. The defendant's employment status and history;
b. The defendant's financial condition, ability to raise funds and source of funds;
c. The defendant's length and character of residence in the community, and the nature and extent of the accused's family ties to the community;
d. The nature and severity of the crime, the strength of the evidence, and the severity of the sentence that could be imposed on conviction, to the extent these factors are relevant to the risk of non-appearance and the commission of other crimes while awaiting trial;
e. The defendant's criminal record, including any record of appearance or nonappearance
on other criminal charges;
f. The likelihood of the defendant attempting to intimidate witnesses or victims, or to tamper with the evidence;
g. Identification of responsible members of the community who would vouch for the accused's reliability;

h. Any other factors indicating the defendant's ties to the community. A prosecutor should not seek a bail amount or other release conditions that are greater than necessary to ensure the safety of others and the community and to ensure the appearance of the defendant at trial.

4-4.3 Continuing Obligation
If, after the initial bail determination is made, the prosecutor learns of new information that makes the original bail decision inappropriate, the prosecutor should take steps to modify the accused's bail status or conditions.

4-4.4 Alternatives to Pretrial Incarceration
Prosecutors should recommend bail decisions that facilitate pretrial release rather than detention to the extent such release is consistent with the prosecutor's responsibilities set forth in Section 4-4.1.

4-4.5 Periodic Reports
A prosecutor should request periodic reports on detained defendants to determine if continued detention under the current conditions is appropriate. The prosecutor's office should be informed of any violations of pretrial release conditions of a defendant released pending trial, and should seek revocation of release status, higher bail and/or appropriate sanctions as deemed necessary, in accordance with applicable law or court rules.

6-1.1 False Statement
A prosecutor shall not knowingly make a false statement of fact or law to a court. If a prosecutor learns that a previous statement of material fact or law made to the court by the prosecutor is incorrect, the prosecutor shall correct such misstatement in a timely manner.

6-1.2 Legal Authority
A prosecutor shall inform the court of legal authority in the controlling jurisdiction known to the prosecutor to be directly adverse to his or her position.

6-1.3 False Evidence
A prosecutor shall not offer evidence that the prosecutor knows to be false. If a prosecutor learns that material evidence previously presented by the prosecutor is false, the prosecutor shall take reasonable remedial measures to prevent prejudice caused by the false evidence.

6-1.4 Ex Parte Proceeding
A prosecutor, in an ex parte proceeding authorized by law, shall inform the court of all material facts known to the prosecutor which he or she reasonably believes are necessary to an informed decision by the court.

AMERICAN BAR ASSOCIATION

Fourth Edition of the

CRIMINAL JUSTICE STANDARDS

for the

PROSECUTION FUNCTION

PART I.

GENERAL STANDARDS

Standard 3-1.2 Functions and Duties of the Prosecutor

(a) The prosecutor is an administrator of justice, a zealous advocate, and an officer of the court. The prosecutor's office should exercise sound discretion and independent judgment in the performance of the prosecution function.

(b) The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances. The prosecutor should seek to protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and defendants.

(c) The prosecutor should know and abide by the standards of professional conduct as expressed in applicable law and ethical codes and opinions in the applicable jurisdiction. The prosecutor should avoid an appearance of impropriety in performing the prosecution function. A prosecutor should seek out, and the prosecutor's office should provide, supervisory advice and ethical guidance when the proper course of prosecutorial conduct seems unclear. A prosecutor who disagrees with a governing ethical rule should seek its change if appropriate, and directly challenge it if necessary, but should comply with it unless relieved by court order.

(d) The prosecutor should make use of ethical guidance offered by existing organizations, and should seek to establish and make use of an ethics advisory group akin to that described in Defense Function Standard 4-1.11.

(e) The prosecutor should be knowledgeable about, consider, and where appropriate develop or assist in developing alternatives to prosecution or conviction that may be applicable in individual cases or classes of cases. The prosecutor's office should be available to assist community efforts addressing problems that lead to, or result from, criminal activity or perceived flaws in the criminal justice system.

(f) The prosecutor is not merely a case-processor but also a problem-solver responsible for considering broad goals of the criminal justice system. The prosecutor should seek to reform and improve the administration of criminal justice, and when inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, the prosecutor should stimulate and support efforts for remedial action. The prosecutor should provide service to the community, including involvement in public service and Bar activities, public education, community service activities, and Bar leadership positions. A prosecutorial office should support such activities, and the office's budget should include funding and paid release time for such activities.

Standard 3-3.3 Relationship With Courts, Defense Counsel and Others

(a) In all contacts with judges, the prosecutor should maintain a professional and independent relationship. A prosecutor should not engage in unauthorized *ex parte* discussions with, or submission of material to, a judge relating to a particular matter which is, or is likely to be, before the judge. With regard to generalized matters requiring judicial discussion (for example, case-management or administrative matters), the prosecutor should invite a representative defense counsel to join in the discussion to the extent practicable.

(b) When *ex parte* communications or submissions are authorized, the prosecutor should inform the court of material facts known to the prosecutor, including facts that are adverse, sufficient to enable the court to make a fair and informed decision. Except when non-disclosure is authorized, counsel should notify opposing counsel that an *ex parte* contact has occurred, without disclosing its content unless permitted.

(c) In written filings, the prosecutor should respectfully evaluate and respond as appropriate to opposing counsel's arguments and representations, and avoid unnecessary personalized disparagement.

(d) The prosecutor should develop and maintain courteous and civil working relationships with judges and defense counsel, and should cooperate with them in developing solutions to address ethical, scheduling, or other issues that may arise in particular cases or generally in the criminal justice system. Prosecutors should cooperate with courts and organized bar associations in developing codes of professionalism and civility, and should abide by such codes that apply in their jurisdiction.

Standard 3-4.4 Discretion in Filing, Declining, Maintaining, and Dismissing Criminal Charges

(a) In order to fully implement the prosecutor's functions and duties, including the obligation to enforce the law while exercising sound discretion, the prosecutor is not obliged to file or maintain all criminal charges which the evidence might support. Among the factors which the prosecutor may properly consider in exercising discretion to initiate, decline, or dismiss a criminal charge, even though it meets the requirements of Standard 3-4.3, are:

(i) the strength of the case;

(ii) the prosecutor's doubt that the accused is in fact guilty;

(iii) the extent or absence of harm caused by the offense;

(iv) the impact of prosecution or non-prosecution on the public welfare;

(v) the background and characteristics of the offender, including any voluntary restitution or efforts at rehabilitation;

(vi) whether the authorized or likely punishment or collateral consequences are disproportionate in relation to the particular offense or the offender;

(vii) the views and motives of the victim or complainant;

(viii) any improper conduct by law enforcement;

(ix) unwarranted disparate treatment of similarly situated persons;

(x) potential collateral impact on third parties, including witnesses or victims;

(xi) cooperation of the offender in the apprehension or conviction of others;

(xii) the possible influence of any cultural, ethnic, socioeconomic or other improper biases;

(xiii) changes in law or policy;

(xiv) the fair and efficient distribution of limited prosecutorial resources;

(xv) the likelihood of prosecution by another jurisdiction; and

(xvi) whether the public's interests in the matter might be appropriately vindicated by available civil, regulatory, administrative, or private remedies.

(b) In exercising discretion to file and maintain charges, the prosecutor should not consider:

(i) partisan or other improper political or personal considerations;

(ii) hostility or personal animus towards a potential subject, or any other improper motive of the prosecutor; or

(iii) the impermissible criteria described in Standard 1.6 above.

(c) A prosecutor may file and maintain charges even if juries in the jurisdiction have tended to acquit persons accused of the particular kind of criminal act in question.

(d) The prosecutor should not file or maintain charges greater in number or degree than can reasonably be supported with evidence at trial and are necessary to fairly reflect the gravity of the offense or deter similar conduct.

(e) A prosecutor may condition a dismissal of charges, *nolle prosequi*, or similar action on the accused's relinquishment of a right to seek civil redress only if the accused has given informed consent, and such consent is disclosed to the court. A prosecutor should not use a civil waiver to avoid a bona fide claim of improper law enforcement actions, and a decision not to file criminal charges should be made on its merits and not for the purpose of obtaining a civil waiver.

(f) The prosecutor should consider the possibility of a noncriminal disposition, formal or informal, or a deferred prosecution or other diversionary disposition, when deciding whether to initiate or prosecute criminal charges. The prosecutor should be familiar with the services and resources of other agencies, public or private, that might assist in the evaluation of cases for diversion or deferral from the criminal process.

Standard 3-5.2 The Decision to Recommend Release or Seek Detention

(a) The prosecutor should favor pretrial release of a criminally accused, unless detention is necessary to protect individuals or the community or to ensure the return of the defendant for future proceedings.

(b) The prosecutor's decision to recommend pretrial release or seek detention should be based on the facts and circumstances of the defendant and the offense, rather than made categorically. The prosecutor should consider information relevant to these decisions from all sources, including the defendant.

(c) The prosecutor should cooperate with pretrial services or other personnel who review or assemble information to be provided to the court regarding pretrial release determinations.

(d) The prosecutor should be open to reconsideration of pretrial detention or release decisions based on changed circumstances, including an unexpectedly lengthy period of detention.

Standard 3-6.9 Facts Outside the Record

When before a jury, the prosecutor should not knowingly refer to, or argue on the basis of, facts outside the record, unless such facts are matters of common public knowledge based on ordinary human experience, or are matters of which a court clearly may take judicial notice, or

are facts the prosecutor reasonably believes will be entered into the record at that proceeding. In a nonjury context the prosecutor may refer to extra-record facts relevant to issues about which the court specifically inquires, but should note that they are outside the record.

Standard 3-6.10 Comments by Prosecutor After Verdict or Ruling

(a) The prosecutor should respectfully accept acquittals. Regarding other adverse rulings (including the rare acquittal by a judge that is appealable), while the prosecutor may publicly express respectful disagreement and an intention to pursue lawful options for review, the prosecutor should refrain from public criticism of any participant. Public comments after a verdict or ruling should be respectful of the legal system and process.

(b) The prosecutor may publicly praise a jury verdict or court ruling, compliment government agents or others who aided in the matter, and note the social value of the ruling or event. The prosecutor should not publicly gloat or seek personal aggrandizement regarding a verdict or ruling.

Standard 3-8.1 Duty To Defend Conviction Not Absolute

The prosecutor has a duty to defend convictions obtained after fair process. This duty is not absolute, however, and the prosecutor should temper the duty to defend with independent professional judgment and discretion. The prosecutor should not defend a conviction if the prosecutor believes the defendant is innocent or was wrongfully convicted, or that a miscarriage of justice associated with the conviction has occurred.

IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS
147TH JUDICIAL DISTRICT

THE STATE OF TEXAS	§	
VS.	§	
JOHN DOMINICK COLYANDRO,	§	CRIMINAL ACTION NO. _____
JAMES WALTER ELLIS, &	§	CRIMINAL ACTION NO. _____
THOMAS DALE DELAY	§	CRIMINAL ACTION NO. _____

BILL OF INDICTMENT

JOHN DOMINICK COLYANDRO RE-INDICTMENT OF CRIMINAL ACTION NO. D1DC-05-904150 PID #730883/MNI #1221697/TCDA-SPD #4403-03	TRIAL COURT: 331ST BAIL: $
JAMES WALTER ELLIS RE-INDICTMENT OF CRIMINAL ACTION NO. D1DC-05-904151 PID #730881/MNI #1221680/TCDA-SPD #4403-03	TRIAL COURT: 331ST BAIL: $
THOMAS DALE DELAY DA #D1DC-05900725 PID # /MNI # /TCDA-SPD #4403-03	TRIAL COURT: 331ST BAIL: $
CRIMINAL CONSPIRACY TEXAS PENAL CODE § 15.02 (STATE JAIL FELONIES)	

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

THE GRAND JURY OF THE COUNTY OF TRAVIS, STATE OF TEXAS, duly selected, organized, sworn, and charged as such at the April term, A.D., 2005, of the 147th Judicial District Court of said county, in said court at said term, upon their oaths do present that on or about the thirteenth day of September, A.D., 2002, in the County of Travis and State of Texas,

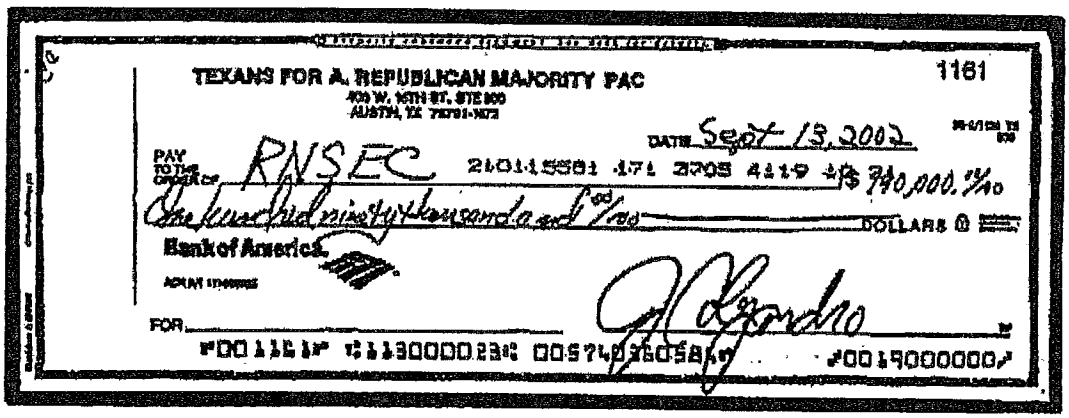
FILED #2
2005 SEP 28 AM 12: 5-
DISTRICT CLERK

JOHN DOMINICK COLYANDRO, JAMES WALTER ELLIS, AND THOMAS DALE DELAY,

the defendants herein, with the intent that a felony be committed, did enter into an agreement with one or more of each other or with a general purpose political committee known as Texans for a Republican Majority PAC that one or more of them would engage in conduct that would constitute the offense of knowingly making a political contribution in violation of Subchapter D of Chapter 253 of the Texas Election Code, a violation of Sections 253.003 and 253.094 and 253.104 of the Election Code, in that said contribution was made directly to the Republican National Committee, a political party, during a period beginning sixty days before the date of a general election for state and county officers and continuing through the date of the election, and indirectly to candidates for the Texas House of Representatives, and that said contribution included a prohibited political contribution by a corporation; and that John Dominick Colyandro, and James Walter Ellis, and Texans for a Republican Majority PAC did perform overt acts in pursuance of the agreement, to wit: John Colyandro and Texans for a Republican Majority PAC did accept contributions from corporations, namely Diversified Collection Services, Inc. in the amount of $50,000, and Sears, Roebuck and Co. in the amount of $25,000, and Williams Companies, Inc. in the amount of $25,000, and Cornell Companies, Inc. in the amount of $10,000, and Bacardi U.S.A., Inc. in the amount of $20,000, and Questerra Corporation in the amount of $25,000; and James Ellis and Texans for a Republican Majority PAC did tender, deliver, and cause to be tendered and delivered to the Republican National Committee and Terry Nelson, a representative of the Republican National Committee, a check (a copy of which is hereinafter reproduced) payable to RNSEC (the Republican National State Elections Committee, a nonfederal component of the Republican National Committee) in the amount of $190,000, said check being from the same bank account into which the above-described corporate contributions had been deposited; and James Ellis and Texans for a Republican Majority PAC did

provide the said Terry Nelson with a document that contained the names of candidates for the Texas House of Representatives and amounts to be contributed to each of the said candidates, namely, Todd Baxter, Dwayne Bohac, Glenda Dawson, Dan Flynn, Rick Green, Jack Stick, and Larry Taylor; and James Ellis and Texans for a Republican Majority PAC requested, solicited, and proposed that the Republican National Committee and the Republican National State Elections Committee make political contributions to said candidates after the aforesaid check was delivered to Terry Nelson; and John Colyandro did sign the aforesaid check; and John Colyandro did deliver the aforesaid check, and did cause the aforesaid check to be delivered to James Ellis by instructing Russell Anderson to send the aforesaid check to James Ellis;

[INDICTMENT EXHIBIT]


TEXANS FOR A REPUBLICAN MAJORITY PAC
1161
DATE Sept 13, 2002
PAY TO THE ORDER OF RNSEC
$ 190,000.00
DOLLARS
Bank of America
FOR

THE GRAND JURY FURTHER PRESENTS that, with the advice and consent of counsel, the defendant, THOMAS DALE DELAY, did heretofore knowingly, intelligently, and voluntarily waive the application of Articles 12.01 and 12.03 of the Texas Code of Criminal Procedure to the indictment presented herein. In particular, the Grand Jury present that with the advice and consent of counsel, the defendant, THOMAS DALE DELAY, did knowingly, intelligently, and voluntarily waive the requirement that an indictment for the felony offense of criminal

You may ignore this paragraph.

conspiracy, the object of which is a felony other than those listed in Subdivisions (1) through (5) of Article 12.01 of the Texas Code of Criminal Procedure, may be presented within three years from the date of the commission of the offense, and not afterward, insofar as such requirement pertains to the indictment presented herein,

THE GRAND JURY FURTHER PRESENTS that on or about the thirteenth day of September, A.D., 2005, the Grand Jury of the County of Travis, State of Texas, duly selected, organized, sworn, and charged as such at the April term, A.D., 2005, of the 147th Judicial District Court of said county, in said court at said term, upon their oaths did present an indictment charging the defendants, JOHN DOMINICK COLYANDRO AND JAMES WALTER ELLIS, with the offense hereinbefore charged in this indictment, and the said indictment was pending in the 331st Judicial District Court of Travis County, Texas at the time of the presentment of this indictment.

AGAINST THE PEACE AND DIGNITY OF THE STATE.

Foreperson of the Grand Jury

23 of 149 DOCUMENTS

LARRY DOUGLAS HENRY, Appellant v. THE STATE OF TEXAS, Appellee

NO. 01-05-00845-CR

COURT OF APPEALS OF TEXAS, FIRST DISTRICT, HOUSTON

2007 Tex. App. LEXIS 224

January 11, 2007, Opinion Issued

NOTICE: [*1] PUBLISH. TEX. R. APP. P. 47.2(b).

SUBSEQUENT HISTORY: Appeal after remand at *Henry v. State, 2007 Tex. App. LEXIS 244 (Tex. App. Houston 1st Dist., Jan. 11, 2007)*

PRIOR HISTORY: On Appeal from the 174th District Court. Harris County, Texas. Trial Court Cause No. 1028549.

COUNSEL: For Appellant: Casie L. Gotro, Houston, TX; Michael Logan Ware, Fort Worth, Tx.

For State: Peyton Z. Peebles, III, Assistant District Attorney, Houston, TX.

JUDGES: Panel consists of Justices Taft, Keyes, and Hanks.

OPINION BY: Evelyn V. Keyes

OPINION:

A jury convicted appellant, Larry Douglas Henry, of intoxication manslaughter and assessed punishment at nine years in prison. *See TEX. PEN. CODE ANN. § 49.08* (Vernon 2003). In four points of error, appellant contends (1) the trial court erred by denying appellant's request to instruct the jury on the lesser-included offense of driving while intoxicated; (2) he received ineffective assistance of counsel during the voir dire examination of the venire; (3) the trial court abused its discretion in admitting the results of appellant's blood analysis without a proper chain of custody; (4) the trial court abused its discretion in admitting the results of appellant's blood analysis and testimony regarding that analysis over appellant's hearsay objections.

We reverse and remand the cause. [*2]

Background

On October 31, 2004, appellant visited his neighbor, Troy Hewlitt, at his Northwest Houston home around nine o'clock in the evening. Appellant testified to drinking half a beer while at Hewlitt's house. Later that evening, appellant's friend, Douglas McIntyre, arrived at Hewlitt's house. During the evening, McIntyre began to argue with his wife, and appellant offered to leave Hewlitt's house with McIntyre, so that McIntyre could "cool off a little bit."

Appellant drove McIntyre in appellant's Ford F-350 pickup truck to The Alamo Ice House, a bar approximately 15 to 20 minutes from Hewlitt's house, where appellant was previously scheduled to meet someone about a job opportunity. Appellant and McIntyre stayed at the bar for approximately one hour, where they each consumed two beers.

During the drive back to Hewlitt's house, McIntyre testified that appellant was not speeding, was driving in accordance with all other rules of traffic, and was not swerving or swaying. As they approached Hewlitt's neighborhood, traveling southbound on Hollister Road, appellant approached the intersection of West Little York and Hollister. McIntyre testified that he recalled appellant [*3] turning on his left turn signal before he entered the intersection. Appellant

attempted to make a left turn from Hollister onto West Little York when he collided with a Honda sedan, driven by the complainant, Jose Sanchez, who was traveling northbound on Hollister.

Melissa Penilla testified that the she was traveling northbound on Hollister directly behind the complainant at the time of the accident. She testified that she witnessed the complainant drive through a red light from the left turn lane at the Hollister and West Little York intersection and collide with appellant's truck.

Captain R. Roberts of the Houston Fire Department arrived at the accident scene, where he and his team had to remove the complainant from his vehicle with the "jaws-of-life." The complainant did not respond to emergency personal and appeared to have severe facial injuries and blood loss as a result of the accident. An ambulance transferred the complainant to Ben Taub Hospital where he was pronounced dead later that evening.

Harris County Sheriff Deputies at the accident scene suspected that appellant might have been drinking. They administered a field sobriety test to appellant and, after determining [*4] that appellant did not have control of his physical and mental faculties at the time of the accident, transported him to Ben Taub Hospital. After the hospital staff treated appellant for injuries he had suffered in the accident, Harris County Sherriff's Deputy A. Marines performed another field sobriety test. After appellant failed the field sobriety test for a second time, Deputy Marines arrested him for intoxication manslaughter.

Deputy Marines then supervised the collection of appellant's blood sample by a nurse at the hospital. Marines delivered the sample to the Harris County Medical Examiner's Office for analysis. Dr. Terry Danielson, the assistant chief toxicologist with the Harris County Medical Examiner's Office, testified that appellant's blood-alcohol content was 0.22 grams of alcohol per 100 milliliters blood, which was over the legal limit of 0.08 grams per 100 milliliters. *See TEX. PEN. CODE ANN. § 49.01(1)(B), (2)(B)* (Vernon 2003) (defining intoxication as having a blood-alcohol content level of 0.08 grams of alcohol per 100 milliliters of blood or more). Dr. Danielson conceded that his laboratory staff performed the actual analysis of appellant's [*5] blood and that he only approved the results.

A jury later convicted appellant of intoxication manslaughter. Appellant appeals from his conviction.

Lesser-Included Offense

In his first point of error, appellant contends that the trial court erred by denying his request for a jury instruction on the lesser-included offense of driving while intoxicated ("DWI"). Prior to the court's reading the charge to the jury, appellant requested that the lesser-included offense of DWI be included in the jury charge. The court denied the request.

The defendant's request for a lesser-included offense instruction to the jury should be granted if a two-pronged test is met. *Ferrel v. State, 55 S.W.3d 586, 589 (Tex. Crim. App. 2001)*. First, "the charged offense [must] include[] the proof required to establish the lesser-included offense." *Id.*; *TEX. CODE CRIM. PROC. ANN. art. 37.09(1)* (Vernon 2006). Second, there must be "some evidence in the record that would permit a jury rationally to find that if the defendant is guilty, he is guilty only of the lesser offense." *Ferrel, 55 S.W.3d at 589.*

Here, the State charged appellant [*6] with intoxication manslaughter. *See TEX. PEN. CODE ANN. § 49.08.* Intoxication manslaughter is committed if a person (1) "operates a motor vehicle in a public place," (2) "is intoxicated," and (3) "by reason of that intoxication, causes the death of another by accident or mistake." *Id. § 49.08(a)*. Appellant requested that DWI be included in the charge as a lesser-included offense of intoxication manslaughter. A person is DWI "if the person is intoxicated while operating a motor vehicle in a public place." *Id. § 49.04(a)* (Vernon 2003). Because intoxication manslaughter includes all of the elements of DWI, intoxication manslaughter includes the proof required to establish the offense of driving while intoxicated. Thus, the misdemeanor offense of driving while intoxicated is a lesser included-offense of intoxication manslaughter. *Ramirez v. State, 01-05-00533-CR, 2006 Tex. App. LEXIS 5643, 2006 WL 2075261, at *2 (Tex. App.--Houston [1st Dist.] June 29, 2006, pet. ref'd)*; *Martin v. State, 84 S.W.3d 267, 269 (Tex. App.--Beaumont 2002, pet. ref'd)*. The first prong of the lesser-included-offense test has been satisfied. n1

n1 The State does not dispute that misdemeanor DWI is a lesser included offense of intoxication manslaughter.

[*7]

We next determine whether some evidence is included in the record that would allow a rational juror to find that, if the appellant is guilty, he is guilty only of the requested lesser offense. *Ferrel, 55 S.W.3d at 589.* We may not consider "whether the evidence is credible, controverted, or in conflict with other evidence." *Moore v. State, 969 S.W.2d 4, 8 (Tex. Crim. App. 1998).* If some evidence "affirmatively rebuts or negates" a required element of the charged offense, the lesser-included charge may be raised. *Schweinle v. State, 915 S.W.2d 17, 19 (Tex. Crim. App. 1996).* Here, a required element in the charged offense of intoxication manslaughter is causing the death of another by reason of the intoxication, which is not required in the requested lesser offense of DWI. *Compare TEX. PEN. CODE ANN. § 49.08(a), with TEX. PEN. CODE ANN. § 49.04(a).* It is not enough that operation of a vehicle, even by an intoxicated person, causes the death; rather, the "death must be the result of the intoxication and proof must be made . . . of that thing which worked a causal connection between [*8] the intoxication and the death." *Daniel v. State, 577 S.W.2d 231, 233 (Tex. Crim. App. 1979); see also Glauser v. State, 66 S.W.3d 307, 313 (Tex. App.--Houston [1st Dist.] 2000, pet. ref'd).*

In *Ramirez v. State*, we considered whether the trial court erred when denying a request for the lesser included charge of DWI when the charged offense was intoxication manslaughter. *Ramirez, 2006 Tex. App. LEXIS 5643, 2006 WL 2075261, at *1.* Ramirez was driving his girlfriend and his two daughters home from the grocery store when his car crossed the median of the road on which they were traveling and struck an oncoming truck. *Id.* Ramirez's daughter died from the injuries sustained in the accident. *Id.* When the police performed a blood-alcohol analysis on him, Ramirez had 0.20 grams of alcohol per 100 milliliters of blood, significantly over the 0.08 limit; he was charged with intoxication manslaughter for the death of his daughter. *Id.*

The testimony at trial showed that prior to the accident, Ramirez was arguing with his girlfriend and that either she took control of the steering wheel, causing the car to loose control, or he lost control of the vehicle [*9] while retrieving a child-support check. *Id.* We concluded that, even though the evidence may be contradictory, at least some evidence showed that the death was not caused by appellant's intoxication; therefore, we held that appellant was harmed because the trial court erred in not instructing the jury on the lesser included-offense of DWI. *2006 Tex. App. LEXIS 5643, [WL] at *2.*

Here, appellant's blood alcohol content was 0.22 grams of alcohol per 100 milliliters of blood, and he failed two field sobriety tests. However, Penilla, an eyewitness to the accident, testified that the complainant's car, a green Honda, was driving in front of her and that the Honda was in the same left hand lane as she was. She stated that "the car in front of me ran the red light and got in an accident with the truck." She said that she saw and heard everything. She also believed that the complainant was in the process of turning left on West Little York.

In addition, Thomas Grubbs testified for appellant as an accident-reconstruction expert and concluded from his investigation that the complainant's Honda was traveling at 51 miles-per-hour at the time of impact. The speed limit on Hollister was 40 miles-per-hour according [*10] to Deputy D. Pearson. Penilla testified that the speed limit on Hollister was 35 miles-per-hour.

McIntyre testified that appellant was obeying all traffic laws and not swerving, swaying, or speeding at the time of the accident. McIntyre also testified that the light only turned yellow as appellant's truck entered the intersection. McIntyre testified that, when they left the bar, appellant did not seem impaired to him. Appellant did not slur his speech and did not walk "funny" or stagger in any way. As they were driving home, appellant was not exceeding the speed limit or swerving along the road. McIntryre testified that it appeared to him that appellant was obeying all the traffic laws. McIntrye stated that, "as far as [he could] recall," appellant used his turn signal. McIntrye further testified that he did not see any headlights coming toward him. As appellant approached the intersection, it was green, but then changed to yellow. McIntryre believed that, as they "hit the intersection," the light turned to yellow.

Like *Ramirez*, appellant has offered at least some evidence that the complainant's death was not caused by appellant's intoxication. *See Ramirez, 2006 Tex. App. LEXIS 5643, 2006 WL 2075261,* [*11] *at *2.* If a jury chose to believe Penilla and Grubbs, appellant's accident reconstruction expert, it could rationally conclude that the complainant's conduct of running a red light and speeding was clearly sufficient to cause the accident and the complainant's subsequent death. Likewise, if a jury chose to believe only the testimony of appellant's passenger, McIntyre, it could rationally conclude that appellant's intoxication--which according to McIntyre did not manifest itself in the violation of traffic laws or any other behavior that would demonstrate the loss of physical and mental capacity--was clearly insufficient to cause the complainant's death. Accordingly, appellant has produced more than a scintilla of evidence to negate the causation element of the charged offense of intoxication manslaughter, and a rational juror could have found appellant guilty only of the lesser-included offense of DWI. Thus, the trial court erred in denying appellant's request for a jury instruction on the lesser-included offense of DWI. n2 *See Ramirez, 2006 Tex. App. LEXIS 5643, 2006 WL 2075261, at *2.*

N2 Moreover, the trial court gave appellant an instruction on concurrent causation. *See TEX. PEN. CODE ANN. § 6.04* (Vernon 2003). The charge stated, "A person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the defendant clearly insufficient." By giving appellant a *section 6.04* instruction, the trial court acknowledged that causation was a fact issue, and therefore, appellant was entitled to an instruction on the lesser included offense of DWI.

[*12]

Has appellant been harmed?

If the trial court errs in regard to the jury charge in a criminal case, and the appellant timely objects to that error at trial, as in the instant case, we determine harm by conducting an *Almanza* harm analysis. *See Saunders v. State, 840 S.W.2d 390, 392 (Tex. Crim. App. 1992)*; *O'Brien v. State, 89 S.W.3d 753, 756 (Tex. App.--Houston [1st Dist.] 2002, pet. ref'd)*; *see also Almanza v. State, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985)* (op. on reh'g). In that analysis, some harm is required for reversible error. *Almanza, 686 S.W.2d at 171*. "Some" harm in an *Almanza* analysis means "any " harm; thus, if the charging error causes any actual harm to the appellant, as opposed to "theoretical harm," then the error requires a reversal of the judgment of the trial court. *Arline v. State, 721 S.W.2d 348, 351 (Tex. Crim. App. 1986)*; *Almanza, 686 S.W.2d at 171*. If the charge error involves the absence of a lesser-included offense that leaves the jury with the sole option to convict the appellant of the charged offense or to acquit him, some harm [*13] exists. *Saunders v. State, 913 S.W.2d 564, 572 (Tex. Crim. App. 1995)*; *Ramirez, 2006 Tex. App. LEXIS 5643, 2006 WL 2075261, at *2.*

Although the evidence showed that appellant may be guilty only of the lesser offense, DWI, the trial court gave the jury the sole option of convicting appellant of the charged offense of intoxication manslaughter or acquitting him. The "available compromise" of the lesser-included offense was absent due to the error of the trial court. *See Saunders, 913 S.W.2d at 572*. Accordingly, because some harm exists, the error is reversible. *See Ramirez, 2006 Tex. App. LEXIS 5643, 2006 WL 2075261, at *2*. We hold that appellant suffered harm because the trial court erred by not giving the jury the option of finding him guilty of a lesser-included offense that was raised by evidence. *Id.*

We sustain appellant's first point of error.

Conclusion

Because we sustain appellant's first point of error, that the trial court committed reversible error by denying appellant's request for a jury instruction on the lesser-included offense of DWI, we reverse the judgment of the trial court and remand for further proceedings.

Evelyn V. Keyes

Justice

Panel [*14] consists of Justices Taft, Keyes, and Hanks.

Publish. *TEX. R. APP. P. 47.2(b).*

ANTHONY SHAWN MEDINA, Appellant v. THE STATE OF TEXAS, Appellee

NO. 72,594

COURT OF CRIMINAL APPEALS OF TEXAS

7 S.W.3d 633; 1999 Tex. Crim. App. LEXIS 108

October 6, 1999, Delivered

SUBSEQUENT HISTORY: Certiorari Denied May 1, 2000, Reported at: *2000 U.S. LEXIS 3084.*

PRIOR HISTORY: ON DIRECT APPEAL FROM HARRIS COUNTY.

This Opinion Substituted by the Court for Withdrawn Opinion of June 2, 1999, Previoulsy Reported at: *1999 Tex. Crim. App. LEXIS 60.*

DISPOSITION: Affirmed.

COUNSEL: For Plaintiff or Petitioner: Stanley G. Schneider, Houston.

For Defendant or Respondent: Keli Pool Roper, Assist. DA, Houston.

JUDGES: KELLER, J. delivered the opinion of the Court in which Mc CORMICK, P.J. and MANSFIELD, PRICE, HOLLAND, JOHNSON, and KEASLER, JJ., joined. MEYERS, J., concurs with note. WOMACK, J., filed an opinion joined by JOHNSON, J., which concurred in point of error ten and otherwise joined the opinion of the Court.

OPINIONBY: KELLER

OPINION:

The Court's prior opinion is withdrawn.

Appellant was convicted in August 1996 of a capital murder committed on January 1, 1996. *TEX. PENAL CODE § 19.03.* The verdicts required the trial court to sentence appellant to death. *TEX. CODE CRIM. PROC. art. 37.071* § 2. Appeal from the sentence of death is direct and automatic to this Court. *Id*; TEX. CONST. Art. I, § 5. Appellant raises twenty-two points of error. We will affirm.

I. SUFFICIENCY OF THE EVIDENCE

A. Legal Sufficiency

In points of error one and two, appellant challenges the legal sufficiency of the evidence to establish an intent to kill. Citing *Morrow v. State, 753 S.W.2d 372 (Tex. Crim. App. 1988),* appellant argues the evidence is insufficient because it fails to establish that he specifically intended that death result from his conduct.

Reviewed in the light most favorable to the verdict, *Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979), Nelson v. State, 848 S.W.2d 126, 131 (Tex. Crim. App. 1992),* the evidence in appellant's case establishes that shortly after midnight on January 1, 1996, appellant drove past the Rodriguez residence and opened fire into a crowd of children and teenagers standing in the well-lit front yard of the home. The young people, mostly family, were attending a New Year's Eve celebration. Appellant sprayed gunfire across the front yard and into the group of people at about five to seven feet from the ground and from only a few feet away from some of the victims. Appellant's gunfire struck several cars, the home, and three people. Rocio Pedrosa was shot in the abdomen. She survived. The capital murder victims -- David Rodriguez, 8, and his sister Diane Rodriguez, 13 -- were nearest to appellant's gunfire. David sus-

tained two fatal wounds; one pierced his head while the other pierced his arm and traveled into his chest. Diane sustained a non-fatal wound which pierced her right breast and a fatal wound which pierced her left shoulder and traveled into her neck. The murder weapon was a Russian SKS assault rifle with eight and one quarter pounds trigger pull. Johnny Valadez, who was in the car with appellant, testified that appellant affirmed that he had shot "her" because "he saw fat meat fly off." n1

n1 There was evidence that these murders were committed in revenge for the murder of Hector Garcia, a fellow gang member of appellant's and his close friend. It was established that the Rodriguez home was targeted by La Raza 13, appellant's gang, because Veronica Rodriguez, the victims' cousin, was the girlfriend of Marco Martinez, of the H-town Crips. Appellant apparently held Martinez responsible for Garcia's murder.

The theory of capital murder under which appellant was indicted and convicted, *TEX. PENAL CODE § 19.03(a)(7)(A)* includes within its ambit both intentional and *knowing* murders. § 19.03(a)(7)(A) provides in relevant part that a person commits an offense if he "murders more than one person...during the same criminal transaction" (ellipsis inserted). Section 19.03(a) defines capital murder with reference to Section 19.02(b) which states, in pertinent part, that a person commits an offense if he:

(1) intentionally or ***knowingly*** causes the death of an individual;

(emphasis added). n2 *Section 6.03(b), TEX. PENAL CODE*, in pertinent part, states, "A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result." Thus, the evidence is sufficient in this case if it supports the rational conclusion that appellant committed the murders intentionally or knowingly. The facts of this case, while supporting both an intentional and knowing theory of murder, more accurately present two murders committed knowingly. We hold that the evidence is sufficient to support a rational conclusion that appellant committed the murders knowingly, that is, that appellant was aware that his conduct was reasonably certain to result in death.

n2 *See and compare* capital murder under *TEX. PENAL CODE § 19.03(a)(2)*(1986). The phrase "intentionally commits the murder" in § 19.03(a)(2) makes "intentional" the culpable mental state necessary for conviction of capital murder under 19.03(a)(2), and excludes the possibility of a "knowing" capital murder under 19.03(a)(2). *Demouchette v. State, 731 S.W.2d 75, 80 (Tex. Crim. App. 1986).*

Nevertheless, the evidence is also sufficient to show that the murders were committed intentionally. In response to the argument that the evidence is insufficient to establish an intent to kill, the State argues that *Vuong v. State, 830 S.W.2d 929, 933 (Tex. Crim. App. 1992),* is directly on point against appellant. We agree with the State; *Vuong* is controlling.

Vuong was convicted of capital murder after he entered a crowded restaurant and opened fire at the patrons. Vuong argued the evidence was insufficient to establish that he acted with the specific intent to kill because the evidence showed that he had acted irrationally and without thinking. As appellant does today, Vuong argued that firing a gun into a crowd of people could not be capital murder because the act lacks a specific intent to kill. We rejected Vuong's arguments, holding that

Appellant's use of a deadly weapon in a tavern filled with patrons supplies ample evidence for a rational jury to conclude beyond a reasonable doubt that Appellant had the requisite intent to kill: "The specific intent to kill may be inferred from the use of a deadly weapon, unless in the manner of its use it is reasonably [**6] apparent that death or serious bodily injury could not result." *Godsey v. State, 719 S.W.2d 578, 580-81 (Tex. Crim. App. 1986). Clearly, the use of an automatic weapon under these circumstances was a "manner of use" in which death or serious bodily harm was a likely result.* In addition, there are a number of other factors that could have led a jury to reasonably believe Appellant's conduct was knowing or intentional, including: (1) the testimony of witnesses concerning appellant's calculated demeanor, (2) evidence showing that seven of the approximately eleven shots fired during the criminal episode struck human targets, and (3) the fact that the victim Tien was shot twice directly in the face and the victim Hien was killed by a bullet that hit him squarely in the chin. Finally, we note that it is not required that the State show a motive in order to sustain a conviction of capital murder. *Garcia v. State, 495 S.W.2d 257, 259 (Tex. Crim. App. 1973).*

Vuong, 830 S.W.2d at 934 (emphasis added).

As in *Vuong*, the circumstances surrounding the present offense support a rational finding that appellant acted with the specific intent to kill. Clearly, the use of an automatic weapon under these circumstances was a "manner of use" in which death or serious bodily harm was a likely result. Opening fire with an automatic rifle, at close range, on a group of people supports the conclusion that appellant acted with the specific intent to kill. Points of error one and two are overruled.

deletions by Prof. Thompson

II. GUILT PHASE

A. Jury instructions

*****deletions by Prof. Thompson*****

3. Knowingly

In point of error ten, appellant contends that the trial court erred in overruling his objection to the trial court's instruction to the jury that he could be found guilty of capital murder if the jury found that he knowingly engaged in the conduct leading to the victims' deaths. The State agrees that the trial court's definition of "knowingly" was incorrect because it defined "knowingly" as to the nature of conduct, but the State argues that, because appellant did not object on the same grounds upon which he now complains, the error must be shown to have been egregious.

At trial appellant objected to the inclusion of a definition of "knowingly" in the jury charge. He argued that capital murder under 19.03(a)(7)(A) could only be committed intentionally and not knowingly. As the State correctly argues, appellant did not object that the particular definition included was incorrect. As appellant's objection at trial does not comport with his objection on appeal, his present objection was not preserved. *TEX. R. APP. PROC. 33.1.* As he alleges this particular jury charge error for the first time on appeal, appellant must establish that egregious harm arose from the alleged error, that is, that he was denied a fair trial. *Alvarado v. State, 912 S.W.2d 199, 216 (Tex. Crim. App. 1995).*

Because it sheds light on our further resolution of this issue, we answer first whether capital murder under Section 19.03(a)(7)(A) might be committed knowingly. For the reasons already given in points one and two, *supra*, capital murder under § 19.03(a)(7)(A) includes "knowing" killings. The trial court correctly determined and instructed the jury that capital murder under Section 19.03(a)(7)(A) can be committed intentionally or knowingly. *Compare TEX. PENAL CODE § 19.03(a)(2).*

Capital murder is a result-of-conduct offense; a jury charge which defines "intentionally" as it relates to the nature of conduct as well as the result of conduct is, therefore, incorrect. *See Cook v. State, 884 S.W.2d 485, 491 (Tex. Crim. App. 1994).* Appellant points out that the trial court defined "knowingly" with reference to nature of conduct and not as to result of conduct. The instructions stated,

A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist.

According to appellant, this error caused egregious harm because it lessened the State's burden of proof, authorizing his conviction if the jury found that he knowingly engaged in the conduct instead of finding that he engaged in conduct which he knew with reasonable certainty would result in death. The State concedes that it was error for the trial court to define knowingly as to the nature of his conduct and not the result of appellant's conduct. We agree that it is error to define a knowing murder as to the nature of conduct alone. The most accurate definition of knowingly would have referred to the result of conduct. *TEX. PENAL CODE § 6.03(b).* But for the following reasons we cannot agree the error was so egregious and created such harm that appellant has not had a fair and impartial trial.

First, the trial court correctly instructed the jury regarding intentional murder, and the evidence was sufficient to support a conviction under that theory of the offense. There was, therefore, at least one theory of the offense upon which appellant's conviction may stand. *See* points of error one and two. *See also Atkinson v. State, 923 S.W.2d 21, 27 (Tex. Crim. App. 1996)* (the harmfulness of error in a jury charge should be measured against the likelihood that the jury's verdict was actually based upon an alternative available theory of culpability not affected by erroneous portions of the

charge). Second, the application paragraph repeatedly and consistently instructed the jury that they must believe beyond a reasonable doubt that appellant "intentionally or knowingly caused the death" before they could find him guilty. Where the application paragraph correctly instructs the jury, an error in the abstract instruction is not egregious. *See Plata v. State, 926 S.W.2d 300, 302-3 (Tex. Crim. App. 1996)*(The inclusion of a merely superfluous abstraction never produces reversible error in the court's charge because it has no effect on the jury's ability fairly and accurately to implement the commands of the application paragraph or paragraphs).

Finally, for knowing murders, the distinction between result of conduct and nature of conduct blurs because awareness of the result of the conduct necessarily entails awareness of the nature of the conduct as well. Murder is committed knowingly when the actor engages in conduct while aware that death is reasonably certain to result from his conduct. *TEX. PENAL CODE § § 6.03(b)* and 19.02(b)(1). To be aware that his conduct is reasonably certain to result in death, the actor must also be aware of the lethal nature of his conduct:

Murder under Section 19.02(a)(1), supra, by knowingly causing death, contemplates both the commission of an act clearly dangerous to human life and an awareness of the nature of that act. Applying the definition of "knowingly," a person knowingly causes death "when he is aware that his conduct is reasonably certain to cause the result." Section 6.03(b), supra. In a prosecution under Section 19.02(a)(1), it surely cannot be inferred that the individual was reasonably certain his conduct would result in death unless his conduct in causing death was clearly dangerous to human life. Thus, with respect to a murder under Section 19.02(a)(1), supra, the act, by necessity, must be objectively clearly dangerous to human life and the individual, by definition, must subjectively be aware that the act resulting in the death was clearly dangerous to human life.

Lugo-Lugo v. State, 650 S.W.2d 72, 81 (Tex. Crim. App. 1983). Appellant's case is illustrative; appellant is guilty of murder because he was aware that firing an automatic weapon into a crowd of people was, by the nature of the conduct, reasonably certain to result in death. n6 In short, a knowing murder under 19.02(b)(1) is a result-of-conduct offense which by definition is also a nature-of-conduct offense. In light of the foregoing discussion, we cannot conclude that appellant suffered egregious harm. Point of error ten is overruled.

n6 This is what is meant when courts hold that intent to kill can be inferred from the manner in which a deadly weapon is employed. *See e.g., Vuong v. State, 830 S.W.2d 929, 933 (Tex. Crim. App. 1992).*

****deletions by Prof. Thompson****

KELLER, J.

DELIVERED: October 6, 1999

CONCURBY: Meyers, Womack

CONCUR: Meyers, J., concurs with note: Under the specific facts of this particular case, I agree that the error presented in point of error ten, in misdefining "knowingly" was not egregious. However, I cannot agree that a "knowing murder" under *Penal Code § 19.02(b)(1)*, which is defined by caselaw as a result of conduct offense, is also always by definition, a nature of conduct offense.

Womack, J., filed a concurring opinion in which Johnson, J., joined. I join the judgment of the Court and, except as to Point of Error Ten, its opinion. I agree that the trial court erred when it defined "knowingly" in terms of the nature of conduct, and that the error was not objected to, and that it does not require reversal. I do not subscribe to the statement that "a knowing murder under 19.02(b)(2) is a result-of-conduct offense which by definition is also a nature-of-conduct offense" (*ante, 7 S.W.3d at 640).* And I think we should decide the question of harm by doing more than looking at the statutes. *See Almanza v. State, 686 S.W.2d 157 (Tex.Cr.App.1984).* *

* As a statement on how to determine the severity of any egregious error in the charge we cannot improve on the following from the court of appeals in 1890:

'But in determining whether the error is material ... we are to look to the whole record bearing upon the subject. What was the nature of the testimony supporting the verdict? Was it cogent and overwhelming? What was the character of the testimony presenting the phase or theory of the case omitted to be noticed in the charge, and upon which omission error is assigned? Was it all reasonable? Did it present a theory which a reasonable mind could entertain, or was it supported by such testimony as was remotely calculated to destroy the State's case when considered in connection with the other testimony in the case, as well as the charge as a whole? Was the phase of the case simply an addition to the case as made by the State and consistent therewith, or was it in direct conflict with the State's theory? These are all important matters to be considered in passing upon the (degree of harm) in the omission or error....' *Davis v. State, 28 Tex. Ct. App. 542, 13 S.W. 994, 995 (1890). writ of error dism'd, 139 U.S. 651, 11 S. Ct. 675, 35 L. Ed. 300 (1891)." Almanza v. State, 686 S.W.2d at 172* (footnote omitted).

COY WAYNE WESBROOK, Appellant v. THE STATE OF TEXAS

NO. 73,205

COURT OF CRIMINAL APPEALS OF TEXAS

29 S.W.3d 103; 2000 Tex. Crim. App. LEXIS 86

September 20, 2000, Delivered

SUBSEQUENT HISTORY: As Corrected September 25, 2000. As Corrected September 21, 2000.

PRIOR HISTORY: ON DIRECT APPEAL FROM THE 184th DISTRICT COURT OF HARRIS COUNTY.

COUNSEL: Wayne T. Hill, Houston.

Keli Pool Roper, Assist. DA, Houston.

JUDGES: Mansfield, J., delivered an opinion announcing the judgment of the Court, in which Keasler, J., joined. Meyers, J., delivered an opinion that concurred as to point of error two and otherwise joined the opinion of Mansfield, J. Keller, J., delivered an opinion that concurred in the result as to point of error six. McCormick, P.J., joined the opinion of Keller, J. Womack, J., dissented with an opinion, in which Price, Holland, & Johnson, JJ., joined.

OPINIONBY: Mansfield

OPINION:

Appellant, Coy Wayne Wesbrook, was charged by indictment for capital murder committed in Harris County on November 13, 1997. See *Tex. Pen. Code § 19.03(a)(7)*. A verdict of guilty was returned by the jury. That same jury answered the special issues in such a manner that the trial court was obligated to impose a sentence of death. See Art. 37.071, § 2(b),(e) & (g). n1 Direct appeal to this Court is automatic pursuant to Article 37.071, § 2(h). Appellant presents thirteen points of error for consideration. With the exception of those points challenging the sufficiency of the evidence, each point of error will be addressed in the order it occurred at trial. We will affirm appellant's conviction and punishment.

n1 All references to Articles are to those in the Texas Code of Criminal Procedure in effect at the time of trial.

Appellant, in points of error two and three, challenges the legal and factual sufficiency of the evidence presented during the guilt/innocence stage of trial. To properly consider these points, it is necessary to review the relevant facts, as illustrated by the State's evidence and by appellant's own testimony.

Around two o'clock in the morning, on November 13, 1997, 9-1-1 operators in Harris County received several calls reporting the sound of gunshots coming from a downstairs apartment in a small complex located in the eastern portion of the county. Five shots were heard within approximately forty seconds. Neighbors, either already awake or awakened by the gunshots, rushed outside to find one man lying on the ground and appellant, armed with a hunting rifle, exiting the apartment. Neighbors described appellant as calm as he walked to his truck, placed the gun inside the cab, and then stood by the tailgate where he waited for the sheriff's deputies to arrive. As appellant waited, he was overheard making comments like, "I did it. I did it. Let's get it over with," or "I did what I had to do." Appellant continued to make similar statements, some of which could be heard on various 9-1-1 calls made from the crime scene that night.

The first deputy on the scene found appellant waiting patiently and also observed a male figure, obviously deceased, lying on the ground nearby. Appellant peacefully complied with law enforcement demands as he was taken into

custody. When law enforcement officers looked inside the apartment, they saw the bodies of a woman lying on a couch and a man in a kneeling position on the floor next to a second couch. A fourth victim, still alive, lay on the floor. When the deputy asked appellant who was inside, he replied, "My ex-wife, that's who I came here to get." n2 Stepping inside, the deputy found appellant's estranged wife, also still alive, in the bedroom. Appellant, who was handcuffed at this point, was questioned about the location of the gun. He indicated with his head and said, "It's in my truck." With appellant's consent, investigators searched the truck and recovered the weapon. A search of the grounds outside the apartment turned up a live round consistent with the bullet used in appellant's rifle. A firearms expert testified that appellant's gun was capable of holding five rounds, four in the magazine and one in the chamber.

n2 There was some conflict over appellant's actual statement at this point. Defense counsel pointed out on cross-examination that during an earlier hearing the sheriff's deputy who testified about this statement indicated that appellant had replied, "My wife, that's who I came here to see."

The female victim on the couch, Ruth Money, was believed by investigators to have been shot first. She sustained a single wound to her chest from a bullet fired in a downward trajectory that exited her lower back. The second person shot was either the victim found outside, Anthony Rogers, or the victim found inside kneeling next to the couch, Antonio Cruz. Rogers was hit with a bullet that passed through his right arm, entered his chest, struck his right lung, and exited the body. Evidence indicated that he was shot either just before he attempted to exit the apartment door or as he was exiting. Cruz was killed by a bullet fired into his ear that severed his spinal cord and exited the back of his neck. The two remaining victims were believed to have been shot in the apartment bedroom from a distance of approximately two to four feet. The last male victim, Kelly Hazlip, was shot in the abdomen from a distance of about two feet. Hazlip survived for five days before dying. Appellant's estranged wife, who died shortly after emergency personnel arrived, appears to have held her hand up in a defensive gesture just before appellant fired. That hand suffered extensive damage as the bullet passed through. Bullet and bone fragments were then blown back into her face, neck and the right half of her chest and shoulder.

Appellant, the only surviving witness to the shooting, testified on his own behalf to explain the sequence of events that night. Appellant told the jury that he and his estranged wife, Gloria Coons, had separated, but he had arrived at her apartment after she had given indications of reconciliation. He had hoped she would be alone but, instead, he found Coons with her roommate, Ruth Money, and two male friends, Kelly Hazlip and Anthony Rogers. It was apparent that all had been drinking extensively. Appellant agreed to sit down and drink with the group even though he claimed he was uncomfortable with the situation. Antonio Cruz arrived a short time later. n3 Eventually, the subject of conversation in the group turned to that of a sexual nature and culminated with appellant's estranged wife walking into her bedroom with Hazlip. After a few moments, Anthony Rogers joined them. A short time later she reappeared with Rogers, whose pants were unzipped, announced that she had just provided him with oral sex, and she was about to have sex with Hazlip who was still in the bedroom.

n3 A neighbor testified that sometime during the evening appellant's truck was heard driving off and then returned about thirty minutes later. Appellant testified that he and Rogers left together to get more beer. Prosecutors presented an alternative argument that appellant actually left alone in his truck to retrieve his rifle from home. Appellant denied this and claimed his rifle always remained in his truck.

At this point, as appellant testified, he was humiliated by this behavior and left the apartment to get in his truck and leave. Antonio Cruz followed, briefly talked with appellant, and eventually grabbed the truck's keys as appellant tried to start the vehicle. Cruz kept the keys and reentered the apartment. n4 Appellant grabbed his hunting rifle and followed to get the keys back. Once inside, appellant claimed he was verbally harassed, threatened, and physically abused by those present. He testified that Ruth Money threw a beer at him, and he fired the gun at her in response. Rogers and Cruz, according to appellant, then rushed toward him, and he shot both men. Finally, appellant entered the bedroom, saw Coons and Hazlip still having sex and shot both. In his defense, appellant told the jury that he "lost it" and had no intention of killing any of the people inside that apartment.

n4 The truck's keys were finally recovered from the sister of Antonio Cruz. After her brother's autopsy, she was allowed to retrieve his belongings and found them in the pocket of his pants.

In his second point of error, appellant argues the evidence used to establish his conviction for capital murder was legally insufficient because alternative evidence established that he was justified in using deadly force against Antonio Cruz. See *Tex. Pen. Code § 9.42.*

deletions

By claiming legal insufficiency in this manner, appellant is arguing that the evidence of justification to kill Antonio Cruz in order to retrieve his personal property was so compelling that the issue of his guilt should have never even been presented to the jury for its consideration. We disagree. Although the trial court decided that enough evidence existed to warrant a jury instruction on justification to protect personal property, we can confidently state that, after thoroughly examining the available record and viewing it in a light favorable to the verdict, this evidence of justification was not so strong that it greatly preponderated against the jury's finding of capital murder to the point of completely overwhelming it and rendering that evidence legally insufficient. Moreover, the jury's implicit rejection of appellant's theory of justification could not be considered irrational given the quantum of incriminating evidence presented by the State. Appellant's second point of error is overruled.

In his third point of error, appellant argues the evidence was factually insufficient to "establish that [he] intentionally and knowingly caused the death of Gloria Coons and Antonio Cruz."

deletions

Whether he killed because of the rage he felt over his estranged wife's flagrant promiscuity or he killed because of the need to retrieve his property, the evidence indicates appellant made sure his weapon was loaded to its maximum capacity, n5 he walked into a small apartment with this high-powered rifle and, from close range, fired a single bullet into vulnerable regions of each of the five individuals who were inside. Afterwards, he stepped outside and proclaimed to the neighbors that he "did it." The only evidence that indicated this was an act of sudden passion was appellant's own testimony in which he stated that while he shot the victims, there was no intent to kill them. The jurors were free to place whatever value they wished upon appellant's testimony. They apparently rejected his proclamation and reasonably concluded that the evidence indicated appellant either acted with intent or acted knowingly. Viewing this evidence in a neutral light, we see no manifest injustice in this result and overrule the third point of error.

n5 Prosecutors argued that, as evidenced by the live round found on the ground outside the apartment, as appellant checked to ensure the rifle was loaded, he ejected a round from the rifle's chamber and then replaced the bullet with one of several he stored in his truck.

Appellant, in his fourth and fifth points of error, argues the trial court "erred in failing to declare the Texas Death Penalty statute unconstitutional" on the grounds it violated the Eighth and Fourteenth Amendments to the United States Constitution. Specifically, appellant argues he was denied due process and equal protection and subjected to cruel and unusual punishment because he was prevented from submitting special instructions to the jury at both guilt/innocence and punishment on the issue of "sudden passion" arising out of "adequate cause." See *Tex. Pen. Code § 19.02(a),*(d).

The Legislature is vested with the lawmaking power of the people in that it alone "may define crimes and prescribe penalties." *Matchett v. State, 941 S.W.2d 922, 932 (Tex.Crim.App. 1996), cert. denied, 521 U.S. 1107, 117 S. Ct. 2487, 138 L. Ed. 2d 994 (1997); State ex rel. Smith v. Blackwell, 500 S.W.2d 97, 104 (Tex.Crim.App. 1973).* It is within the Legislature's exclusive power to define the elements of capital murder and establish guidelines for deciding when the sentence of death is an appropriate penalty. *Matchett v. State, 941 S.W.2d at 932; Ex parte Granviel, 561 S.W.2d 503, 515 (Tex.Crim.App. 1978).* And while all persons or things within a particular class or similar situation must be affected alike, the State possesses broad discretion in classification in the exercise of its power of regulation. *Taylor v. State, 513 S.W.2d 549, 551 (Tex.Crim.App. 1984).* The Legislature set out the guidelines and requirements to be met before an individual could stand trial and be convicted of either murder or capital murder, and appellant, in the instant case, satisfied the criteria for capital murder when he "murdered more than one person during the same criminal transaction." n6 *Tex. Pen. Code § 19.03(a)(7)(A).* At the time of appellant's trial, the issue of sudden passion was solely a punishment issue to be determined only after a conviction of murder. n7 The jury had been provided the option of convicting appellant of the lesser-included offense of murder but convicted him, instead, of the greater offense of capital murder. At this

point, the issue of "sudden passion" could be considered only as a mitigating circumstance for the jury when deciding the second punishment issue. See Art. 37.071, § 2(d)(1). See also *Buhl v. State, 960 S.W.2d 927* (Tex.App. - Waco, pet. ref'd), *cert. denied, 525 U.S. 1057, 119 S. Ct. 623, 142 L. Ed. 2d 561 (1998)*. The Legislature, through its broad power to classify crimes and those who stand accused of crimes, chose not to permit the defense of "sudden passion" in the context of capital murder. No equal protection concerns are present as a result of the Legislature's prerogative to treat capital murder defendants differently from other murder defendants in this manner. Additionally, we are confident appellant experienced nothing that affected the fundamental fairness of his trial in violation of any right to due process. Finally, appellant fails to explain how he was subjected to cruel and unusual punishment, and we can discern no indications ourselves that the refusal to instruct the jury on "sudden passion" constituted cruel and unusual punishment. The trial court properly denied appellant's requests at both guilt/innocence and punishment to instruct the jury on the issue of sudden passion. Points of error four and five are overruled.

n6 Appellant's argument rests on the proposition that the Legislature envisioned the killing of multiple people arising from "sudden passion" because this passion can arise "out of provocation by the individual killed or *another acting with the person killed. . . ." Tex. Pen. Code § 19.02(a)(2)* (emphasis supplied). Appellant places a great deal of faith in this emphasized phrase, faith that we feel is misguided. A commonsense reading of the definition of "sudden passion" describes the killing of only one person; provocation by the *individual* killed or another acting with the *person* killed. The language in this definition is couched in singular terms. Appellant's contention that the Legislature intended that the defense of "sudden passion" include the murder of more than one person has no merit.

n7 For those murders committed after August 31, 1994, a defendant could attempt to prove the issue of sudden passion by a preponderance of the evidence only at the punishment stage of trial. *Tex. Pen. Code § 19.02(d)*. The option of convicting a defendant of voluntary manslaughter was no longer available. See *Moore v. State, 969 S.W.2d 4, 9 (Tex.Crim.App. 1998)*.

deletions by Prof. Thompson

Finding no reversible error, we affirm the judgment of the trial court.

DELIVERED: September 20, 2000

CONCURBY: MEYERS; KELLER

*****concurring opinions deleted by Prof. Thompson*****

David Lee GARRETT, Appellant, v. The STATE of Texas, Appellee.

No. 55305

COURT OF CRIMINAL APPEALS OF TEXAS

573 S.W.2d 543; 1978 Tex. Crim. App. LEXIS 1443

November 22, 1978

COUNSEL: [**1]

Melvyn Carson Bruder and Barry P. Helft, Dallas, for appellant.

Henry M. Wade, Dist. Atty., W. T. Westmoreland, Jr., and James D. Burnham, Asst. Dist. Attys., Dallas, for the State.

JUDGES:

Before ODOM, PHILLIPS and DALLY, JJ.

OPINION BY:

ODOM

OPINION:

This is an appeal from a conviction for murder wherein appellant was convicted under the provisions of V.T.C.A., *Penal Code Sec. 19.02(a)(3)*, the felony murder rule, for causing the death of an individual by committing an act clearly dangerous to human life in the course of committing a felony. n1 The felony was an aggravated assault on the deceased. n2 The punishment was 68 years in prison.

n1 "(a) A person commits an offense if he:

"...

"(3) commits or attempts to commit a felony, other than voluntary or involuntary manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission of attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual."

n2 The indictment, omitting formalities, reads as follows:

"David Lee Garrett . . . did unlawfully commit the felony offense of aggravated assault with a deadly weapon by then and there intentionally and knowingly threatening William V. Ray with imminent bodily injury by use of a deadly weapon, to-wit: a pistol; and while in the course of and in furtherance of the commission of that felony offense he did then and there commit an act clearly dangerous to human life, to-wit: he pulled a loaded pistol out of his pocket to scare the said William V. Ray; thereby causing the death of the said William V. Ray."

Appellant, in a confession, admitted going into the Ben Franklin store where the offense occurred to buy some film. He stated that he became involved in an altercation with the clerk at the cash register and pulled a gun he was carrying to scare the clerk. He asserts the gun went off immediately on being pulled from his pocket and that he had no intention of shooting the clerk. Appellant fled the scene without taking anything but turned himself in shortly thereafter. The

State was unable to bring forth any eyewitness who could testify to exactly what had transpired between appellant and decedent except a five-year old boy whose testimony was inconclusive.

In his first ground of error appellant contends the evidence is insufficient because the aggravated assault cannot support a felony murder conviction. In his argument under this ground of error, however, it is made clear that his real complaint is not addressed to the sufficiency of the evidence to support the allegations in the indictment. It is, instead, a challenge to the scope of the felony murder doctrine under Sec. 19.02(a)(3), supra. As stated in his brief, "The ultimate question presented in this ground of error is whether the felony-murder doctrine, as codified in Sec. 19.02(a)(3), should apply where the precedent felony is an assault and is inherent in the homicide."

The felony murder rule dispenses with any inquiry into the mens rea accompanying the homicide itself. The underlying felony supplies the necessary culpable mental state.

> "Thus, the culpable state of mind for the act of murder is supplied by the mental state accompanying the underlying committed or attempted felony giving rise to the act. The transference of the mental element establishing criminal responsibility for the original act to the resulting act conforms to and preserves the traditional mens rea requirement of the criminal law." *Rodriquez v. State, Tex.Cr.App., 548 S.W.2d 26.*

The instant prosecution must rest on the proposition that the intent with which the act of aggravated assault was committed can be transferred to the act which caused the homicide. The indictment charges that the gravamen of the aggravated assault was threatening decedent with a gun and that the dangerous act resulting in death was pulling a loaded pistol from his pocket to scare the decedent. The State is thus attempting to use the very act which caused the homicide, committing an aggravated assault by use of a deadly weapon, as the felony which boosts the homicide itself into the murder category.

To allow this would make murder out of every aggravated assault that results in a death. It would relieve the State of the burden of proving an intentionally or knowingly caused death in most murder cases because murder is usually the result of some form of assault. Such a result has been rejected in the vast majority of jurisdictions throughout the United States where it is held that a felonious assault resulting in death cannot be used as the felony which permits application of the felony murder rule to the resulting homicide. n3 As then Chief Judge Cardozo stated:

> n3 See, *40 A.L.R.2d 1341 (1971); People v. Ireland, 70 Cal.2d 522, 75 Cal.Rptr. 188, 450 P.2d 580 (Cal.1969); State v. Essman, 98 Ariz. 228, 403 P.2d 540 (1965); Tarter v. State, 359 P.2d 596 (Okl.Ct.Crim.App.1961); People v. Wagner, 245 N.Y. 143, 156 N.E. 644 (1927).*

> "To make the quality of the intent indifferent, it is not enough to show that the homicide was felonious, or that there was a felonious assault which culminated in homicide . . . Such a holding would mean that every homicide, not justifiable or excusable, would occur in the commission of a felony, with the result that intent to kill and deliberation and premeditation would never be essential . . . The felony that eliminates the quality of the intent must be one that is independent of the homicide and of the assault merged therein, as, e. g., robbery or larceny or burglary or rape." *People v. Moran, 246 N.Y. 100, 158 N.E. 35 (1927).* n4

> n4 The elements of the mens rea necessary for murder referred to under New York law are different from those required by V.T.C.A., *Penal Code Sec. 19.03* but the principal is the same. The felony murder rule allows a conviction for murder without proof of the killer's state of mind, whatever that is required by statute to be.

The felony murder rule calls for the transfer of intent from one criminal act to another, from the underlying felony to [*546] the act causing the homicide. *Rodriguez v. State, supra.* In the present case appellant pulled a gun which went off, striking the victim. The aggravated assault and the act resulting in the homicide were one and the same. The application of the felony murder doctrine to situations such as this is an attempt to split into unrelated parts an indivisible transaction. There must be a showing of felonious criminal conduct other than the assault causing the homicide.

Any other result in this case would allow circumvention of the statutory limits of the felony murder statute. Sec. 19.02(a)(3), supra. The legislature has provided that an individual is guilty of murder when death results from an act

dangerous to human life committed in the course of a felony other than voluntary or involuntary manslaughter. Most voluntary manslaughter offenses are initiated as aggravated assaults. n5 If a felony murder may be predicated on the underlying aggravated assault, the statutory restriction on the scope of the doctrine that prohibits basing a felony murder prosecution on voluntary manslaughter could be regularly circumvented. The legislative prohibition against resting a Sec. 19.02(a)(3) prosecution on voluntary manslaughter necessarily includes a prohibition against resting such a prosecution on offenses statutorily includable in voluntary manslaughter. To hold to the contrary would render the statute meaningless and its effect nil. n6

n5 Such was an apparently supportable theory of the offense in this case, in that voluntary manslaughter was submitted to the jury as a lesser included offense of the aggravated assault-felony-murder.

n6 The State's reliance on *Rodriquez v. State, Tex.Cr.App., 548 S.W.2d 26,* is misplaced. The statement there that "the legislature has seen fit to exempt only felonies of voluntary and involuntary manslaughter" merely restates the terms of the statute itself, and must be construed, as the statute itself, in light of common-sense and to promote the code's objectives. Sec. 1.05(a), P.C.

In the instant case, the State improperly prosecuted appellant under the felony murder doctrine.

The judgment is reversed and the indictment ordered dismissed.

RESHAWN LEWAYNE JOHNSON, Appellant v. THE STATE OF TEXAS

NO. 1390-98

COURT OF CRIMINAL APPEALS OF TEXAS

4 S.W.3d 254; 1999 Tex. Crim. App. LEXIS 127

October 27, 1999, Delivered

SUBSEQUENT HISTORY: As Corrected January 7, 2000. Later proceeding at *Johnson v. Stratton, 2001 Tex. App. LEXIS 3155* (Tex. App. Amarillo, May 16, 2001)
Later proceeding at *Johnson v. State, 2002 Tex. App. LEXIS 2026* (Tex. App. Amarillo, Mar. 19, 2002)
Writ of mandamus denied *In re Johnson, 2004 Tex. App. LEXIS 10969* (Tex. App. Amarillo, Dec. 3, 2004)

PRIOR HISTORY: ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE SEVENTH COURT OF APPEALS LUBBOCK COUNTY. *Johnson v. State, 1998 Tex. App. LEXIS 4397* (Tex. App. Amarillo, July 22, 1998)

DISPOSITION: Affirmed.

COUNSEL: For Plaintiff or Petitioner: Marvin Williams, Jr., Lubbock.

For Defendant or Respondent: Laura Bayouth Popps, Pro Tem DA, Austin.

JUDGES: MEYERS, J., delivered the opinion of the Court, joined by Mansfield, Keller, Price, Holland, Womack, Johnson, and Keasler, J.J.. McCormick, P.J., concurred in the result.

OPINION BY: MEYERS

OPINION:

Appellant was convicted of murder and the jury assessed punishment at confinement for life. The Court of Appeals for the Seventh Judicial District affirmed appellant's conviction and sentence. *Johnson v. State, 1998 Tex. App. LEXIS 4397*, No. 07-97-0471-CR (Tex. App.--Amarillo July 22, 1998)(designated do not publish). We granted appellant's petition for discretionary review to decide whether a defendant may be convicted of the offense of felony murder when the underlying felony is injury to a child, and the acts that constitute that offense are the same acts that constitute "an act clearly dangerous to human life." *TEX. PENAL CODE § 19.02(b)(3)*.

Appellant was indicted for felony murder. The indictment alleged appellant committed the felony offense of Injury to a Child "and while in the course of and furtherance of commission of said offense, did then and there commit an act clearly dangerous to human life, to-wit: hitting [the victim] with a deadly weapon, to-wit: a blunt object . . .." n1 On direct appeal, appellant argued that the acts allegedly forming the offense of injury to a child were the same acts relied upon by the State to prove appellant's commission of "an act clearly dangerous to human life," to-wit, hitting the deceased with a blunt object. Appellant contended the act constituting the underlying felony and the act clearly dangerous to human life merged, and thus could not support a conviction for felony murder, relying on *Garrett v. State, 573 S.W.2d 543 (Tex. Crim. App. 1978)*. The Court of Appeals held this argument had been rejected in *Ex parte Easter, 615 S.W.2d 719 (Tex. Crim. App. 1981), cert. denied, 454 U.S. 943, 70 L. Ed. 2d 252, 102 S. Ct. 481 (1981)*, which the Court of Appeals interpreted as holding *Garrett* inapplicable to circumstances like those presented in the instant case.

n1 The indictment alternatively alleged appellant committed the felony offense of Injury to a Child "and while in the course of and furtherance of commission of said offense, did then and there commit an act clearly

dangerous to human life, to-wit: causing [the victim] to come into contact with a deadly weapon, to-wit: a blunt object . . .."

The State also says appellant's argument was rejected in *Easter*. The State further contends that *Garrett* is flawed and should be overruled, but to the extent it retains any precedential authority, it ought to be limited to its facts. Finally, the State reasons that a plain reading of the felony murder statute requires this Court to find no improper merger in this case.

Texas Penal Code section 19.02(b)(3), the felony murder provision, provides:

A person commits an offense if he . . . commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

The felony murder rule dispenses with the necessity of proving mens rea accompanying the homicide itself; the underlying felony supplies the culpable mental state. *Garrett, 573 S.W.2d at 545*. Under the plain language of the provision, it appears that any felony can serve as the underlying felony, with the exception of manslaughter.

Despite the plain language, we have interpreted section 19.02(b)(3) as exempting from the felony murder rule not only manslaughter, but also lesser included offenses of manslaughter. *Garrett, supra*. In *Garrett*, the defendant became involved in an altercation with a store clerk. The defendant claimed he pulled his gun in an attempt to scare the clerk. *Garrett, 573 S.W.2d at 544-45*. The gun went off and killed the clerk, although the defendant maintained he had not intended to fire. The defendant was charged with felony murder, the underlying felony being aggravated assault on the deceased. The question presented was whether the felony murder doctrine as embodied in section 19.02(b)(3), applies where the underlying felony is an assault that is inherent in the felony. We said it does not, emphasizing that to hold otherwise would render every aggravated assault resulting in death a felony murder, thereby relieving the State of the burden of proving mental state in most murder cases since murder usually results from some form of assault. We stated, "There must be a showing of felonious criminal conduct other than the assault causing the homicide." *Garrett, 573 S.W.2d at 546*. We noted this view was consistent with section 19.02(b)(3), reasoning that the provision's exclusion of manslaughter necessarily encompassed lesser offenses that were included in voluntary manslaughter.

The language used in *Garrett*, requiring a "showing of felonious criminal conduct other than the assault causing the homicide[,]" suggested wholesale adoption of what is known as the "merger doctrine." *Id.* As explained by one court of appeals, "where there exists no general mens rea based upon proof of the commission of a separate felony which may be transferred from that crime to an independent homicide committed in the course thereof, the felony murder rule cannot apply because there is a 'merger' of the two offenses." *Richardson v. State, 823 S.W.2d 710, 714* (Tex. App.–San Antonio 1992, pet. ref'd). The underlying felony has to be an act separate and apart from the assault resulting in the death.

But since *Garrett*, there has been little indication that the Court intended to apply such a broadly stated rule. Certainly, we retreated from so broad an application in *Easter*. In *Easter*, like the instant case, the underlying felony was injury to a child. The defendant complained in a post-conviction writ of habeas corpus that his conviction for felony murder could not stand because the acts allegedly constituting the underlying felony of injury to a child were the same acts as those allegedly causing the resulting death. We held *Garrett* inapplicable. While our reasons for so holding were not articulated exceedingly clearly, n2 we did point to one "cogent reason for holding that the rule enunciated in *Garrett v. State, supra*, is inapplicable here[,]" that being the fact that the crime of injury to a child is not a lesser included offense to murder: n3

n2 The Court first observed that the identical claim had been rejected under the 1925 Penal Code in *Hilliard v. State, 513 S.W.2d 28, 31-33 (Tex. Crim. App. 1974)*, and that there had been little change in the felony murder provision in the 1974 Code. But the fact that *Hilliard* addressed the identical claim is not especially persuasive since *Hilliard* was decided before *Garrett*. The Court also noted that the underlying felony of injury to a child supplied the necessary culpable mental state under the felony murder rule, and thus the indictment was not fundamentally defective so as to be susceptible to a challenge for the first time in a post-conviction writ. This is not especially helpful, either, as it not clear from the opinion that the defendant was complaining about the indictment.

n3 It is worth noting that *Garrett* did not speak in terms of the aggravated assault as a lesser included offense of the *homicide*, but rather as a lesser included offense of *manslaughter*. *Garrett* did, of course, recite approval of the merger doctrine which looks to see if the act constituting the underlying felony and the act resulting in the homicide were the same. But this is not a query as to whether the underlying offense is a lesser included of murder. *Garrett* later addressed the distinct notion that the underlying offense was lesser included in the offense of manslaughter, which is exempted from the felony murder provision.

In *Garrett, supra,* the aggravated assault was a lesser included offense in the homicide; and, this court properly held that it could not be used to supply the necessary intent in the murder case.

However, the language carefully chosen in Garrett should not be given an overly broad meaning. Not every "assaultive" offense, if alleged as an underlying felony, will merge with the homicide in a felony murder indictment.

Easter, 615 S.W.2d at 721.

Despite the suggestion in *Easter* that *Garrett* should be limited, the Court subsequently reaffirmed application of the merger rule as set out in *Garrett*, in its opinion on original submission in *Aguirre.v. State, 732 S.W.2d 320 (Tex.. Crim. App. 1982).* There, the indictment alleged the felony offense of criminal mischief and further alleged that in the course of and in furtherance of such felony, the defendant committed an act clearly dangerous to human life, shooting a gun into occupied dwelling, which act caused death. The jury charge authorized conviction by murder or, alternatively, felony murder. We observed that if the jury had convicted on the basis of the felony murder theory, its verdict could not stand for the reasons stated in *Garrett*. We then stated, "nothing held in *Easter* militates against our application of the principles enunciated in *Garrett* to the case at bar." n4 *Id. at 322.* Upon this, we reversed the judgment on the ground that the verdict could have rested on the felony murder theory held untenable in *Garrett*.

n4 The Court's discussion as to why *Easter* did not present a problem to the rule set out in *Garrett*, is less than clear. We first said that *Easter* held the "lesson of Garrett . . . inapplicable to a felony murder *indictment* for causing the death of a child when the underlying felony alleged is injury to a child and concluded the indictment was not fundamentally defective." *Aguirre, 732 S.W.2d at 322* (opinion on original submission) (emphasis in original). But it is not apparent from our opinion in *Easter* that our focus was only on the *indictment*. We also stated that the evidentiary issue argued in *Easter* was rejected because sufficiency of the evidence cannot be raised on collateral attack. But this is not clear from the opinion in *Easter*, either. While the Court did reject appellant's claim of "insufficiency" in *Easter*, the rest of the opinion does not appear to concern itself only with the question of whether the indictment was fundamentally defective.

After our opinion on original submission in *Aguirre*, but before our opinion on rehearing five years later, the Court delivered *Murphy v. State, 665 S.W.2d 116 (Tex. Crim. App. 1983).* In *Murphy*, the indictment alleged the defendant committed the felony offense of arson by starting a fire in a habitation for the purpose of collecting insurance proceeds, and in the course of and furtherance of the commission of that offense, committed an act clearly dangerous to human life, to wit: starting a fire in a habitation, thereby causing the death of an individual. We granted review, in part, to examine the Court of Appeals' holding that the felony murder merger doctrine did not apply. The defendant argued that the conduct alleged constituting the "gist of the underlying felony, namely, 'starting a fire,' was the exact same act alleged to have been clearly dangerous to human life and thus was 'inherent in the homicide.'" *Murphy, 665 S.W.2d at 119.* We cited *Garrett* as standing for the proposition that the felony murder doctrine, embodied in section 19.02(a)(3), does not apply "where the precedent felony is an assault inherent in the homicide." *Id. at 120.* We held *Garrett* inapplicable to the facts presented in *Murphy*:

In the instant cause, the indictment alleges and the proof shows that appellant was engaged in felonious criminal conduct, namely, arson at the time the deceased was killed. Therefore, as required in *Garrett*, there was a showing of felonious criminal conduct other than the assault which caused the homicide. Unlike *Garrett*, appellant's act of arson in setting a habitation on fire and the resulting homicide of the victim were not one in the same. In this case, appellant attempted to set fire to a house in order to destroy it and collect insurance money, a property offense, and in the furtherance of such offense, the deceased was killed.

Id. It is not clear from the Court's opinion what separate felonious *act*, apart from setting the fire, lead to the victim's death. There is some suggestion that the distinction lies, not in the fact that there was a separate *act*, but in the fact that the underlying offense of arson was a p*roperty* offense, as opposed to an offense against a person.

Five years after issuing its opinion on original submission, the Court reversed itself on rehearing in *Aguirre*, holding the opinion on original submission untenable in light of *Murphy*. *Aguirre, 732 S.W.2d at 324* (opinion on rehearing). We concluded *Aguirre* was controlled by the Court's opinion in *Murphy* due to the fact that the underlying felony at issue in *Aguirre* was a property offense. *Aguirre, 732 S.W.2d at 325*. We explained that the criminal conduct engaged in by the defendant was felony criminal mischief by attempting to blow open a door with a shotgun, a property offense. In the course of committing this property offense, the deceased was shot and killed. "Unlike the situation in *Garrett v. State, supra,* the appellant's act of criminal mischief and the deceased's resulting homicide were not one in the same: *Garrett v. State, supra,* does not mandate the reversal of this case." *Id.*

Focusing on the *type* of underlying offense rather than on whether or not the underlying offense is a separate *act*, is a departure from the broad language in *Garrett*, but remains somewhat consistent with *Garrett*'s statement that lesser included manslaughter offenses ought also be exempted from the felony murder rule. Although *Aguirre* (op on rehearing) and *Murphy* are not abundantly clear, one principle can be gleaned without question: the merger rule announced in *Garrett* does not apply as broadly as it was stated. *Aguirre* (on rehearing) and *Murphy* demonstrate this Court's desire to limit *Garrett* to its facts. We now expressly say so and put an end to any confusion on this point. We disavow our overly broad statement in *Garrett* that in order to support a conviction under the felony murder provision, "there must be a showing of felonious criminal conduct other than the assault causing the homicide." *Garrett, 573 S.W.2d at 546.* We hold *Garrett* did not create a general "merger doctrine" in Texas. The doctrine exists only to the extent consistent with section 19.02(b)(3). Thus, *Garrett* hereinafter stands only for the proposition that a conviction for felony murder under section 19.02(b)(3), will not lie when the underlying felony is manslaughter or a lesser included offense of manslaughter. This holding is consistent with the plain meaning of the felony murder provision. As we explained in *Garrett*:

> If a felony murder may be predicated on the underlying aggravated assault, the statutory restriction on the scope of the doctrine that prohibits basing a felony murder prosecution on voluntary manslaughter could be regularly circumvented. The legislative prohibition against resting a Sec. 19.02(a)(3) [now, 19.02(b)(3)] prosecution on voluntary manslaughter necessarily includes a prohibition against resting such a prosecution on offenses statutorily includable in voluntary manslaughter. *Garrett, 573 S.W.2d at 546.*

The offense of injury to a child is not a lesser included offense of manslaughter. The Court of Appeals did not err in holding *Garrett* inapplicable to the facts of this case.

The judgment of the Court of Appeals is affirmed.

MEYERS, J.

Delivered October 27, 1999

SCOTT MATTISON LAWSON, Appellant v. THE STATE OF TEXAS

NO. 1767-00

COURT OF CRIMINAL APPEALS OF TEXAS

64 S.W.3d 396; 2001 Tex. Crim. App. LEXIS 125

December 5, 2001, Delivered

SUBSEQUENT HISTORY: As Amended December 11, 2001. Magistrate's recommendation at, Habeas corpus proceeding at *Lawson v. Dretke, 2006 U.S. Dist. LEXIS 9755* (N.D. Tex., Mar. 10, 2006)

PRIOR HISTORY: ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE SEVENTH COURT OF APPEALS. DEAF SMITH COUNTY.

Lawson v. State, 26 S.W.3d 920, 2000 Tex. App. LEXIS 6166 (Tex. App. Amarillo 2000) Lawson v. State, 26 S.W.3d 920, 2000 Tex. App. LEXIS 6166 (Tex. App. Amarillo, 2000)

COUNSEL: FOR APPELLANT: C. R. Daffern, Amarillo.

FOR STATE: Jim English, Assist. DA, Hereford.

JUDGES: HERVEY, J., delivered the opinion of the Court in which Keller, P.J., Womack, Keasler, Holcomb, and Cochran, J.J., joined. Cochran, J., filed a concurring opinion in which Keller, P.J., Keasler and Holcomb, J.J., joined. Meyers, J., filed a dissenting opinion in which Price and Johnson, J.J., joined. Johnson, J., filed a dissenting opinion in which Meyers, J., joined.

OPINION BY: Hervey

OPINION:

Appellant was convicted of murder pursuant to the felony murder doctrine embodied in *Texas Penal Code, Section 19.02(b)(3)*. That section provides that a person is guilty of murder if he causes the death of another during the commission of a felony, other than manslaughter. The instant indictment alleged that appellant killed the victim while committing an "intentional and knowing" aggravated assault of that individual.

Appellant claimed on direct appeal that he could not be prosecuted for murder under Section 19.02(b)(3) because the aggravated assault was the same act that killed the victim. The Court of Appeals, on direct appeal and again on remand from this Court for reconsideration in light of our decision in *Johnson v. State*, rejected this claim. *Lawson v. State, 26 S.W.3d 920, 921-22* (Tex.App.--Amarillo 2000, pet. granted); *see also Johnson v. State, 4 S.W.3d 254 (Tex.Cr.App. 1999)*. We exercised our discretionary authority to review this decision.

In *Johnson v. State*, we limited this Court's decision in *Garrett v. State*, which held that "there must be a showing of felonious criminal conduct other than the assault causing the homicide" to support a murder conviction under the felony murder rule. *See Johnson, 4 S.W.3d at 258; Garrett v. State, 573 S.W.2d 543, 546* (Tex.Cr.App. [panel op.] 1978). Thus, *Johnson* restricted *Garrett* to "hereinafter [stand] only for the proposition that a conviction for felony murder under section 19.02(b)(3), will not lie when the underlying felony is manslaughter or a lesser included offense of manslaughter." *See Johnson, 4 S.W.3d at 258*. We will follow *Johnson*.

Applying *Johnson*, the issue here is whether an "intentional and knowing" aggravated assault is a lesser included offense of manslaughter. Manslaughter is defined as recklessly causing an individual's death. *See Section 19.04, Texas Penal Code*. The statutory underlying felony with which appellant was charged is an "intentional and knowing" aggravated assault. *See Sections 22.01(a)(1) & 22.02(a)(1), Texas Penal Code*, (defining the offense of aggravated assault).

An "intentional and knowing" aggravated assault is not a lesser included offense of manslaughter, nor is it statutorily includable in manslaughter. *See Johnson, 4 S.W.3d at 258; Garrett, 573 S.W.2d at 546.*

The judgment of the Court of Appeals is, therefore, affirmed.

Hervey, J.

CONCURBY: Cochran

CONCUR:

CONCURRING OPINION

I join the majority opinion. I write separately to provide an additional rationale for our decision and to review the historical purpose of the felony murder rule in hopes of assisting the bench and bar in analyzing the application of this doctrine.

The felony murder rule developed under early common law. It holds that a person whose conduct causes an unintended death during the commission or attempted commission of a felony is guilty of murder. n1 Thus, if a robber points a gun at the bank teller and the gun "accidentally" discharges, killing the bank teller, then the bank robber is guilty of murder. It matters not whether the robber intended to shoot or whether he intended to kill. n2 Train robbers who force a brakeman to serve as their shield and take them to the express car are guilty of murder when a passenger, hoping to foil the robbery, shoots and kills the brakeman. n3 Under common law, one who commits arson may be found guilty of the murder of a person who died inside the house or by fighting the fire even though the arsonist did not intend to cause any personal injury by his act. n4

n1 *See* Hall, General Principles of Criminal Law 129 et seq. (2d ed. 1960); Perkins & Boyce, Criminal Law 61-72 (3d ed. 1982); LaFave & Scott, Criminal Law § 7.5 (2d ed. 1986); Crum, *Causal Relations and the Felony Murder Rule, 1952 Wash. U.L.Q. 191.*

n2 *See, e.g., Davis v. State, 597 S.W.2d 358, 361* (Tex. Crim. App.), *cert. denied, 449 U.S. 976, 66 L. Ed. 2d 238, 101 S. Ct. 388 (1980)* ("Where the defendant intends to commit a robbery and actually does so, the shooting of the victim, even though accidental, it is still an unlawful killing").

n3 *Keaton v. State, 41 Tex. Crim. 621, 633, 57 S.W. 1125, 1129 (1900).*

n4 *See id. (citing Reddick v. Comm., 17 Ky.L.Rep. 1020, 33 S.W. 416 (1895)* (one who commits arson may be found guilty of murder of woman who died in burning building). This court reaffirmed that common law principle in *Murphy v. State, 665 S.W.2d 116, 119 (Tex. Crim. App. 1983)* (defendant who committed arson to collect insurance proceeds could be convicted of murder when person died as a result of setting the fire).

In contrast, the offense of manslaughter is never felony murder, for obvious reasons. n5 Involuntary manslaughter is, by definition, an accidental homicide, committed with recklessness. If involuntary manslaughter could form the basis of a felony murder prosecution, each and every such recklessly caused death would constitute felony murder. The offense of involuntary manslaughter would be swallowed up by the felony murder rule. Voluntary manslaughter is also always exempt from the felony murder doctrine because it is illogical to assign a lesser punishment for an actor who commits a murder in the "heat of passion," but then turn around and bump the crime back up to murder under the felony murder doctrine. n6

n5 *See LaFave & Scott,* § 7.5(g) (if felony murder doctrine applied to reckless homicides, "manslaughter has ceased to exist as a separate crime; all manslaughters ride up an escalator to become felony-murders").

n6 *See* Perkins & Boyce at 69 ("It would be futile to recognize the sudden heat of passion, engendered by great provocation, as sufficiently mitigating to reduce a voluntary homicide to manslaughter, if in the next breath it was added that manslaughter is a dangerous felony and hence homicide resulting from such an attempt must be murder").

The principle behind the common law felony murder rule is this: When you embark upon an inherently dangerous criminal project, you are responsible for the deadly consequences that result from that felonious conduct. n7 The doctrine originally applied to all felonies or those crimes denominated as *malum in se*. n8 Because virtually all crimes in 18th and 19th century England were classified as felonies, the rule became intolerably overbroad and harsh in its consequences. As one English judge put it in 1887: "it was said that if a man shot at a fowl with intent to steal it, and accidentally killed a man, he was to be accounted guilty of murder, because the act was done in the commission of a felony. I very much doubt, however, whether this is really the law . . ." n9

n7 *See* 4 Blackstone, Commentaries *200-201.

n8 *See* Perkins at 62.

n9 *Regina v. Serne*, 16 Cox C.C. 311, 312-13 (1887). The discussion in *Serne* is based upon the henhouse homicide hypothetical posed by Justice Holmes in The Common Law 58 (1881). Justice Holmes stated: "If the object of the [felony murder] rule is to prevent such accidents [as the henhouse homicide], it should make accidental killing with firearms murder, not accidental killing in the effort to steal; while if its object is to prevent stealing, it would do better to hang one thief in every thousand by lot." *Id.*

If it ever had been English law that a chicken thief who accidentally killed a person in the course of stealing the fowl is guilty of murder, that law quickly changed. The common law rule was narrowed to this: a homicide resulting from any felony committed in a dangerous or violent way, is murder. n10

n10 *See Regina v. Whitmarch*, 62 Just.P. 711 (1898) ("If a man by the perpetration of a felonious act brings about the death of a fellow creature he is guilty of murder, unless when he committed the felonious act the chance of death resulting therefrom was so remote that no reasonable man would have taken it into consideration. In that case he is not guilty of murder, but only of manslaughter"); *Rex. v. Jarmain, 2 All E.R. 613, 616 (1945)* (stating felony murder rule as: "he who uses violent measures in the commission of a felony does so at his own risk and is guilty of murder if those violent measures result, even inadvertently, in the death of the victim").

England statutorily abolished the felony murder rule by the Homicide Act of 1957.

In the United States, courts and legislatures have narrowed the original (and overbroad) felony murder doctrine in various ways, including one or more of the following: n11

n11 *See generally* LaFave & Scott § 7.5 at 622.

1) by limiting its application to certain enumerated felonies which are inherently dangerous; n12

n12 *See, e.g.*, Model Penal Code § 210.2(1)(b) (criminal homicide constitutes murder when "it is committed recklessly under circumstances manifesting extreme indifference to the value of human life"; applying a presumption of recklessness and indifference when actor commits robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping, or felonious escape).

2) by imposing stricter criteria for determining whether the fatal act created a foreseeable risk to human life; n13

n13 This proximate cause limitation focuses on whether the conduct and circumstances in the particular case created a foreseeable risk to human life. *See, e.g., Wade v. State, 581 P.2d 914 (Okla. Crim. App. 1978)* (to invoke felony murder doctrine it is sufficient that underlying felony is "potentially dangerous in light of the facts and circumstances surrounding both the felony and the homicide"); *Jenkins v. State, 230 A.2d 262 (Del. 1967)* (when underlying felony was burglary of a building, felony murder rule applies only when actor's conduct was "foreseeably dangerous to human life" and depends "upon whether someone may be reasonably expected to be present in the building, and upon other circumstances of the case");

3) by imposing a stricter standard for the time that may elapse between the felony's commission and the victim's death; n14 or

n14 *See generally*, LaFave & Scott, § 7.5 (discussing required temporal, as well as causal, connection between underlying felony and person's death); *see, e.g., Doane v. Commonwealth, 218 Va. 500, 237 S.E.2d 797 (1977)* (defendant who ran stop sign and killed pedestrian while driving car he had stolen day before could not be convicted of felony murder).

4) by requiring that the underlying felony be independent from the conduct which causes the death. n15

n15 *See People v. Wilson, 1 Cal.3d 431, 82 Cal.Rptr. 494, 462 P.2d 22 (1969)* (stating that under felony murder rule, it is essential that the actor was engaged in some other felony, so distinct "as not to be an ingredient of the homicide" itself).

The Texas Legislature chose to narrow the common law felony murder rule set out in *section 19.02(b)(3) of the Penal Code* in two distinct ways. First, the statute requires that, regardless of the specific underlying felony (always excepting manslaughter, of course), the defendant must commit an act that is "clearly dangerous to human life." Instead of simply enumerating specific felonies which, in the abstract, are usually dangerous, the Legislature required that the state prove that this specific actor, under these specific circumstances, did some act that was clearly dangerous. This limitation preserves the original justification for the felony murder rule-a person is criminally responsible for the consequences of his dangerous and violent criminal conduct-while protecting the defendant against prosecution for murder for an unforeseeable death which occurs during the commission of a felony which is violent in the abstract, but not in the particular case. n16 Second, the Legislature narrowed the proximate cause relationship in the felony murder rule. Not only must the defendant commit an act that is clearly dangerous to human life, it must also be that specific act which causes the victim's death. The State must prove that *but for* the dangerous act, the deceased would not have died. n17 The death must be the natural and probable consequence of the defendant's dangerous conduct. n18

n16 For example, suppose that the actor is committing a bank robbery. He hands the bank teller a note saying, "Your money or your life." He has no gun or other weapon, only the threatening note. The bank teller keels over and dies of a heart attack. Robbery is a violent and dangerous felony in the abstract, but not in this instance. Here, the actor did not commit an act that was "clearly dangerous to human life," yet his act of presenting a threatening note may well have caused the teller's heart attack and death.

n17 That requirement should not be over applied, however. It does not mean that the death must result from any *intentional* dangerous conduct, merely that the act itself was, by any reasonable estimation, clearly dangerous. The culpable *mens rea* is supplied by the commission of the underlying felony with its accompanying mental state of intention, knowledge, or recklessness.

n18 *See generally,* LaFave and Scott § 7.5(b) (discussing proximate or legal cause limitation on felony murder rule).

Despite these two explicit legislative limitations, this Court imposed another, non-statutory, restriction on the felony murder rule. This extra limitation was the "merger" doctrine, announced in *Garrett v. State,* n19 which held that the actor's conduct constituting the underlying felony must be separate and distinct from the "clearly dangerous" act which causes the person's death. In *Garrett*, the defendant initiated a fight with a store clerk, pulled a gun to scare him, and the gun "went off," killing the clerk. Garrett was charged with felony murder, with the underlying felony being aggravated assault. This Court held that "there must be a showing of felonious criminal conduct other than the assault causing the homicide." n20 There is not and never was any such requirement in section 19.02(b)(3), nor was there any such requirement at common law. Under modern common law, "homicide is murder if the death results from the perpetration or attempted perpetration of an inherently dangerous felony." n21 Aggravated assault is surely an inherently dangerous felony. Even if a felony assault were not inherently dangerous in a specific case under specific circumstances, the Texas

Legislature restricted the application of the doctrine to those particular instances in which the actor committed an act clearly dangerous to human life which caused the death of a person."

n19 *573 S.W.2d 543 (Tex. Crim. App. 1978).*

n20 *Garrett, 573 S.W.2d at 546.* This is called the "merger doctrine" and is thoroughly discussed in *Johnson v. State, 4 S.W.3d 254, 255-58 (Tex. Crim. App. 1999).* In *Johnson,* this Court noted that the "merger doctrine" set out in *Garrett* would prohibit conviction for felony murder unless the defendant had committed an underlying felony plus an additional act (other than the conduct covered by the underlying felony) that was clearly dangerous to human life. *Id. at 256.* Eight members of this Court explicitly rejected such a broad rule in *Johnson. Id.* Instead, the Court held that a felony murder conviction could be based upon the underlying felony of injury to a child without proof of any additional dangerous act beyond that covered by the underlying felony. *Id. at 258.*

n21 Perkins & Boyce, at 70.

The concern in *Garrett* was that every aggravated assault that resulted in a death would then be subject to prosecution as a murder. True enough, if the actor commits an act clearly dangerous to human life which causes the person's death. That is precisely the rationale of the felony murder rule. But unlike involuntary manslaughter, not every aggravated assault results in death. If manslaughter could constitute the underlying felony in a felony murder, then every single manslaughter case would be automatically upped to felony murder. The offense of manslaughter itself would be obviated. That is neither logical nor legal. n22 But not every instance of aggravated assault, injury to a child, criminal mischief, etc. ends in death. Not every instance of these offenses is the result of an act that is clearly dangerous to human life. Not every instance of these offenses would automatically be upped to felony murder. Use of these offenses as the basis of a felony murder prosecution do not pose the same logical and legal problem of merger that involuntary manslaughter has always been recognized, both at common law and in felony murder statutes, as posing.

n22 It is precisely for this reason that the Texas Legislature explicitly exempted the felony of manslaughter from the definition of felony murder under section 19.02(b)(3).

Certainly one legitimate way to limit the overbroad old common law felony murder rule is to require the commission of some felony, any felony except manslaughter, *plus* an additional violent or dangerous act which causes the death. n23 However, the Texas Legislature did not choose this method. It chose to limit the felony murder rule by two alternate restrictions. It had both the power and authority to do so. This Court might have the power, but it does not have the authority, to create other, nonstatutory limitations upon the felony murder statute set out in section 19.02(b)(3).

n23 *See* LaFave & Scott, § 7.5(g)(2) (discussing "merger" doctrine in context of aggravated assault and collecting cases).

Is *Garrett* the law in Texas today? Does the judicially created merger doctrine still apply in Texas felony murder cases? The majority declines to say. But if the *Garrett* merger doctrine does still exist, it has been distinguished, limited, disagreed with, and eroded into virtual nonexistence by this Court. n24 The best historical analysis of the felony murder doctrine, critique of *Garrett,* and conclusion that the felony murder merger doctrine is not a part of Texas statutory law is contained in Presiding Judge (retired) Onion's relatively recent opinion in *Rodriguez v. State.* n25 After discussing the historical basis of the common law felony murder rule, its adoption and evolution in Texas, the statutory definition of felony murder in the 1974 Penal Code, the "troublesome" *Garrett* decision in 1978, its subsequent erosion as this Court "recognized its intrusion on legislative turf," Judge Onion concluded that the 1994 Penal Code definition of felony murder under section 19.02(b)(3) statutorily superseded and rejected the merger rule judicially created in *Garrett.* He stated:

n24 *See, e.g., Ex parte Easter, 615 S.W.2d 719* (Tex. Crim. App.) (*Garrett* distinguished; merger rule does not apply to underlying felony of injury to child), *cert. denied, 454 U.S. 943, 70 L. Ed. 2d 252, 102 S. Ct. 481 (1981); Aguirre v. State, 732 S.W.2d 320 (Tex. Crim. App. 1982)* (*Garrett* distinguished; merger rule does not

apply to criminal mischief); *Murphy v. State, 665 S.W.2d 116 (Tex. Crim. App. 1983)* (*Garrett* distinguished; merger rule does not apply to arson); *Homan v. State, 19 S.W.3d 847, 849 n. 4 (Tex. Crim. App. 2000)* (noting that *Garrett* applies only to manslaughter and lesser included offenses of manslaughter).

n25 *953 S.W.2d 342* (Tex. App. - Austin 1997, pet. ref'd) (stating that felony murder merger doctrine does not exist under Texas statute and holding that felony of deadly conduct may provide basis for felony murder conviction).

Our legislature within its constitutional role remains free to abolish felony murder or limit its application or effect to other felonies. It is not the role of courts to abolish or judicially limit or expand a constitutionally valid statutory offense clearly defined by the legislature. n26

n26 *Id. at 354.*

I agree. The offense of felony murder is defined by *section 19.02(b)(3) of the Penal Code.* It should not be defined or limited by *Garrett* or any other judicially created merger rule.

Cochran, J.

DISSENT BY: Johnson

DISSENTING OPINION

I join Judge Meyers's dissent.

The majority argues that because the state alleged that the assault in the instant case was committed "intentionally and knowingly," but not "recklessly," and because manslaughter includes the culpable mental state of "recklessly," the aggravated assault in this case is not a lesser-included offense of manslaughter; thus, it concludes that the merger doctrine is inapplicable here. *Ante,* at (slip op. at 3). This holding ignores both statutes and case law.

While the majority bases its decision on mental state, the ground for review did not specifically raise that issue: "The court of appeals erred in holding that the felony-murder doctrine, as codified in Sec. 19.02(b)(3), applied when the precedent felony was an aggravated assault, on the same person, and the very same act which caused the homicide."

Because the majority focuses on culpable mental states, it fails to recognize that, although an assault may very well be intentional or knowing, the very essence of manslaughter is that the death resulted from recklessness. Proving an intentional mental state as to the assault does not disprove recklessness as to causing the death of the assaulted individual. It is easy to imagine a situation in which the assailant intended to assault an individual, with no desire to cause death, but "consciously disregarded a substantial and unjustifiable risk" of death, *TEX. PEN. CODE § 6.03(c),* and in fact caused the death of the individual recklessly. Determining the mental state for one offense has no bearing on determining the mental state for the other.

More to the point, *art. 37.09(2) of the Texas Code of Criminal Procedure* provides that "an offense is a lesser included offense if . . . it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person . . . suffices to establish its commission." Under art. 37.09(2), aggravated assault is a lesser-included offense of manslaughter because the only difference is a less serious injury or risk of injury to the same person; when the state proves manslaughter, it will also necessarily prove aggravated assault, physical injury being a less serious injury than death. Therefore, the assault in the instant case is a lesser-included offense of manslaughter, and pursuant to the so-called "merger doctrine," a conviction for felony murder is prohibited. *Johnson v. State, 4 S.W.3d 254, 258 (Tex. Crim. App. 2000)* (eight judges joining majority opinion, one concurring in the judgment); *TEX. PEN. CODE § 19.02(b)(3).*

Today's decision effectively abolishes the merger doctrine that is mandated by statute, *see* § 19.02(b)(3), and that we delineated and clarified only two years ago in *Johnson, supra.* n1 Under the majority opinion, the merger doctrine can always be avoided simply by doing as the state did in this case: charge felony murder by charging manslaughter and aggravated assault, but omit the term "recklessly" from the aggravated assault charge. In this way, the state will always be able to charge felony murder, even when the evidence shows only manslaughter or a lesser-included offense of man-

slaughter. As noted above, this effectively overrules *Johnson, supra*, and judicially nullifies the legislative mandate of § 19.02(b)(3).

n1 The concurring opinion asks, "Is *Garrett* the law in Texas today? Does the judicially created merger doctrine still apply in Texas felony murder cases?" *Ante*, at (slip op. at 8) (Cochran, J., concurring). However, we specifically answered these questions in *Johnson, 4 S.W.3d at 258:* "We hold *Garrett* did not create a general 'merger doctrine' in Texas. The doctrine exists only to the extent consistent with section 19.02(b)(3). Thus, *Garrett* hereinafter stands only for the proposition that a conviction for felony murder under section 19.02(b)(3), will not lie when the underlying felony is manslaughter or a lesser included offense of manslaughter. This holding is consistent with the plain meaning of the felony murder provision."

Because today's opinion overrules, *sub silentio*, a decision only two years old, while purporting to follow it, and because it ignores legislative mandates concerning both the merger doctrine and the statutory definition of lesser-included offense, I dissent.

Johnson, J.

Meyers, J., filed a dissenting opinion, in which Price and Johnson, J.J., joined.

The majority holds that because appellant was indicted with "intentionally and knowingly" committing aggravated assault, and the culpable mental state for committing manslaughter is "recklessly," appellant was not indicted for an offense that is a lesser included offense of manslaughter. *Lawson v. State, 64 S.W.3d 396, 397 (Tex. Crim. App. 2001)* (hereinafter cited as Majority Op.). Only two years ago, eight members of this Court joined an opinion in which we held that while Texas does not have a general merger doctrine, a felony murder conviction cannot be predicated on a conviction for manslaughter or an offense that is statutorily includable in manslaughter. *Johnson v. State, 4 S.W.3d 254, 258 (Tex. Crim. App. 1999). Johnson* thereby affirmed the underlying holding of *Garrett v. State, 573 S.W.2d 543 (Tex. Crim. App.1978)* but explicitly limited *Garrett* to its facts. *Johnson, 4 S.W.3d at 258.*

Garrett is factually identical to the case before us. The appellant in *Garrett* was indicted for "intentionally and knowingly" committing aggravated assault and we held that the assault could not form the basis of his felony murder conviction. *Garrett, 573 S.W.2d at 545 n.2, 546.* We stated in relevant part:

any other result in this case would allow circumvention of the statutory limits of the felony murder statute... Most voluntary manslaughter offenses are initiated as aggravated assaults. If a felony murder may be predicated on the underlying aggravated assault, the statutory restriction on the scope of the doctrine that prohibits basing a felony murder prosecution on voluntary manslaughter could be regularly circumvented. The legislative prohibition against resting a Sec. 19.02(a)(3) [now 19.02(b)(3)] prosecution on voluntary manslaughter necessarily includes a prohibition against resting such a prosecution on offenses statutorily includable in voluntary manslaughter. To hold to the contrary would render the statute meaningless and its effect nil.

Garrett, 573 S.W.2d at 546. By permitting a felony murder conviction to be predicated on an offense that is statutorily includable in manslaughter, the majority contradicts itself. On the one hand, the majority effectively overrules *Garrett* and eviscerates our recent opinion in *Johnson*; on the other hand, it cites no authority *other than Garrett* and *Johnson*. n2 *See* Majority Op. at 3.

n2 When it affirmed appellant's conviction on remand from this Court, the Amarillo Court of Appeals acknowledged that aggravated assault may be statutorily includable in the offense of manslaughter. *Lawson v. State, 26 S.W.3d 920, 922.* However, it relied on the fact that appellant had been indicted for an intentional aggravated assault and on a decision in *Neff v. State, 629 S.W.2d 759, 760 (Tex. Crim. App. 1982)* to hold that the assault in this instance was not a lesser included offense of manslaughter. *Lawson, 26 S.W.3d at 922.* The court's reliance on *Neff* was not only novel-the first instance in *Neff*'s nearly twenty years of existence-it was also misplaced. *Neff* addressed the question of whether the constitutional prohibition against double jeopardy would prevent the retrial of an appellant for involuntary manslaughter where the *appellant* had succeeded in gaining a new trial after arguing that the trial court erred in charging the jury on murder and aggravated assault. *Neff, 629 S.W.2d at 760.* If *Neff* is instructive despite its factual dissimilarities, it is not controlling. *Neff* addressed only whether appellant's trial for aggravated assault barred retrial for *involuntary* manslaughter; the court did not ad-

dress voluntary manslaughter. In addition, proof that an aggravated assault was committed intentionally and knowingly encompasses proof that the offense was committed recklessly. *See Little v. State, 659 S.W.2d 425, 426 (Tex. Crim. App. 1983).*

In addition, the majority's opinion permits precisely the type of circumvention we cautioned against in *Garrett* and "makes murder out of every aggravated assault that results in death." *See Garrett, 573 S.W.2d at 545. Penal Code § 19.02(b)(3)* provides that an offense is murder if the actor causes the death of another by committing an act clearly dangerous to human life in the course of committing a felony *other than manslaughter*. According to the majority, the State may now circumvent this legislative prohibition by simply alleging that the defendant committed an intentional and knowing aggravated assault rather than manslaughter. While I respectfully acknowledge the merger doctrine's judicial pedigree, n3 I am unwilling to jettison the legislature's explicit directive against relying on manslaughter to convict a defendant of felony murder. I am additionally unwilling to uproot this Court's precedent in *Johnson* and *Garrett*. I dissent.

n3 *See Lawson v. State*, no. 1767-00 slip op. at 8 (Tex. Crim. App. Dec. 5, 2001) (Cochran, J. concurring); *Lawson, 26 S.W.3d at 922.*

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NEWS

[Friday, June 10, 1994]

Students protest rape case verdict

By JOAN CONFER
and ERIN STROUT
Collegian Staff Writers

It all started in 1988 on the campus of East Stroudsburg University when a young woman discovered saying "no" is not always enough.

She found herself alone in a room with a young man -- not unusual for a college student. When she said he pushed her onto his bed and had sexual intercourse without her consent, it became unusual. She said "no" repeatedly, but did not fight back.

The Pennsylvania Supreme Court ruled on June 1 that the case of Commonwealth vs. Berkowitz, in which Robert A. Berkowitz's rape conviction was overturned because there was no evidence of "forcible compulsion."

Berkowitz faces six to 12 months in prison for a misdemeanor indecent-assault conviction, which was upheld.

Since then, opposition has been sparked University and statewide.

Jennifer Weissenberger, co-director of Womyn's Concerns, received support for protest from some members of the Center for Women Students, the women's studies program and other women's studies students while discussing the decision.

Some group members want to send petitions signed by students to local legislators, such as state Rep. Lynn Herman, R-Centre, she said. Although she has not contacted any legislators yet, she plans to send letters.

Members would also like to rally in Harrisburg, but a rally on campus would educate students more, Weissenberger said. She did not speculate when a rally may take place.

The case mimics what happens often on college campuses, said Kathryn Geller Myers, spokeswoman for the Pennsylvania Coalition Against Rape. The coalition is sponsoring a rally today at the Monroe County Courthouse and is asking all state rape crisis centers to support House Bill 160, which would modify the law.

"We are displeased at the court's narrow interpretation of the law," she said.

Date rape on college campuses is widespread due to increased alcohol use and the closeness in students' ages, Myers said.

And there is a higher incidence of date rape in State College because of the University, said Jean Riddle Collins, sexual assault coordinator at the Women's Resource Center, 140 W. Nittany Ave. The center did not have any specific statistics.

Collins said in a lot of date rape cases, the "force" the court interpreted from the law is not present.

Women being raped often experience a paralyzing terror which prevents them from fighting back, she said. Many victims think they are going to be badly hurt or die whether or not physical force is involved.

Some women also distance themselves emotionally in a rape situation "to the point where they are not really there anymore," Collins said.

Some legislators are joining opposition in the state House of Representatives, through measures such as House Bill 160. State Rep. Karen Ritter, D-Lehigh, is sponsoring the bill.

Herman called the decision "appalling," adding that he

fears it opens the doors for more people to be victimized.

Although no groups have formally contacted Herman he said he is sure the district wants him to support legislation changing the law.

"In a college community, with many young adults present, the decision has a more adverse effect on the social climate," Herman said.

Ritter's legislation would clarify that an alleged victim would not have to prove they experienced force or threat of force if there was no consent.

The coalition and the center both support Ritter's legislation and will continue to support legislation until the law is changed.

"Most of the centers in the state are rallying behind it," Collins said.

Regardless of the court's decision or the current law, she said the center is not changing how they educate people about rape.

"Telling people they need to fight back is sometimes more dangerous," Collins said. "The reality is that men are the people who can prevent rape."

The coalition will also continue to educate women in the same way, Myers said. It does not encourage women to fight back if it means hurting themselves further.

"It is not wise to escalate the violence in an already violent situation," Myers said. " 'No' should be respected whether it's a man or a woman saying it."

Send an Opinion Letter to the Editor about this article.

1 of 1 DOCUMENT

HAMPTON MULL, Appellant v. THE STATE OF TEXAS, Appellee

NO. 14-01-01175-CR

COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT, HOUSTON

2003 Tex. App. LEXIS 1524

February 20, 2003, Filed

NOTICE: [*1] PURSUANT TO THE TEXAS RULES OF APPELLATE PROCEDURE, UNPUBLISHED OPINIONS SHALL NOT BE CITED AS AUTHORITY BY COUNSEL OR BY A COURT.

SUBSEQUENT HISTORY: Petition for discretionary review refused by *Mull, 2003 Tex. Crim. App. LEXIS 447* (Tex. Crim. App., Sept. 24, 2003)

PRIOR HISTORY: On Appeal from the 183rd District Court. Harris County, Texas. Trial Court Cause No. 870,807.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant sought review of the order of the 183rd District Court, Harris County, Texas, ordering his criminal conviction of sexual assault.

OVERVIEW: Three male co-defendants each had intercourse with complainant in succession. The complainant was a 20-year-old college student. Complainant said that she told appellant to stop "numerous times," finally saying it loudly, to which he responded, "Oh, so you want me to stop." Appellant was convicted of sexual assault; the 2 co-defendants were acquitted. The trial court imposed 600 hours of community service, boot camp, $ 5,000 in restitution, and 7 years probation. On review, appellant contended the evidence was factually insufficient to sustain his conviction and that the trial court erred in denying his motion to sever his case from that of the 2 co-defendants. The appellate court rejected his contentions. The evidence was factually sufficient to sustain the conviction. The jury was authorized to believe or disbelieve any part of the testimony of any witness. Appellant failed to meet his burden of showing that clear prejudice resulted from the trial court's denial of the motion to sever.

OUTCOME: The judgment was affirmed.

LexisNexis (TM) HEADNOTES - Core Concepts:

Criminal Law & Procedure > Evidence > Weight & SufficiencyCriminal Law & Procedure > Juries & Jurors > Province of Court & Jury

[HN1] In reviewing the factual sufficiency of the evidence, the court sets aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. The court considers all of the evidence in the record and not just the evidence which supports the verdict. The court is authorized to disagree with the jury's determination, even if probative evidence exists which supports the verdict. However, a factual sufficiency review must be appropriately deferential to avoid substituting the appellate court's judgment for that of the fact finder or substantially intruding upon the jury's role as the judge of the weight and credibility of testimony. Unless the record clearly reveals that a different result is appropriate, the court must defer to the jury's determination concerning the weight given to contradictory testimony.

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault

[HN2] A person commits a sexual assault if he penetrates a female's sexual organ by any means without consent. *Tex. Pen. Code Ann. § 22.011(a)(1)(A)* (Vernon Supp. 2002).

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault
[HN3] In a sexual assault case, there is no requirement that a certain amount of force be used, only that it is used.

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury
[HN4] The jury, as judge of the credibility of witnesses, is authorized to believe or disbelieve all, none, or any part of the testimony of any witness.

Criminal Law & Procedure > Pretrial Motions > Joinder & Severance > Severance of DefendantsCriminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion
[HN5] A trial court must grant a severance if a joint trial would be prejudicial to any defendant. *Tex. Code Crim. Proc. Ann. art. 36.09* (Vernon 1981). The determination of whether a joint trial would be prejudicial is within the sound discretion of the trial court. The denial of a motion to sever will constitute an abuse of discretion only when the movant satisfies the heavy burden of showing clear prejudice.

Criminal Law & Procedure > Pretrial Motions > Joinder & Severance > Severance of Defendants
[HN6] The use of conflicting or inconsistent defenses among co-defendants may warrant severance if harmful to one of the defendants.

Criminal Law & Procedure > Pretrial Motions > Joinder & Severance > Severance of Defendants
[HN7] In order to be entitled to a severance based on inconsistent defenses, the co-defendants' respective positions must be mutually exclusive in the sense that to believe the core of one defense, the jury would have to disbelieve the core of the other.

Criminal Law & Procedure > Appeals > Reviewability > Preservation for ReviewCriminal Law & Procedure > Appeals > Reviewability > Time Limitations
[HN8] Tex. R. App. P. 33.1 states that in order to preserve a complaint for appellate review, a party must have made a timely and sufficiently specific objection, request, or motion in the trial court.

Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors
[HN9] Tex. R. App. P. 44.2(a) states that in reviewing constitutional error for harm, the court must reverse unless it determines beyond a reasonable doubt that the error did not contribute to the conviction or the punishment. The question is not whether the outcome was proper or whether there was overwhelming evidence of guilt, but whether the evidence dissipates the error's effect upon the jury's function in determining the facts so that it did not contribute to the verdict. The court must isolate the error and all its effects, then ask whether a rational trier of fact might have reached a different result if the error and its effects had not occurred. When making this determination, the court is to consider: (1) the source of the error; (2) the nature of the error; (3) whether, or to what extent, it was emphasized by the State; (4) the probable collateral implications of the error; and (5) whether declaring the error harmless would encourage the State to repeat it with impunity. The focus must remain, not on the propriety of the outcome of the trial, but on the integrity of the process that led to the conviction.

JUDGES: Panel consists of Justices Edelman, Seymore, and Guzman.

OPINIONBY: Eva M. Guzman

OPINION: MEMORANDUM OPINION

Appellant, Hampton Mull was convicted of sexual assault. After finding him guilty, a jury assessed punishment at seven years probation. The trial court imposed 600 hours of community service, boot camp, and $ 5,000 in restitution, as special conditions of the probation. In two issues, appellant contends the evidence was factually insufficient to sustain his conviction and that the trial court erred in denying his motion to sever his case from that of two co-defendants. We affirm.

I. Sufficiency of the Evidence

A. The Evidence

In his first issue, appellant contends the evidence is factually insufficient to sustain the verdict. We begin our discussion with a summary of the events of the night in question.

The complainant was a twenty-year-old student at Texas Southern University. On the night of February 27, 2001, she [*2] consumed some alcoholic beverages while at a party with friends. Later that night, she was talking with a group of people in a common area at TSU between the men's and the women's dormitories. According to several witnesses, she acted and spoke in a sexually provocative manner toward two men at that time, Donte Duplechain and Michael Thomas. The complainant, however, denied such conduct. Subsequently, she said that she wanted to go to her dorm room, Donte agreed to escort her there. However, he and Michael Thomas instead took her to the men's dorm. She

was led to a bedroom, and she sat down on a bed before she realized she was not in her own room.

Three males, all co-defendants in the trial court, each had intercourse with complainant in succession. Michael Thomas was the first to have intercourse with complainant that night. Complainant testified that during intercourse, she told him that she "didn't know him like this" and told him to "stop." Michael Thomas also testified, giving the impression that the sex was consensual. The jury acquitted Michael Thomas. The second male was Vashawn Thomas. The complainant testified that she did not know Vashawn and that he did not say anything [*3] to her before getting on top of her. She said that when she said "no" and "stop," someone in the room said, "shut her up," and Vashawn put his hand over her mouth. She said at this point her body froze and she knew that regardless of what she said or did they were "going to do whatever." The third male was appellant, Hampton Mull. Complainant testified that as soon as Vashawn got up, appellant got on top of her. There was no conversation between appellant and complainant before he penetrated her. She began to cry and told him to "stop" a few times. A couple of witnesses testified that after each time she said "stop," she followed it by saying, "I'm alright." At least one witness heard someone in the room tell the appellant, "that's not cool." Finally, complainant said, "stop" real loud and appellant stopped. Complainant then got off the bed, gathered her clothes, and was escorted out of the room by a male friend who had come to look for her. The friend testified that the complainant said to him, "I'm sorry" and that she did not know what had happened.

Complainant went to her dorm room, called a different friend, and told him she had been raped. Later, when she went outside to meet [*4] with the friend who had escorted her from the men's dorm, appellant confronted her and said, "Who am I? Did I do anything to you?" and asked her if she wanted him to call the police.

B. Standard of Review

[HN1] In reviewing the factual sufficiency of the evidence, we set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Johnson v. State, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000).* We consider all of the evidence in the record and not just the evidence which supports the verdict. *Santellan v. State, 939 S.W.2d 155, 164 (Tex. Crim. App. 1997).* The court is authorized to disagree with the jury's determination, even if probative evidence exists which supports the verdict. *Clewis v. State, 922 S.W.2d 126* . However, a factual sufficiency review must be appropriately deferential to avoid substituting the appellate court's judgment for that of the fact finder or substantially intruding upon the jury's role as the judge of the weight and credibility of testimony. *Johnson, 23 S.W.3d at 7.* Unless the record clearly reveals that a different result is appropriate, [*5] we must defer to the jury's determination concerning the weight given to contradictory testimony. *Id. at 8.*

C. Analysis

[HN2] A person commits a sexual assault if he penetrates a female's sexual organ by any means without consent. *TEX. PEN. CODE ANN. § 22.011(a)(1)(A)* (Vernon Supp. 2002). The indictment charged that consent was lacking because appellant forced complainant to submit by the use of physical force or violence. Appellant's position is that the evidence is factually insufficient both because the evidence of the use of physical force was so weak as to undermine confidence in the verdict and because the evidence of physical force was greatly outweighed by contrary evidence. *See Johnson, 23 S.W.3d at 11* (explaining requirements of showing factual insufficiency). The key evidentiary points cited by appellant in support of his position are: (1) there was no evidence he applied physical force to complainant; (2) there was no evidence complainant physically resisted appellant; (3) complainant said, "I'm alright" after saying "stop"; (4) complainant was moaning during the encounter; (5) several witnesses who observed [*6] the events testified that they did not believe an assault was taking place; and (6) complainant said, "I'm sorry, I'm sorry" to her friend who came to look for her.

We find appellant's first argument, that there was no evidence of physical force, to be unsupported by the record. Complainant testified that appellant got on top of her without her permission and continued to lay on her and penetrate her after she told him to stop. This is sufficient evidence that he applied physical force to sexually assault complainant. *See Gonzales v. State, 2 S.W.3d 411, 415* (Tex. App.--San Antonio 1999, no pet.) (stating that [HN3] "there is no requirement that a certain amount of force be used, only that it is used."). n1 Regarding complainant's alleged failure to physically resist appellant, there is no requirement that a rape victim physically resist her attacker in order to establish that a rape occurred. *See, e.g., id.* Regardless, having already been subjected to a sexual assault by at least one man, and with a crowd of men around her, complainant may have been unable to physically resist or she could reasonably have felt that such resistance would have been futile.

n1 In *Gonzales*, the court considered evidence that the defendant lay on top of the

> victim as evidence of the use of physical force. 2 *S.W.3d at 415.* Appellant emphasizes the fact that when asked directly whether appellant used physical force, complainant stated only that, "He just stuck his penis in me. It wasn't a polite way to do it . . . It hurted . . . if that's considered." Complainant's statement should be analyzed in the proper context. Reviewing the entirety of complainant's testimony and the evidence in general, there was sufficient evidence of the use of physical force.

[*7]

Although there is testimony in the record supporting appellant's third argument, that complainant said, "I'm alright" after she told appellant to "stop," there was no evidence that she said she was alright after each time that she said "stop." Complainant herself said that she told appellant to stop "numerous times," finally saying it loudly, to which he responded, "Oh, so you want me to stop." Based on this evidence, the jury could have reasonably believed that complainant told appellant to stop several times before he did finally stop. The jury could also have interpreted the "I'm alright" comment as something other than permission to continue. Indeed, the fact that she was crying during the encounter suggests that the statement, if made, was not tantamount to permission to continue.

Fourth, the testimony that complainant was moaning could have been interpreted by the jury, in light of the circumstances, as produced by pain or by horror at what was happening to her. Although two witnesses described the moans as the "normal" or "regular" sounds of a woman having sex, the jury could well have discounted their testimony because they were present at the scene of the crime and failed [*8] to intervene and they were friends, or at least acquaintances, of the defendants. These factors suggest they may have had a bias favoring the defendants. *See Sharp v. State, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986)* (stating that [HN4] the jury, as judge of the credibility of witnesses, was authorized to believe or disbelieve all, none, or any part of the testimony of any witness). For the same reasons, the jury could have discounted the testimony raised in appellant's fifth contention, suggesting that observers thought nothing illegal was occurring. This testimony is further called into question by the testimony that someone said, "that's not cool," while appellant was having intercourse with complainant.

Lastly, the evidence that appellant allegedly said, "I'm sorry" to her friend who came to look for her does not change our analysis. If she said this, she may have meant that she was sorry that the incident had occurred, or given the events of the night, she may have been incoherent by that point.

In sum, we find appellant's evidentiary arguments without merit and further find the evidence factually sufficient to sustain the conviction. Appellant's first issue is overruled. [*9]

Michael Highfill, Appellant v. The State of Texas, Appellee

NO. 03-00-00126-CR

COURT OF APPEALS OF TEXAS, THIRD DISTRICT, AUSTIN

2001 Tex. App. LEXIS 3167

May 17, 2001, Filed

NOTICE: PURSUANT TO THE TEXAS RULES OF APPELLATE PROCEDURE, UNPUBLISHED OPINIONS SHALL NOT BE CITED AS AUTHORITY BY COUNSEL OR BY A COURT.

SUBSEQUENT HISTORY: Supplemental Opinion on Motion for Rehearing July 26, 2001, Reported at: *2001 Tex. App. LEXIS 5058.*

Petition for discretionary review granted: *Highfill, 2002 Tex. Crim. App. LEXIS 11* (Tex. Crim. App. Jan. 30, 2002).

PRIOR HISTORY: FROM THE DISTRICT COURT OF TRAVIS COUNTY, 390TH JUDICIAL DISTRICT. NO. 0983143, HONORABLE JULIE H. KOCUREK, JUDGE PRESIDING.

DISPOSITION: Affirmed.

JUDGES: Before Chief Justice Aboussie, Justices Yeakel and Patterson.

OPINION BY: Jan P. Patterson

OPINION: A jury found appellant Michael Highfill guilty of capital murder. *See Tex. Penal Code Ann. § 19.03(a)(2)* (West 1994). The State did not seek the death penalty and the district court assessed punishment at imprisonment for life. *See id.* § 12.31(a) (West 1994); *Tex. Code Crim. Proc. Ann. art. 37.071*, § 1 (West Supp. 2001).

Appellant contends the evidence is legally and factually insufficient to sustain the conviction. He also contends the jury charge was defective in numerous respects, his trial counsel was ineffective, the jury received other evidence during deliberations, and he was denied a hearing on his motion for new trial. We overrule these contentions and affirm.

The body of Luis Flores was found in a field in northeastern Travis County on the morning of June 5, 1998. Flores had been shot twice at close range, in the back of the head and the back of the neck. The fatal bullets were .25 caliber, and shell casings of that size were found near the body. Blood-soaked sections from that morning's newspaper were also found at the scene. Flores's car was later found abandoned in southern Williamson County. More .25 caliber shell casings and bloodstained newspaper were in the car.

It is undisputed that Flores was shot by Rebecca Walton. Walton was a drug abuser and petty criminal who often bought crack cocaine and other drugs from Flores. Flores sometimes arranged for Walton to work as a prostitute to raise money. Appellant had been Walton's constant companion for a month or so prior to the shooting. Appellant was also a drug abuser who supported himself by shoplifting and forging checks, often with the help of Walton and Flores.

Walton was tried for capital murder, convicted of the lesser included offense of murder, and sentenced to imprisonment for sixty years. She later testified as a defense witness at appellant's trial. Walton testified that Flores beat her severely about one week before the shooting and stole money and drugs from her. Immediately thereafter, Walton purchased a .25 caliber pistol through a newspaper classified ad and told a friend, Catherine Goodwin, she was going to kill Flores. Walton pawned the pistol to a person known as "Wild Man" for $ 20 shortly after purchasing it.

Appellant and Walton spent the evening of June 4 driving around Austin with Flores, shoplifting and taking drugs. Walton asked Flores if he would like to purchase a gun. Flores expressed an interest. Walton had Flores drive to an encampment of homeless persons in northeastern Austin where "Wild Man" could usually be found. Walton redeemed the pistol from "Wild Man," apparently with money supplied by Flores, and showed it to Flores. Walton suggested that she, appellant, and Flores drive to a rural location where Flores could fire the weapon. As they drove there, Walton told Flores how she had purchased the pistol. She told Flores to stop at a convenience store, where she would purchase a newspaper and show him the gun ads. In his written statement to the police, appellant described what happened next:

[Flores] stopped [at] Braker and 35 at the Diamond Shamrock [to] get a paper. [Walton] asked if I had change to get the paper. I got out and she said she had to use the restroom. As we were walking in together she said come to the bathroom with me.

I said what ever, I thought she had some dope and we were going to smoke it. She looked at me and said are you ready to see a Mexican die. I said what. She said he fucked me over and nobody does that to me. She said she was going to get his dope and money. She said she was going to get it from him while we were in the country. I thought she was going to rob him. When she said you want to see a Mexican die she was smiling. I went out and got the paper and went to the car.

When [Walton] came out she smiled at me. She told [Flores] where to drive, she said that country road where nobody is at. He said yeah like he knew and he drove out there.

They discussed where he should park so no one could see us. When we got there she put her hand out the door and fired a round or maybe two out the window towards the field. He said let me see it or shoot it. She said let's get out of the car. She got out and fired it again towards the field.

I think [Flores] said something, I don't know if he said anything or not. I could hear her spin in the gravel, real quick. I saw a flash and I looked [at] him and it looked [as if] he was trying to get out of the car. He was moving or jumping or something. I don't know if I said anything I saw the flash go off again. When I looked back his head was back and I heard him moan. His head was on the back rest like he passed out or something.

Walton's description of the shooting largely corresponded to appellant's.

Appellant helped Walton remove Flores's body from his car. Walton went through Flores's pockets, taking cash, credit cards, identification, and other items. Portions of the newspaper were used to soak up blood in the car. Walton and appellant drove Flores's car to Jennifer Williams's house in Round Rock, and then to Goodwin's apartment in Austin. At both locations, Walton and appellant told what had happened and went through the items taken from Flores's body. They returned to Williams's house, and Williams helped them dispose of Flores's car. Williams later contacted the police and provided them with the information that led to the arrests of Walton and appellant at Goodwin's apartment on June 6.

Walton testified that she had been very angry at Flores and had planned to scare him, but she denied having any prior intent to kill or rob him. In his statement, appellant professed to be shocked by Walton's actions. He said he helped Walton after the shooting only because he feared for his own life. Goodwin also testified that appellant was upset after the shooting and expressed his fear of Walton.

Sufficiency of the Evidence

The indictment alleged that appellant murdered Flores in the course of robbing him. *See Tex. Pen. Code Ann. § 19.03(a)(2)*. The court's jury charge included instructions on the law of parties. *See id.* § § 7.01, .02 (West 1994). The jury was told that a person is criminally responsible for an offense committed by another if, with the intent to promote or assist the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense. *Id.* § 7.02(a)(2). The jury was further instructed that if, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, even if having no intent to commit it, provided the offense [*7] was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of carrying out the conspiracy. *Id.* § 7.02(b). **n1**

n1 Appellant raises several issues regarding these instructions that will be discussed later in this opinion.

Appellant contends the evidence is legally insufficient to sustain his conviction on either theory of parties liability presented to the jury. Evidence is legally sufficient to support a criminal conviction if, when all the evidence is viewed in the light most favorable to the verdict, a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia, 443 U.S. 307, 324, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); Griffin v. State, 614 S.W.2d 155, 158-59 (Tex. Crim. App. 1981).* In determining whether a defendant participated in an offense as a party, we may look to events before, during, and after the commission of the offense. *Burdine v. State, 719 S.W.2d 309, 315 (Tex. Crim. App. 1986); Medellin v. State, 617 S.W.2d 229, 231 (Tex. Crim. App. 1981).* While a defendant's mere presence when the offense was committed will not make him a party, it is a relevant circumstance that, with other circumstances, may be sufficient to establish a defendant's status as a party. *Medellin, 617 S.W.2d at 231.*

Goodwin testified that Walton told her she was going to kill Flores because he had beaten and robbed her. Goodwin also testified that appellant was present at her apartment when Walton showed Goodwin the pistol she had purchased. By his own admission, appellant knew on the night of the shooting that Walton was luring Flores to a remote area with the intention of robbing him. Appellant also admitted that, at the convenience store, Walton told him in substance that she intended to kill and rob Flores. Nevertheless, appellant assisted Walton in her ruse by purchasing the newspaper in which Walton was purportedly going to show Flores the gun ads and accompanying them to the remote location. After Flores was killed, appellant helped Walton remove the body from the car and steal Flores's belongings. Some of Flores's property was found with appellant's things in Goodwin's apartment. Viewing this evidence in the light most favorable to the verdict, we believe that a rational trier of fact could conclude beyond a reasonable doubt that Walton planned to rob and kill Flores, and that appellant aided Walton in this undertaking with the intent to assist the commission of the crime. *See Tex. Pen. Code Ann. § 7.02(a)(2).* Alternatively, a rational trier of fact could conclude beyond a reasonable doubt that appellant conspired with Walton to rob Flores, that Walton murdered Flores in furtherance of the conspiracy, and that the murder should have been anticipated by appellant given Walton's prior statements. *See id.* § 7.02(b).

Appellant urges that, as a matter of law, he could not be convicted on the theory that he conspired to rob Flores because Walton was acquitted of capital murder in the course of a robbery. Appellant relies on the rule that "inasmuch as two persons are necessary to a conspiracy, if two are tried and one is acquitted, the other must also be acquitted." *Barber v. State, 764 S.W.2d 232, 234 (Tex. Crim. App. 1988)* (quoting *Hustead v. State, 95 Tex. Crim. 49, 251 S.W. 1074, 1075 (Tex. Crim. App. 1923)).* Appellant's reliance on this rule is misplaced because he was not on trial for criminal conspiracy. *See Tex. Pen. Code Ann. § 15.02* (West 1994). The existence of the conspiracy to rob Flores was relevant only to establish appellant's guilt as a party to the capital murder of which he was accused. "In a prosecution in which an actor's criminal responsibility is based on the conduct of another, the actor may be convicted on proof of commission of the offense and that he was a party to its commission, and it is no defense . . . that the person for whose conduct the actor is criminally responsible has been acquitted . . . [or] has been convicted of a different offense . . . ." *Id.* § 7.03(2) (West 1994).

The evidence is legally sufficient to sustain the conviction. Point of error one is overruled.

deletions by Prof. Thompson

The judgment of conviction is affirmed.

Jan P. Patterson, Justice

Before Chief Justice Aboussie, Justices Yeakel and Patterson

Affirmed

Filed: May 17, 2001

STANLEY THOMAS WILLIAMS, Appellant, v. THE STATE OF TEXAS, Appellee

No. 61,662

COURT OF CRIMINAL APPEALS OF TEXAS

646 S.W.2d 221; 1983 Tex. Crim. App. LEXIS 891

February 2, 1983

SUBSEQUENT HISTORY:

Rehearing Denied March 16, 1983.

PRIOR HISTORY: Appeal from Dallas County.

JUDGES:

McCormick, Judge.

OPINION BY:

McCORMICK

OPINION:

This is an appeal from a conviction for conspiracy to commit aggravated kidnapping. Punishment, enhanced by one prior conviction, was assessed at life. Appellant raises twenty-two grounds of error. Due to our disposition of his fourteenth ground of error, we find it unnecessary to address his other contentions.

Appellant argues that since the evidence shows that the appellant's only co-conspirator was feigning participation the evidence is insufficient to support a conspiracy conviction.

V.T.C.A., *Penal Code, Section 15.02(a)*, sets out the elements of a conspiracy. They are:

> (1) a person
>
> (2) with intent that a felony be committed
>
> (3) *agrees* with one or more persons that they or one or more of them engage in conduct that would constitute the offense; and
>
> (4) he or one or more of them performs an overt act in pursuance of the agreement.

Thus, one of the essential elements that must be proven is an agreement between the co-conspirators to commit the offense. The corpus delicti of conspiracy must contain a showing of *agreement* to commit a crime. *Brown v. State, 576 S.W.2d 36 (Tex.Cr.App. 1979)* (on rehearing). Black's Law Dictionary defines agreement as follows:

> "A coming or knitting together of minds; . . . the coming together in accord of two minds on a given proposition; . . . a mutual assent to do a thing . . . ."

If an indictment alleges a conspiracy between only two individuals, but the evidence at trial shows that there was no actual, positive agreement to commit a crime, then the evidence is insufficient to support a conviction for conspiracy.

The evidence adduced at the trial of this cause shows that in June of 1977 Steve Jennings, appellant's alleged co-conspirator, was asked by Lt. David Golden of the Dallas Police Department to cultivate a friendship with appellant. Jennings was to report any suspicious activity to Lt. Golden. Around August 1, 1977, appellant asked Jennings if he was interested in making big money. Jennings replied affirmatively. During the next two weeks, appellant asked Jennings if kidnapping would bother him. When Jennings replied "no", appellant told Jennings he was setting up a kidnapping whereby a ransom of $100,000 would be paid and they would make a sixty-forty split of the ransom money. Through the month of August the plans for the kidnapping were formulated. The victim was to be the son of appellant's former employer. Appellant told Jennings his job was to stay with the boy until after the money was picked up. They were to keep the boy in a vacant apartment in the apartment building which appellant managed. Appellant told Jennings that after the ransom had been paid they would kill the boy and bury him in the river bottoms off Military Parkway. Other plans and preparations were made.

On Friday, September 16, 1977, two days before the kidnapping was to occur, Jennings contacted Lt. Golden and told him of the plans. Jennings was wired for sound by police officers and Jennings met with the appellant for further discussion of the kidnapping. This conversation was recorded by the police. Jennings' telephone was also tapped and, at the police officers' request, he phoned appellant on Saturday and talked with appellant further about the kidnapping plan. Appellant was arrested later that day at his place of business.

At trial, Jennings testified that it was never his intention to go along with the kidnapping. Rather, he was involved merely to get information for Lt. Golden.

In *Woodworth v. State, 20 Texas Ct. App. 375 (1886),* the defendant was charged with conspiring to commit burglary with intent to steal. At trial, defendant's sole co-conspirator testified that his only purpose in going along with the plan was to expose the defendant and in fact he did report the plan to the sheriff. This Court found that the transaction between the defendant and his alleged co-conspirator did not constitute a conspiracy in that the co-conspirator never intended to commit, or to assist in the commission of the burglary. He merely feigned his assent, and thus the evidence was insufficient to support the defendant's conviction for conspiracy.

> "Our Penal Code defines the offense of conspiracy to be a positive agreement entered into between two or more persons to commit one of certain named offenses, burglary being one of the offenses named. (Penal Code, Arts. 800, 802, 804). An 'agreement', as defined by Webster, is 'the union of two or more minds in a thing done or to be done. A coming or knitting together of minds.' One of the definitions of the term given by Bouvier is: 'A coming together of parties in opinion or determination; the union of two or more minds in a thing done or to be done; a mutual assent to do a thing.' Another definition quoted by the last named author is, that it 'consists of two persons being of the same mind, intention, or meaning, concerning the matter agreed upon.' (1 Bouv.Law Dic., title 'Agreement')". *Woodworth v. State, supra at 381, 382.*

See also: *Weathered v. State, 128 Tex.Cr.R. 263, 81 S.W.2d 91 (1935); Odneal v. State, 117 Tex.Cr.R. 97, 34 S.W.2d 595 (1931).* n1 For an analogous situation dealing with V.T.C.A., *Penal Code, Section 71.02*, see *Humphrey v. State, 626 S.W.2d 816, 817* (Tex.App. -- Corpus Christi, 1981), where the indictment charged the defendant with committing theft with intent to establish, maintain and participate in a "combination" with four other individuals. The court of appeals found the evidence insufficient to support the defendant's conviction because two of the five individuals involved were undercover agents carrying on "lawful activities", namely enforcing Texas state law.

n1 Federal case law also supports such a conclusion: *United States v. Martino, 648 F.2d 367, 405 (5th Cir. 1981),* cert. denied, *456 U.S. 943, 102 S. Ct. 2006, 72 L. Ed. 2d 465 (1982); United States v. Enstam, 622 F.2d 857, 867 (5th Cir. 1980),* cert. denied, *450 U.S. 912, 101 S. Ct. 1351, 67 L. Ed. 2d 336 (1981); United States v. Rose, 590 F.2d 232 (7th Cir. 1978),* cert. denied, *442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979); United States v. Chase, 372 F.2d 453 (4th Cir. 1967),* cert. denied, *387 U.S. 907, 87 S. Ct. 1688, 18 L. Ed. 2d 626,* and

Parrish v. United States, 387 U.S. 913, 87 S. Ct. 1701, 18 L. Ed. 2d 635 (1967); Sears v. United States, 343 F.2d 139 (5th Cir. 1965).

In the case at bar, we find there was no meeting of the minds between the alleged co-conspirators. There was no criminal intent in the minds of both individuals. Thus, there could be no conspiracy.

The State argues that Section 15.02, supra, was written so as to adopt a unilateral approach and thus each individual's culpability should be determined without regard to the disposition of the other alleged co-conspirators. And to a certain extent, we agree. n2 However, the essence of the [*224] conspiracy statute is aimed directly at the increased danger to society presented by criminal combinations. *Brown v. State, 576 S.W.2d 36 (Tex.Cr.App. 1979)* (on rehearing).

n2 We believe this is why the Legislature was so careful in its wording of Section 15.02(c), which provides:

"(c) It is no defense to prosecution for criminal conspiracy that:

"(1) one or more of the coconspirators is not criminally responsible for the object offense;

"(2) one or more of the coconspirators has been acquitted so long as two or more coconspirators have not been acquitted;

"(3) one or more of the coconspirators has not been prosecuted or convicted, has been convicted of a different offense, or is immune from prosecution;

"(4) the actor belongs to a class of persons that by definition of the object offense is legally incapable of committing the object offense in an individual capacity; or

"(5) the object offense was actually committed."

Because we have found the evidence insufficient to show an agreement as required by Section 15.02, the judgment is reversed and the cause is reformed to show an acquittal. *Burks v. United States, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978); Greene v. Massey, 437 U.S. 19, 98 S. Ct. 2151, 57 L. Ed. 2d 15 (1978).*

Timothy John CAMMER, Appellant v. STATE of Texas, Appellee

No. 04-98-01014-CR

COURT OF APPEALS OF TEXAS, FOURTH DISTRICT, SAN ANTONIO

2000 Tex. App. LEXIS 7525

November 8, 2000, Delivered
November 8, 2000, Filed

NOTICE: PURSUANT TO THE TEXAS RULES OF APPELLATE PROCEDURE, UNPUBLISHED OPINIONS SHALL NOT BE CITED AS AUTHORITY BY COUNSEL OR BY A COURT.

SUBSEQUENT HISTORY: State's Petition for Discretionary Review Refused April 11, 2001.

PRIOR HISTORY: From the 290th Judicial District Court, Bexar County, Texas. Trial Court No. 96-CR-2316. Honorable Sharon MacRae, Judge Presiding.

DISPOSITION: REVERSED AND REMANDED.

COUNSEL:

FOR APPELLANT: Julie Pollock, Diana L. Hoermann, Hitchings & Pollock, San Antonio, TX.

FOR APPELLEE: Kevin P. Yeary, Assistant Criminal District Attorney, San Antonio, TX.

JUDGES: Opinion by: Paul W. Green, Justice. Sitting: Catherine Stone, Justice, Paul W. Green, Justice, Karen Angelini, Justice.

OPINIONBY: Paul W. Green

OPINION:

Timothy Cammer was convicted by a jury of aggravated assault. On appeal, he attacks the sufficiency of the evidence supporting the jury verdict of guilt and the jury finding regarding self-defense. Cammer also complains of the trial court's failure to instruct the jury on the issue of defense of property with force.

Background

This case involves an incident of "road rage." Cammer was driving a large Ford F-350 pickup truck when he encountered Eric Hammeren, who was driving a Toyota Corolla. One of the drivers evidently "cut off" the other, precipitating an exchange of gestures and taunts between the two drivers. Hammeren then followed Cammer's truck into a restaurant parking lot. After Cammer's passengers exited his truck, Hammeren and his passenger, Kevin Kelly, approached Cammer's truck and began a more personal confrontation. Cammer remained in his vehicle as he and Hammeren exchanged obscenities.

There was some testimony that Cammer chased Hammeren around the parking lot with his truck. At some point, however, Hammeren grabbed onto the truck's driver's side rear view mirror. At or about this time, Cammer shifted the truck into reverse, backed ten to fifteen feet, and then applied the brakes. Cammer said he was acting defensively when Hammeren grabbed the mirror and began banging on his partially open window. Hammeren's story is that he grabbed the mirror only after Cammer began backing toward him and hung on to keep from being run over. It is undisputed that when the truck suddenly stopped, Hammeren was thrown from the truck mirror and suffered serious injuries, including broken ribs and a bruised liver.

Discussion

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2. Jury Instructions

At trial, Cammer requested jury instructions on the issues of self-defense, defense of property with force, and defense of property with deadly force. The trial court granted Cammer's request for a self-defense instruction, but denied the requested instructions on defense of property. Cammer argues the trial court erred in refusing to instruct the jury on the issue of defense of property with force. We agree.

An accused has the right to an instruction on any defensive issue raised by the evidence. *Hamel v. State, 916 S.W.2d 491, 493 (Tex. Crim. App. 1996).* This is true regardless of the strength of the evidence or whether it is controverted. *Hayes v. State, 728 S.W.2d 804, 807 (Tex. Crim. App. 1987).* Further, the defendant need not testify for evidence to raise a defensive issue, but rather, evidence from any source can raise the defensive issue. *Id. at 809.* If the evidence has any tendency to raise the issue of defense of the person as well as defense of property, the court must give a separate charge on each theory. *Sledge v. State, 507 S.W.2d 726, 729 (Tex. Crim. App. 1974).*

Section 9.41 of the Texas Penal Code regards the right to defend one's property, providing:

A person in lawful possession of land or tangible, moveable property is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to prevent or terminate the other's trespass on the land or unlawful interference with the property.

TEX. PEN. CODE ANN. § 9.41(a) (Vernon 1994).

The State argues Cammer never testified he acted out of fear for his truck. Further, the State asserts Cammer's truck "just simply happened to be there" and that if Cammer acted in defense to anything, it was himself. We have already noted, however, that evidence regarding a defensive issue can come from any source. *Hayes, 728 S.W.2d at 809.*

At trial, one of Cammer's former passengers, who witnessed the incident, testified she saw Hammeren and Kelly "throwing stuff at the truck. Might have been rocks." She later testified one of the rocks hit Cammer's side of the truck, possibly leaving a dent. She further testified that as Hammeren was holding onto the mirror, he was "banging on the window." Also, she testified either Hammeren or Kelly was holding some sort of a stick or bat during the confrontation.

In addition, Cammer testified that Hammeren spit at him and at his truck. Cammer claimed he maneuvered his truck in that manner to avoid damaging his vehicle, and at one point, stated he drove forward to "get [Hammeren] away from my vehicle, too." Further, Cammer testified he slammed on the brakes to "get [Hammeren] off my truck and get him away from me."

The State cites *Leach v. State* for the proposition that there must have been some damage to the property for an instruction on defense of property to be available. *See Leach, 983 S.W.2d 45, 47-48* (Tex. App. - Tyler 1998, no pet.). Although we question the need to show actual damages to property to get the instruction, it is unnecessary to decide that issue in this case because there is evidence Cammer's truck had been damaged.

We conclude the evidence is sufficient to raise the fact question of whether Cammer acted out of defense of his property and an instruction should have been given to the jury on this issue. *See Sledge, 507 S.W.2d at 729-30; Venegas v. State, 660 S.W.2d 547, 549-50* (Tex. App. - San Antonio 1983, no pet.). Further, we find the error was "calculated to injure the rights of" Cammer. *See Almanza v. State, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984).* Although a jury may have reasonably found that Cammer, enclosed in his one-ton truck, did not act out of fear for himself, the same jury reasonably could have found Cammer justifiably acted out of fear of damage to his truck.

Conclusion

The trial court erred in denying Cammer's requested instruction on defense of property with force and he is, therefore, entitled to a new trial. All other points of error are overruled. The judgment is reversed and the case is remanded to the trial court for further proceedings.

Michael Thomas WILLIAMS, Appellant, v. The STATE of Texas, Appellee

No. 57579

COURT OF CRIMINAL APPEALS OF TEXAS

630 S.W.2d 640; 1982 Tex. Crim. App. LEXIS 966

April 7, 1982

COUNSEL:

Charles Dickens & Kenneth Mendel, Fort Worth, for appellant.

Tim Curry, Dist. Atty., and Marvin Collins, George Mackey, Richard Davis and Candyce Howell, Asst. Dist. Attys., Fort Worth, Robert Huttash, State's Atty., Austin, for the State.

JUDGES:

Before the court en banc.

OPINIONBY:

ROBERTS

OPINION:

OPINION ON STATE'S MOTION FOR REHEARING

Our prior opinion is withdrawn.

This appellant was found guilty of assault. The court assessed his punishment at a year in jail (probated) and a fine of $ 500. He makes seven claims of error in the court's charge to the jury, some of which must be evaluated in the factual context of the case.

The appellant and the complainant were lovers who had been living together for several months. They went in the appellant's car to a bar. After several hours at the bar they quarrelled, and the appellant left. Sometime later the appellant returned to the bar, knocked a cigarette out of the complainant's mouth (without touching her), and left again. The complainant and the bartender, who was her friend, went to a restaurant for coffee. At the complainant's request, the bartender called the appellant by telephone and asked him to come to the restaurant. The appellant arrived and demanded that the complainant leave with him. When the complainant refused, the appellant pulled a pistol from his boot and displayed it. He threw a glass of water in the complainant's face. He put the pistol back in his boot and walked away from the table. Then he returned and took the complainant by the arm. The parties presented different versions of subsequent events.

The complainant testified that the appellant "dragged" her from the restaurant and "threw" her in the car. As he drove the car, the appellant began striking her with his fists (as alleged in the information) and continued to beat her during the journey home. At the house, the appellant threw the complainant's ten year old son against a dresser, chased the complainant outside, and beat her some more.

The appellant denied beating the complainant or throwing her son against the dresser. His version of the trip home was that the intoxicated complainant repeatedly tried to grab the steering wheel or his arm while he was driving. To keep from wrecking the vehicle, he had to push the complainant away with his arm and hand. He may have struck the complainant's face in that effort. On one occasion when the complainant grabbed the steering wheel, the appellant almost lost control of the car and had to slam on the brakes to avoid hitting a telephone pole. This threw the appellant and the complainant forward; apparently the complainant's face struck the windshield or the dashboard, causing her nose to bleed.

The appellant first complains of the trial court's refusal to give the following special requested charge:

"Conduct is justified under the law of necessity if:

(1) the defendant reasonably believes the conduct is immediately necessary to avoid imminent harm;

(2) the desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law prescribing the conduct; and

(3) a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear.

" "Ordinary standards of reasonableness' means the standards that would be applied by an ordinarily prudent person under the same or similar circumstances as the defendant.

"Now, therefore, if you find and believe from the evidence beyond a reasonable doubt that the Defendant, MICHAEL THOMAS WILLIAMS, on or about October 14, 1976, in the County of Tarrant, State of Texas, did then and there intentionally and knowingly strike (the complainant) as charged in the information, but you further find and believe from the evidence or have reasonable doubt thereof that at the time the said MICHAEL THOMAS WILLIAMS did the act aforesaid, if he did, the said MICHAEL THOMAS WILLIAMS reasonably believed that such act was immediately necessary to avoid imminent harm, to wit: to prevent the said (complainant) from causing him to wreck the automobile in which they were riding, then you will acquit the Defendant and say by your verdict, not guilty."

This is not a perfect charge. Although the first paragraph is substantially identical to V.T.C.A., *Penal Code, Section 9.22*, n1 it is not proper to instruct the jury on subsection (3). The issue of a plain legislative purpose to exclude the justification is one of law, and the jury may not consider it. (At this point, we note that there is no appearance of a legislative purpose to exclude the justification of necessity in cases of assault.)

n1. "Conduct is justified if:

(1) the actor reasonably believes the conduct is immediately necessary to avoid imminent harm;

(2) the desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law prescribing (sic) the conduct; and

(3) a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear." V.T.C.A., *Penal Code, Section 9.22*.

The word "prescribing" in the enrolled bill is an evident typographical error; it should read as "proscribing". See State Bar of Texas, Texas Penal Code: A Proposed Revision, Sec. 9.21(2) (Final Draft 1970).

The second paragraph of the requested charge undertook to define "ordinary standards of reasonableness." The penal code does not define this term, n2 but it does define "reasonable belief" as "a belief that would be held by an ordinary and prudent man in the same circumstances as the actor." V.T.C.A. *Penal Code, Section 1.07(a)(31)*. That definition is a codification of the usual definition of reasonableness. Consonant with that definition, "ordinary standards of reasonableness" may be defined as the standards that an ordinary and prudent person would apply to the circumstances that the actor faced.

n2. This term evidently derives from the term "according to ordinary standards of intelligence and morality" in *N.Y. Penal Law, Sec. 35.05(2)*. The Texas drafters pointed out that, "Although Section 9.21 derives generally from the Illinois, New York, and Model Penal Code provisions, it also departs from them in significant detail, especially phraseology...." State Bar of Texas, Texas Penal Code: A Proposed Revision 82 (Final Draft 1970). The obvious intent was to facilitate the desired balancing of harms on a case-by-case basis. See id. at 83.

The third paragraph of the requested charge does not completely apply the law to the facts. It fails to include the requirement of subsection (2) that the desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the assault statute.

Although a specially requested charge may be defective, it still may serve to call the court's attention to the need to charge on a defensive issue. *Austin v. State, 541 S.W.2d 162, 166 (Tex.Cr.App.1976).* In this case the requested charge was sufficient to point out the omission of a charge on necessity, and to preserve the question for our review. The remaining question is whether the defense of necessity was raised by the evidence.

The appellant's testimony that he had to strike, or push, the complainant to keep her from wrecking the vehicle was sufficient to raise the defense of necessity.

> "A defendant is entitled to an affirmative defensive instruction on every issue raised by the evidence regardless of whether it is strong, feeble, unimpeached, or contradicted, and even if the trial court is of the opinion that the testimony is not entitled to belief. The defendant's testimony alone may be sufficient to raise a defensive theory requiring a charge." *Warren v. State, 565 S.W.2d 931, 933-934 (Tex.Cr.App.1978)* (citations omitted).

The trial court erred in not instructing the jury on necessity.

deletions

The State's motion is overruled and the judgment is reversed and the cause remanded.

LYDIA H. BOWEN, Appellant v. THE STATE OF TEXAS

NO. PD-1873-03

COURT OF CRIMINAL APPEALS OF TEXAS

162 S.W.3d 226; 2005 Tex. Crim. App. LEXIS 705

May 4, 2005, Delivered

NOTICE: Publish

SUBSEQUENT HISTORY: On remand at, Remanded by *Bowen v. State, 2006 Tex. App. LEXIS 1488 (Tex. App. Fort Worth, Feb. 23, 2006)*

PRIOR HISTORY: ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW. FROM THE SECOND COURT OF APPEALS. WISE COUNTY. *Bowen v. State, 117 S.W.3d 291, 2003 Tex. App. LEXIS 6834 (Tex. App. Fort Worth, 2003)*

COUNSEL: For APPELLANT: Samuel C. Bishop, Decatur, TX.

For STATE: Gregory P. Lowery, COUNTY ATTORNEY; Thomas J. Aaberg, ASSIST. DA. Decatur, TX.

JUDGES: Keasler, J., delivered the opinion of the Court in which Meyers, Price, Womack, Johnson, Hervey, and Holcomb, JJ., joined. Keller, P.J., filed a dissenting opinion. Cochran, J., filed a dissenting opinion.

OPINIONBY: Keasler

OPINION:

Upon the close of evidence at her resisting arrest trial, Lydia Bowen sought a jury instruction on the defense of necessity. The trial judge refused this request. Affirming the trial judge's refusal, the Court of Appeals held that the self-defense statute, *Penal Code section 9.31*, demonstrated a legislative purpose to exclude the necessity defense under *section 9.22(3)*. We disagree. Therefore, we reverse and remand.

Factual and Procedural History

Responding to a disturbance call with an advisory of possible weapons present, Deputy Hamilton arrived at Lydia Bowen's rural home finding Bowen outside and becoming increasingly agitated and belligerent. Hamilton testified that Bowen's aggression became focused on him. After performing a field-sobriety test on Bowen, he informed both Bowen and her husband that he was arresting them for disorderly conduct and public intoxication. Hamilton further testified at trial that Bowen attempted to pull her arm away and head toward her house when Hamilton was placing the handcuffs on her. With the assistance of other officers, Hamilton took Bowen to the ground in order to effect the restraint and to allow Bowen to calm down. Once Bowen said that she would cooperate, Hamilton helped Bowen up from the ground and escorted her to his patrol car, where she again resisted. According to Hamilton, Bowen became belligerent, cursed, screamed, and ultimately kicked him in the shin.

Bowen's factual account differs. Bowen testified at trial that Hamilton kicked out her legs in executing the take-down, causing her terrible pain. According to Bowen, with the help of other officers, Hamilton forced her face into the ground and pinned her with his knees. Bowen admitted to struggling because she could not breathe. She also stated she screamed for help and that she was hurt. After restraining her, Bowen further testified that the officers lifted her directly from the ground to her feet using only the handcuffs and her forearms. Bowen felt that her "arm had popped out of the socket" as a result of being raised in that manner. Although admitting to kicking the officer, Bowen contested that it

occurred while she was being lifted from the ground, not when being placed in the patrol car. She also contested that the kicking was intended to prevent Hamilton from taking her into custody. She alleged that the kicking was in response to the pain of being lifted in this manner and attempting to regain her balance.

Bowen was charged with resisting arrest, search, or transportation by using force against a peace officer. At the close of evidence, Bowen sought a jury instruction on self-defense and the justification defense of necessity. The trial judge refused to submit the necessity instruction, but did submit the instruction on self-defense. After a jury found Bowen guilty as charged, she was sentenced to pay a fine of $ 500.

Court of Appeals

The Court of Appeals first found that Bowen had sufficiently admitted the commission of the alleged offense to entitle her to the justification defense instruction. n1 However, the court held that a legislative purpose existed to exclude the defense under the facts of this case. The court held that *Penal Code section 9.31*, stating that the use of force against another is not justified "to resist an arrest or search that the actor knows is being made by a peace officer ... even though the arrest or search is unlawful," provides legislative support to exclude the availability of a necessity defense. The court concluded that because there was no question surrounding whether Bowen was being arrested or that she knew Hamilton was a peace officer, *section 9.31(b)* precluded the defense of necessity as justification for the resisting arrest offense. n2 The Court of Appeals held that the trial judge properly refused to submit Bowen's necessity defense instruction. In light of this holding, we granted Bowen's petition for discretionary review.

n1 *Bowen v. State, 117 S.W.3d 291, 297 (Tex. App.—Ft. Worth 2003).*

n2 *Id. at 298.*

Analysis

Penal Code section 9.22 states:

> Conduct is justified if:
>
> (1) the actor reasonably believed the conduct is necessary to avoid imminent harm;
>
> (2) the desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct; and
>
> (3) a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear. n3

n3 *TEX. PEN. CODE ANN. § 9.22* (Vernon 2004).

The State argues that the Court of Appeals properly restricted the necessity defense's application and invites this Court to restrict the availability of the necessity defense according to the circumstances presented in each case. The State suggests the proper analysis begins with the underlying charged offense of resisting arrest defined by *section 38.03*. The argument continues that the use of force in resisting an arrest is limited by *section 9.31*, which provides in part:

> The use of force to resist an arrest or search is not justified:
>
> ...
>
> (2) to resist an arrest or search that the actor knows is being made by a peace officer ... even though the arrest or search is unlawful, unless the resistance is lawful under Subsection (c);
>
> ...
>
> (c) The use of force to resist an arrest or search is justified:
>
> (1) if, before the actor offers any resistance, the peace officer ... uses or attempts to use greater force than necessary to make the arrest or search; and

(2) when and to the degree the actor reasonably believes the force is immediately necessary to protect himself against the peace officer's ... use or attempted use of greater force than necessary. n4

The State contends that "since *§ 9.31(c)* restricts resisting arrest to an officer's abuse of force then it must restrict resisting arrest, as a whole. And since the underlying offense in this case is resisting arrest then *§ 9.22* is restricted by *§ 9.31* as well." However, precedent and proper statutory construction prevent us from taking such a restrictive view of the necessity justification. This Court has had several opportunities to interpret *section 9.22(3)* since its enactment in 1973. In each case, we looked to the language of the charged offense to determine whether a legislative purpose plainly excludes the necessity justification.

n4 *TEX. PEN. CODE ANN. § 9.31(b)-(c)* (Vernon 2004).

In *Vasquez v. State*, we looked to the charged offense's statutory language. n5 There, we referred to the offense's statute and held that "the legislature has not excluded the justification of necessity as a defense to the offense of possession of a firearm by a felon." n6 Without a recitation of the facts, in *Johnson v. State* we held that a necessity defense is available in a prosecution for an unlawful carrying of a weapon offense under *section 46.02*. n7 Overruling *Roy v. State*, n8 we disavowed the notion that permitting the defense of necessity would violate the intent of an offense's statute and was, therefore, tantamount to a legislative purpose to exclude the defense. n9

n5 *830 S.W.2d 948 (Tex. Crim. App. 1992).*

n6 *Vasquez, 830 S.W.2d at 950* (citing *Texas Penal Code § 46.05*).

n7 *Johnson v. State, 650 S.W.2d 414, 416 (Tex. Crim. App. 1983), overruled on other grounds, Boget v. State, 74 S.W.3d 23 (Tex. Crim. App. 2002).*

n8 *552 S.W.2d 827 (Tex. Crim. App. 1977).*

n9 *Johnson, 650 S.W.2d at 416.*

Most recently, in *Spakes v. State*, we again utilized a plain-language interpretation of *section 9.22* and the statute defining the charged offense. n10 In determining whether Spakes was entitled to a necessity instruction on his escape charge, we refused to hold that an attempt to surrender once the immediate threat justifying the escape has ceased is a predicate for a necessity instruction's submission. n11 After noting the statutory elements of escape defined under *section 38.07*, we held that there was no apparent legislative purpose to exclude the justification. We further noted that "the plain language codifying the necessity defense evinces a legislative intent that the defense apply to all offenses unless the legislature has specifically excluded it from them." n12 While the State in *Spakes* raised valid arguments as to why the necessity defense should be limited, these arguments were appropriate for the legislature, not the judiciary. We now turn to the statutory language presented in this case. We begin by noting *section 9.22*'s plain language indicates that the defense of necessity may be applicable in every case unless specifically excluded by the legislature. n13 To determine whether a legislative purpose exists to exclude the defense, we focus on the statute defining the charged offense. *Section 38.03* defines the offense of resisting arrest:

(a) A person commits an offense if he intentionally prevents or obstructs a person he knows is a peace officer or a person acting in a peace officer's presence and at his direction from effecting an arrest, search, or transportation of the actor or another by using force against the peace officer or another.

(b) It is no defense to prosecution under this section that the arrest or search was unlawful.

(c) Except as provided in Subsection (d), an offense under this section is a Class A misdemeanor.

(d) An offense under this section is a felony of the third degree if the actor uses a deadly weapon to resist the arrest or search. n14

Section 38.03 does not limit the necessity defense's application because a legislative purpose to exclude the defense does not plainly appear in its text. On its face, we cannot glean any clear legislative purpose indicating that the necessity defense is not available.

n10 *Spakes v. State, 913 S.W.2d 597 (Tex. Crim. App. 1996).*

n11 *Id. at 598.*

n12 *Id.*

n13 *Id.*

n14 *TEX. PEN. CODE ANN. § 38.03* (Vernon 2004).

The State's argument that the necessity defense's availability must be viewed in light of *section 9.31* must also fail because it ignores that necessity and self-defense are separate defenses. n15 The State attempts to link the two defense statutes together by Bowen's use of force. However, Bowen's conduct does not merge the two defense provisions into a single, unified defense. While Bowen's use of force may limit her ability to invoke self-defense, it does not exclude a necessity defense to a resisting arrest offense as a matter of law. We have recognized the independence of separate defenses by holding that a defendant is entitled to the submission of every defensive issue raised by the evidence, even if the defense may be inconsistent with other defenses. n16 We reaffirm this principle by holding self-defense's statutorily imposed restrictions do not foreclose necessity's availability.

n15 *See Boget, 74 S.W.2d at 31; see also Johnson v. State, 650 S.W.2d 414, 416 (Tex. Crim. App. 1983).*

n16 *Hamel v. State, 916 S.W.2d 491, 493 (Tex. Crim. App. 1996); Thomas v. State, 678 S.W.2d 82, 84 (Tex. Crim. App. 1984).*

The Court of Appeals and the State seize upon the issue of whether Bowen knew she was being placed under arrest as a dispositive factor in assessing necessity's availability. But this reasoning assumes that the necessity defense is controlled by the self-defense statute's provisions addressing the use of force. Because we have held otherwise, Bowen's knowledge that she was being placed under arrest is irrelevant to determine whether she was entitled to a necessity instruction as a matter of law.

Conclusion

Because the Court of Appeals held that Bowen sufficiently admitted to committing the offense and raised a necessity issue at trial, Bowen has satisfied the judicially imposed prerequisite to request a necessity instruction. n17 Therefore, the trial court erred in refusing Bowen's requested necessity instruction. We reverse and remand this case to the Court of Appeals for proceedings consistent with this opinion.

n17 *See Young v. State, 991 S.W.2d 835, 838 (Tex. Crim. App. 1999).*

DISSENTBY: Keller; Cochran

DISSENT:

KELLER, P.J., *filed a dissenting opinion.*

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

to an instruction on the defense of necessity. Submitting wholly redundant defenses would not aid the truth-finding function of the trial and risks confusing the jury.

A corollary of excluding the defense of necessity when it is wholly redundant of another defense is that the defense of necessity should be excluded when it is based solely upon *less* evidence than required for raising another defense. One of the elements of the defense of necessity is that "a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear." n1 Each defense to criminal prosecution contains the elements it does because the Legislature deemed it appropriate to require certain circumstances to be present before a defense could be invoked. Permitting the necessity defense solely upon *less* evidence than needed to raise another defense amounts to circumventing these legislatively prescribed requirements. Rather, in comparing the defense of necessity to another potentially applicable defense, the evidence should raise at least one circumstance of mitigating character that cannot be given full effect within the elements of that other defense.

n1 *TEX. PEN. CODE § 9.22(3).*

Turning to the present case, we see that appellant received an instruction on self-defense. In the resisting arrest context, the self-defense statute requires among other things a showing that, before the actor offered any resistance, the officer used or attempted to use "greater force than necessary to make the arrest" and the actor reasonably believed her response was immediately necessary to protect herself against that type of force. n2 All of appellant's evidence regarding the violent nature of the arrest and the pain caused as a result could be given full effect in the context of that self-defense requirement. The evidence did not, for example, show that appellant had some peculiar infirmity or condition, unknown to the officer, that would have made the officer's reasonable conduct a threat to appellant's safety. Under the circumstances, appellant's evidence raised nothing more than the issue of self-defense to the use of unnecessary force. Consequently, the trial court did not err in declining to give an instruction on the defense of necessity.

n2 *TEX. PEN. CODE § 9.31(c)*:

> The use of force to resist an arrest or search is justified:
>
> (1) if, before the actor offers any resistance, the peace officer (or person acting at his direction) uses or attempts to use greater force than necessary to make the arrest or search; and
>
> (2) when and to the degree the actor reasonably believes the force is immediately necessary to protect himself against the peace officer's (or other person's) use or attempted use of greater force than necessary.

KELLER, Presiding Judge

Cochran, J., *filed a dissenting opinion.*

I agree with the majority that the statutory defenses of self-defense under *Texas Penal Code, section 9.31*, and necessity under *section 9.22* are not mutually exclusive in the context of a resisting arrest prosecution. However, I do not think that the court of appeals said that they were. n1 Rather, both the trial court and the court of appeals stated that given the specific evidence in this particular case, appellant's defense was wholly encompassed by the trial court's instructions on self-defense. I agree with that conclusion and therefore respectfully disagree with the majority's holding.

n1 *See Bowen v. State, 117 S.W.3d 291, 295 (Tex. App. - Fort Worth 2003).*

In this case, the evidence concerning precisely how Officer Hamilton arrested appellant was hotly contested. In deciding whether the trial court erred in submitting instructions on a statutory defense, courts look to whether there is *any*

evidence that raises all of the elements of that defense. n2 Thus, we look only to the evidence that supports submission of instructions on self-defense and necessity.

n2 *Thomas v. State, 678 S.W.2d 82, 85 (Tex. Crim. App. 1984)* (trial court erred in failing to submit requested charge on defense of necessity). In *Thomas*, this Court set out the general statement of the law:

> It is axiomatic that a defendant is entitled to an affirmative defensive instruction on every issue raised by the evidence regardless of whether it is strong, feeble, unimpeached, or contradicted, and even if the trial court is of the opinion that the testimony is not entitled to belief.

Id. at 84.

Appellant testified that she knew Officer Hamilton was attempting to arrest her, but she also testified that

. Officer Hamilton, in doing so, "kicked out her legs" when he executed a "takedown"; then he pushed her face into the dirt ;

. She had not used any force against him before he kicked her legs out from under her;

. His kicking her legs and forcing her into the dirt caused her great pain;

. She struggled because she could not breathe with her face in the dirt;

. Officer Hamilton (and another officer) then lifted her up from the ground holding only the handcuffs and her forearms;

. The officers' use of force in lifting her up in this manner made her arm pop out of the socket;

. She kicked at Officer Hamilton to make him stop lifting her up and holding her in this painful manner.

The thrust of all of appellant's testimony was that she did not use any force against Officer Hamilton until he used unnecessary, excessive, and very painful force against her.

He started it by using unreasonable physical force to effect her arrest and she reacted only to protect herself. This testimony clearly raises an issue of self-defense under subsection *9.31(c)*. n3 *Section 9.31(b)*, however, explicitly states that

> The use of force against another is not justified ... to resist an arrest or search that the actor knows is being made by a police officer,... unless the resistance is justified under Subsection (c).

Thus, the legislature has, in no uncertain terms, stated that one is not justified in using force to resist an arrest unless the "resistance" is justified under subsection (c). Subsection (c) is the section appellant invoked with her testimony and that is the section under which the able trial judge instructed the jury.

n3 *Subsection 9.31(c)* of the Texas Penal Code provides

> The use of force to resist an arrest or search is justified:
>
> (1) if, before the actor offers any resistance, the peace officer (or person acting at his direction) uses or attempts to use greater force than necessary to make the arrest or search; and
>
> (2) when and to the degree the actor reasonably believes that force is immediately necessary to protect himself against the peace officer's (or other person's) use or attempted use of greater force than necessary.

Both the trial judge and the court of appeals were very careful to limit their denial of a necessity instruction because of appellant's specific testimony. The court of appeals noted that

> the trial court stated that [it] did not feel that the facts of the case raised the defense of necessity and that self-defense was the appropriate defensive submission under the evidence involving force against a police officer. n4

n4 *117 S.W.3d at 295.*

The court of appeals upheld the trial court's assessment of the evidence and stated that it did "not believe that this admission [that she kicked the officer without intent to resist arrest] entitles her to submission of the necessity defense under the facts of this case." n5

n5 *Id. at 297.*

Appellant's position-with which the majority agrees-is that "I used force against Officer Hamilton's use of excessive force not to resist arrest, but simply to stop the pain. Therefore, I am entitled to an instruction on necessity." This argument proves too much. "Stopping the pain" or "preventing the injury" from the officer's use of excessive force is the very purpose of the statutory justification of self-defense to resisting arrest. n6 As the court of appeals aptly noted,

> Accepting Appellant's argument would allow any person to obtain submission of a necessity defense based upon a struggle involving use of force against a police officer when that person knows they are being placed under arrest, by later claiming he or she was only trying to avoid being hurt. n7

That is precisely the practical, though perhaps unintended, effect of the majority's holding in this case. And it is precisely for that reason that I cannot agree with the majority. The Legislature explicitly rejected this position by enacting *subsection 9.31(b)* which specifically precludes any justification for the use of force in resisting arrest except that justification set out in *subsection 9.31(c)*.

n6 Appellant also makes a compelling argument concerning the "eggshell" defendant who resists the use of perfectly reasonable, non-excessive force by the police officer because this reasonable force causes this particular defendant great pain although it would not cause a person of ordinary physical fitness pain. She claims that the defense of necessity exists for this situation. It does not. In that situation, the defendant is simply not guilty of a crime because she is not "intentionally" preventing a peace officer from effecting an arrest by using force against the officer. For example, appellant might have testified that Officer Hamilton was using perfectly reasonable force in pulling her arms behind her back to handcuff her. She, however, has horrible bursitis and the mere touching of her arm sent her into paroxysms of pain. She reacted *instinctively* against this excruciating pain by pulling away, kicking out, thrashing about, spitting, or whatever. This is not conduct that is intended to prevent her arrest, it is "pain avoidance" conduct which denies an element of the offense: the intent to prevent or obstruct the officer from effecting an arrest. For this defense, one needs no special jury instruction because it is the denial of an element of the crime, not the "confession and avoidance" of an element of the crime. Appellant did not testify that she was an "eggshell" defendant or that Officer Hamilton used only reasonable force. But to the extent that her testimony indicated that her conduct was motivated only by "pain avoidance," not an intent to prevent her arrest, she is still simply denying one of the State's essential elements - using force with the intent to prevent or obstruct her arrest.

n7 *Id. at 296-97.*

Necessity, on the other hand, is a "choice of evils" defense. n8 The defendant intentionally or knowingly commits a criminal offense to avoid a greater evil or greater harm. To invoke such a defense, "the pressure must operate upon the mind of the defendant rather than upon his body." n9 The rationale behind this defense is that "the law ought to promote

the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law." n10

n8 *See generally*, WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 10.1 (2d ed. 2003).

n9 *Id.*, § 10.1(a), at 117.

n10 *Id.* at 118.

That said, when might a necessity defense apply to a prosecution for resisting arrest? When the defendant intentionally and knowingly resists arrest because he has a higher public duty to perform which cannot be performed if he is arrested: the defendant must stop the passenger-laden train from crashing into the rock on the track; he must save the children from drowning on a raft that is floating down the swollen river; he must get his wife to the hospital before she has their first child in the backseat of the car; and so forth. n11 In other words, the necessity is a harm that is separate and independent from the use of force to resist arrest and "the desirability and urgency of avoiding the harm [the train wreck, the drowning, the back-seat delivery] clearly outweigh ... the harm sought to be prevented by the law [resisting arrest] proscribing the conduct." n12

As Professor LaFave points out

> The defenses of self-defense and defense of others are also related to the defense of necessity, justifying intentional homicide or the intentional infliction of bodily injury in cases where it is necessary to save the life of, or to prevent injury to, the defendant or another. It has been said that self-defense and defense of others constitute a part of the law of necessity which has attained relatively fixed rules. n13

n11 Professor LaFave sets out numerous examples of the appropriate invocation of the "choice of evils" necessity defense. LAFAVE, § 10.1(c), at 121-24.

n12 *TEX. PEN. CODE § 9.22(2).*

n13 *Id.*, § 10.1(c) at 121. Professor LaFave notes that "when the provision in the criminal code 'deals specifically and comprehensively with the use of force in defense of self, third persons, and premises,' a defendant 'who is unable to present an effective defense under these specific provisions is precluded from justifying his use of force under the general provision for competing harms.'" *Id.* n.24 (quoting *State v. Crocker, 506 A.2d 209 (Me. 1986)).*

That is, the statutory defense of self-defense is a codification of a subset of the necessity defense and permits the use of force against another under whatever specific circumstances are set out by the legislature. The Texas Legislature has specified the circumstances under which one may intentionally use force to resist arrest in *subsection 9.31(c)*. And, in *subsection 9.31(b)*, it has explicitly limited the intentional use of force to resist an arrest to *only* those circumstances set out in subsection (c).

Given these statutory provisions and the evidence in this case, I must agree with the trial court and court of appeals which both held that appellant was not entitled to a separate instruction on the defense of necessity. I, therefore, respectfully dissent.

Cochran, J.

HARRY JACK SPAKES, Appellant v. THE STATE OF TEXAS, Appellee

COURT OF CRIMINAL APPEALS OF TEXAS

913 S.W.2d 597; 1996 Tex. Crim. App. LEXIS 3

January 10, 1996, DELIVERED

PRIOR HISTORY: Petition for Discretionary Review from the Seventh Court of Appeals. (RANDALL County).

DISPOSITION: The judgment of the Court of Appeals is affirmed.

COUNSEL: William E. Kelly, III, Canyon, Texas.

John L. Owen, Assist. DA, Canyon, Texas, Jeffrey L. Van Horn, Assistant State's Attorney, Austin, Texas.

JUDGES: White, J., concurs. KELLER, J. McCormick, P.J. joins.

OPINION

[*597] OPINION ON STATE'S

PETITION FOR DISCRETIONARY REVIEW

A jury convicted Appellant of escape and assessed his punishment at sixty years imprisonment after finding that he was a habitual offender. This conviction was reversed because the trial court failed to submit a requested instruction on the defense of necessity. *Spakes v. State, 891 S.W.2d 7* (Tex.App. - Amarillo 1994).

The State's petition was granted to determine whether a predicate to the defense of necessity, as applicable to the offense of escape, includes an attempt to surrender once the immediate threat justifying the escape has ceased. The State notes that numerous other jurisdictions have imposed this requirement based on an analysis conducted in *People v. Lovercamp, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1975).*

Texas adopted the current penal code in 1973, incorporating within it several common law defenses, including necessity and duress. V.T.C.A. *Penal Code, § 9.22* (Necessity) provides that conduct is justified if:

> [*598] (1) the actor reasonably believes the conduct is immediately necessary to avoid imminent harm;
>
> (2) the desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law prescribing the conduct; and
>
> (3) a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear.

V.T.C.A. *Penal Code, § 9.02*, dictates: "It is a defense to prosecution that the conduct in question is justified under this chapter," and *§ 2.03* states:

> (a) A defense to prosecution for an offense in this code is so labeled by the phrase: "It is a defense to prosecution ...."
>
> * * *

(c) The issue of the existence of a defense is not submitted to the jury unless evidence is admitted supporting the defense.

(d) If the issue of the existence of a defense is submitted to the jury, the court shall charge that a reasonable doubt on the issue requires that the defendant be acquitted.

(e) A ground of defense in a penal law that is not plainly labeled in accordance with this chapter has the procedural and evidentiary consequences of a defense.

V.T.C.A. *Penal Code, § 38.07*, at the time this offense was committed provided:

(a) A person commits an offense if he escapes from custody when he is:

(1) under arrest for, charged with, or convicted of an offense; or

(2) in custody pursuant to a lawful order of a court.

As can be seen, "a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear." Although the State presents several cogent arguments as to why an attempt to surrender should be a prerequisite to applying a necessity defense to the offense of escape, * these arguments are appropriate for the legislature, not for the judiciary. The plain language codifying the necessity defense evinces a legislative intent that the defense apply to all offenses unless the legislature has specifically excluded it from them. As the Court of Appeals held, "Although the test formulated in Lovercamp seems reasonable, it would be an impermissible addendum to *section 9.22* requirements, in view of the language of that statute, for us to hold that the availability of the necessity defense is expressly conditioned upon the five elements set forth in *Lovercamp*." We therefore conclude that a person accused of escape need not present evidence of an attempted surrender before a necessity instruction is required, if some evidence otherwise complying with *§ 9.22* has been presented.

* The State Prosecuting Attorney argues that escape is a continuing offense. Therefore, if at any time while a defendant is in the status of an escapee the threat of imminent harm that made it immediately necessary for him to abscond should dissipate, the defense of necessity should not be available to him unless he immediately turns himself in. However, we have already rejected the State's premise. In *Lawhorn v. State, 898 S.W.2d 886, at 890 (Tex.Cr.App. 1995)*, we held that the offense of escape as defined in V.T.C.A. *Penal Code, § 38.07*, is *not* a continuing offense. As the statutes now plainly read, so long as a defendant presents evidence that his initial departure from custody was occasioned by the immediate necessity to avoid imminent harm, he is entitled to an instruction on the defense of necessity.

The judgment of the Court of Appeals is affirmed.

PER CURIAM

DELIVERED: January 10, 1996

EN BANC

White, J., concurs.

DISSENT BY: KELLER

DISSENT

DISSENTING OPINION ON STATE'S

PETITION FOR DISCRETIONARY REVIEW

The majority holds that an attempt to surrender is not a predicate to the necessity defense in a prosecution for the offense of escape. The majority reaches this conclusion by reasoning that, because escape is not a continuing offense, an inmate's departure may be justified merely by the circumstances that exist at the time he initially leaves custody, regardless of whether he attempts to return to custody after those circumstances dissipate. Under the majority's analysis, a convict is free to stay at large forever, so long as his initial departure was immediately necessary to avoid imminent harm. I disagree.

[*599] The necessity defense consists of three elements, all of which must be satisfied:

(1) the actor reasonably believes the conduct is immediately necessary to avoid imminent harm;
(2) the desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct; and
(3) a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear.

Texas Penal Code § 9.22. While the majority opinion clearly addresses the first and third elements, I believe that it has failed to properly take into account the second element. The second element requires an assessment of the policy reasons for taking a particular action and balances the interests of society versus those of the individual. In balancing these competing interests, I would submit that the harm the individual seeks to avoid in escaping custody never outweighs the harm the law seeks to prevent *unless* the individual returns (or attempts to return) to custody after the danger motivating his departure has passed.

The majority apparently believes that the balancing of interests can take into account only the facts that exist at the time the escape is complete. But, nothing in the language of the second element requires that the balancing of interests be limited to the timeframe in which the offense occurs. There exist examples in the Penal Code that expressly contemplate a defense being established by events occurring after the completion of an offense. The renunciation defense to solicitation must occur after all the elements of the solicitation offense are satisfied. *See Texas Penal Code § 15.04(b).* Moreover, the provision reducing the punishment for kidnapping if the victim is released in a "safe place" has been analyzed like a defense. *Williams v. State, 851 S.W.2d 282, 286 (Tex. Crim. App. 1993).* [1] Obviously, the "release in a safe place" must occur after the elements of the kidnapping are complete. [2]

1 In 1994, the legislature amended the statute to make the issue similar to an *affirmative* defense. *See Texas Penal Code § 20.04(c).* This amendment does not affect the analysis in this opinion.

2 I am aware that kidnapping is a continuing offense. The analogy still applies because, at some point in time, the kidnapping is complete while the elements of the defense do not yet exist. Hence, the defense applies retroactively to criminal activity that occurred before the defense was established.

The necessity defense is really the ultimate catch-all provision for criminal defenses. It is used to judge extreme situations that ought to constitute a defense but have not been specifically provided for by the legislature. While it may not always be appropriate to look beyond the timeframe of the offense itself when assessing competing interests, when it is appropriate, we should not hesitate to do so. I believe that this case presents the latter situation.

Although the issue appears to be one of first impression in Texas, [3] the Court's opinion is at odds with the majority of jurisdictions that have addressed the issue. Most jurisdictions (thirty) require an attempt to surrender or report to the authorities (assuming there is time to do so) as a precondition for asserting justification-type defenses: California, *People v. Lovercamp, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110, 115* (Cal. App., 4 Dist. 1974)(necessity); Federal, *United States v. Bailey, 444 U.S. 394, 413, 62 L. Ed. 2d 575, 100 S. Ct. 624 (1980)*(necessity and duress); Alabama, *Dietz v. State, 474 So. 2d 120, 125-126 (Ala. Crim. App. 1984), reversed on other grounds, 474 So. 2d 127 (Ala. 1985)*(duress); Alaska, *Wells v. State, 687 P.2d 346, 349-350 (Alaska App. 1984)*(necessity); Arizona, *State v. Wolf, 142 Ariz. 245, 689 P.2d 188, 191 (Ariz. App. 1984)*(duress); Colorado, *People v. McKnight, 626 P.2d 678, 681 (Colo. 1981)*(choice of evils); Connecticut, *State v. Woods, 23 Conn. App. 615, 583 A.2d 639, 642 (Conn. App. 1990)* [*600] (necessity); Delaware, *Johnson v. State, 379 A.2d 1129, 1131 (Del. 1977)*(justification); Florida, *State v. Alcantaro, 407 So. 2d 922, 925* (Fla App. 1 Dist. 1981), *pet. for review denied, 413 So. 2d 875 (Fla 1982)*(necessity or duress); Hawaii, *State v. Horn, 58 Haw. 252, 566 P.2d 1378, 1379-1380 (Hawaii 1977)*(choice of evils also known as necessity) [4]; Iowa, *State v. Reese, 272 N.W.2d 863, 866 (Iowa 1978)*(necessity); Kansas, *State v. Irons, 250 Kan. 302, 827 P.2d 722, 726 (Kan. 1992)*(compulsion); Louisiana, *State v. Boleyn, 328 So. 2d 95, 97 (La. 1976)*(necessity); Maryland, *Craddock v. State, 47 Md. App. 513, 424 A.2d 168, 169 (Md. App. 1981)*(necessity and duress); Mississippi, *Corley v. State, 536 So. 2d 1314, 1317-1318 (Miss. 1988)*(necessity); Montana, *State v. Ottwell, 240 Mont. 376, 784 P.2d 402, 404 (Mont. 1989)*(necessity); Nebraska, *State v. Reed, 205 Neb. 45, 286 N.W.2d 111, 114 (Neb. 1979)*(necessity or duress); Nevada, *Jorgensen v. State, 100 Nev. 541, 688 P.2d 308, 309-310 (Nev. 1984)*(necessity); New Jersey, *State v. Saxon, 226 N.J. Super. 653, 545 A.2d 255, 256 (N.J. Super. L. 1988), aff'd sub. nom., State v. Morris, 242 N.J. Super. 532, 577 A.2d 852* (N.J. Super. A.D.), *cert. denied, 122 N.J. 408, 585 A.2d 405 (N.J. 1990)*(duress); New York, *People v. Brown, 68 A.D.2d 503, 417 N.Y.S.2d 966, 972-973* (N.Y.A.D., 2 Dept. 1979)(justification also known as necessity); North Carolina, *State v. Watts, 60 N.C. App. 191, 298 S.E.2d 436, 437 (N.C. App. 1982)*(duress); Ohio, *State v. Cross, 58 Ohio St.*

those jurisdictions that hold escape *not* to be a continuing offense. Only in those jurisdictions does the idea of balancing competing interests hold any meaning.

Moreover, of the thirty jurisdictions imposing a surrender requirement, only seven do not rely upon *Lovercamp* in doing so: Federal, *Bailey*; Alaska, *Wells*, Mississippi, *Corley*, New Jersey, *Saxon*; Oklahoma, *Johnson* [**18] ; Wisconsin, *Herriges*, D.C., *Stewart*. [8] *See* authorities listed above. Not surprisingly, this list of seven contains three out of the four jurisdictions expressly relying upon the continuing offense rationale for imposing the requirement.

8 In *Wolf*, the Arizona court does not cite *Lovercamp* but relies upon Hawaii's decision in *Horn*, which does rely upon *Lovercamp*. 689 P.2d at 191. In *Brown*, the New York court held that its statute is the final benchmark on the parameters of the necessity defense but cited *Lovercamp* favorably. *417 N.Y.S.2d at 972.*

Several of the jurisdictions relying upon *Lovercamp* have carried the theme that the requirement to report to the authorities is a result of balancing the competing interests of the individual and society. Several states have emphasized that imposing a surrender requirement is necessary to minimize disruption of prison conditions. For example, the Arizona court stated:

Public policy considerations take the crime of escape beyond the standard duress defense....Because of the difficulties inherent in long-term housing and containment of criminals, a more stringent standard of duress, when applied to the crime of escape, is generally employed.

Wolf, 689 P.2d at 191 (ellipse inserted). A similar rationale has been elaborated in Connecticut:

To maintain order in state correctional facilities and court lockups, and to avoid an invitation for facile excuses to attempt escapes from custody, the application of the necessity defense must be strictly interpreted.

Woods, 583 A.2d at 642 (concluding that *Lovercamp* must be adopted to preserve these policy interests). The court expressly based its holding upon a balancing approach:

The rationale for applying more specific and stricter standards to the necessity defense in escape cases is to balance the public's interest in preventing escapes from legitimate detentions with the escaping prisoner's individual exigencies.

583 A.2d at 641. Similarly, the Iowa court remarked that imposing a surrender requirement "would at least in part answer [*603] the state's contention that the necessity defense would disrupt prison conditions." *Reese, 272 N.W.2d at 867*. Pennsylvania has also justified the imposition of a surrender requirement as an appropriate way to balance competing interests:

Thus, where a defense to escape is allowed, the important interest in public safety must be balanced against the prisoner's need to resort to self-help by requiring that the escapee return to custody as soon as he is no longer under duress. [Citing *Lovercamp*].

Commonwealth v. Brothers, 409 Pa. Super. 202, 597 A.2d 1164, 1169 (Pa. Super. 1991).

Clearly, at least some of these jurisdictions relied upon public policy considerations apart from the statutory language of the defense they were interpreting (especially for those jurisdictions interpreting the duress defense). We may well be more limited, as a *general* proposition, in interpreting our state's own statutory defenses. When a Texas statute is unambiguous, an appellate court must interpret it in accordance with the plain meaning of its words unless that interpretation would lead to absurd results. *Boykin v. State, 818 S.W.2d 782, 785-786* & 786 n. 4 (Tex. Crim. App. 1991). But, even if we were to hold *§ 9.22* to be unambiguous, subsection (2) plainly requires the balancing of the individual's interests against those of society. Unlike any other provision of the Penal Code, the necessity defense expressly mandates the application of public policy considerations. Moreover, such considerations need not be relegated to individualized factual determinations by criminal defendants. The balancing test "is a value determination. The defendant's belief is not necessarily relevant and certainly not controlling." *City of St. Louis v. Klocker, 637 S.W.2d 174, 175-176 (Mo. App. E.D. 1982)*(trespass at abortion clinic). Nor should this value judgment be relegated solely to the jury. In some well-established fact-patterns, the value determination should be addressed by the courts, especially where establishing a uniform requirement would help to appropriately balance the competing interests involved. The American Law Insti-

tute, in its commentary on the Model Penal Code, takes this exact approach, viewing the surrender requirement as dictated by the balancing prong of the necessity defense [9]:

> 9 The Model Penal Code's version of the defense is entitled "Justification Generally: Choice of Evils" and provides in relevant part as follows:
>
> (1) Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
>
> (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
>
> (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
>
> (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.
>
> American Law Institute, MODEL PENAL CODE AND COMMENTARIES, Part I, § 3.02 at 8 (1985).

The harm sought to be prevented by the law defining the offense may be viewed broadly enough to permit judicial attention to the effects on law enforcement of allowing the defense in the particular circumstances involved. For example a court could consider whether recognition of the defense when a prisoner has escaped to avoid assault would have the effect of substantially encouraging unjustified escapes. It may well be, however, that such possible encouragement could be sufficiently deflected by a requirement that actors who escape to avoid assaults must turn themselves in at the earliest safe opportunity. [Citing *Lovercamp*].

American Law Institute, MODEL PENAL CODE AND COMMENTARIES, Part I, § 3.02 at 12 n. 5 (1985).

Moreover, several states that rely upon *Lovercamp* for imposing a surrender requirement have statutory definitions of escape that are materially identical to the Texas definition. Compare the Texas definition with those in Arizona, Kansas, and Louisiana. [10] Although this writer is unable to ascertain [*604] whether or not these states consider the offense of escape to be "continuing," all three states rely upon *Lovercamp*, and as noted above, Arizona has expressly articulated a public policy basis for limiting the necessity defense.

> 10 Texas defines "escape" in relevant part as an "unauthorized departure from custody or failure to return to custody following temporary leave for a specific purpose or limited period...." *Texas Code of Criminal Procedure, Article 38.01(2).*
>
> Arizona defines "escape" as an "unauthorized departure from custody or from a correctional facility in which a person is held or detained with knowledge that such departure is unpermitted or failure to return to custody or detention following a temporary leave granted for a specific purpose or for a limited period." A.R.S.A., Vol. 5A, § 13-2501(4).
>
> Kansas defines "escape" as a "departure from custody without lawful authority or failure to return to custody following temporary leave lawfully granted pursuant to express authorization of law or order of a court." K.S.A., Vol. 2A, § 21-3809(b)(2).
>
> Louisiana defines "escape" in relevant part as: "The intentional departure of a person...from lawful custody of any officer of the Department of Corrections or any law enforcement officer or from any place where he is lawfully detained by any law enforcement officer." *La.R.S. 14:110*, A(1)(ellipse inserted). *See also Boleyn, 328 So. 2d at 96 n. 1.*

The above discussion illustrates the difference between the continuing offense cases (exemplified by *Bailey*) and the interest-balancing *Lovercamp* approach. While *Bailey* arrives at its conclusion by characterizing the *offense* of escape, *Lovercamp* arrives at its conclusion by characterizing the *defense* of necessity. Because the requirement to surrender (or attempt to do so) is contained within the balancing prong of the necessity defense, whether or not escape is a continuing offense is irrelevant. The interests of an escapee *never* outweigh the interests of society *unless* the escapee subsequently surrenders (or attempts to do so). I believe that the *Lovercamp* approach to the surrender requirement is both sound and supported by the great weight of authority. I would hold that a surrender or an attempted surrender (assuming there is an opportunity to do so) is a predicate to the necessity defense in an escape prosecution.

The cases of *Lawhorn v. State, 898 S.W.2d 886 (Tex. Crim. App. 1995)* and *Fitzgerald v. State, 782 S.W.2d 876 (Tex. Crim. App. 1990)* are distinguishable from the present case. In *Lawhorn*, the issue was whether escape could be an underlying felony for the offense of burglary of a habitation when a prisoner had departed from custody prior to entering the habitation. We held that the escape was complete upon departure from custody, and therefore, the escape was complete before the defendant entered the habitation. *898 S.W.2d at 890*. Because the escape was complete before the defendant entered the habitation, the escape could not serve as the underlying felony for burglary. *Id.* a 890-892. *Lawhorn* did not involve the necessity defense; the balancing of an individual's interests against those of society was not in issue. The surrender requirement relates only to whether an escape is justified by necessity -- not to when an escape occurs or is complete.

In *Fitzgerald*, this Court held that evidence of extraneous offenses committed after escape was not relevant to rebut the defendant's necessity defense. *782 S.W.2d at 883-885*. The opinion addressed the first prong of the necessity defense -- whether the defendant reasonably believed that his conduct was immediately necessary to avoid imminent harm. *Id. at 885*. We reasoned that an escapee's "reasonable belief" about the immediate danger must necessarily become fixed at the moment the offense of escape is complete. *Id.*

But the opinion in Fitzgerald does not address the *second* prong of the necessity defense -- whether the desirability and urgency of avoiding the harm clearly outweigh the harm sought to be prevented by the law. The second prong, requiring a balancing of individual and societal interests, is not limited to the time at which the offense is complete. Moreover, there is an important reason that the commission of extraneous offenses should not be relevant to the balancing test. The harm to be prevented by the law prohibiting escape is prisoners roaming at large in the community. While the commission of other crimes may result from a prisoner's roaming at large, that is not the harm to which the escape statute is specifically directed. Indeed, there are other statutes directed at these evils. But a prisoner who remains at large, after escaping an immediate threat to himself, directly [*605] implicates the very harm sought to be prevented by making escape a crime.

Because I believe that the harm the escapee seeks to avoid *never* clearly outweighs the harm the law seeks to prevent *unless* the escapee subsequently surrenders or attempts to do so (as long as he has the opportunity), I would reverse and remand accordingly.

I respectfully dissent.

CRAIG EMMETT MENDENHALL, Appellant v. THE STATE OF TEXAS

NO. 1089-00

COURT OF CRIMINAL APPEALS OF TEXAS

77 S.W.3d 815; 2002 Tex. Crim. App. LEXIS 119

June 12, 2002, Delivered

PRIOR HISTORY: ON DISCRETIONARY REVIEW FROM THE TENTH COURT OF APPEALS. FREESTONE COUNTY. *Mendenhall v. State, 15 S.W.3d 560, 2000 Tex. App. LEXIS 601 (Tex. App. Waco 2000)*

DISPOSITION: Affirmed.

COUNSEL: FOR APPELLANT: STAN SCHWIEGER, WACO AND BRIAN W. WICE, HOUSTON.

FOR STATE: ROBERT W. GAGE, COUNTY ATTORNEY, FAIRFIELD.

JUDGES: Holcomb, J., delivered the opinion of the Court, in which Keller, P.J., and Price, Womack, Hervey, and Cochran, JJ., joined. Meyers, Johnson, and Keasler, JJ., concurred in the result.

OPINIONBY: Holcomb

OPINION:

In this case, we must determine whether the Tenth Court of Appeals erred in holding that the trial court did not reversibly err in refusing to instruct the jury on the affirmative defense of insanity due to involuntary intoxication. We begin our discussion with a review of the relevant facts. n1 A Freestone County grand jury indicted appellant, Craig Emmett Mendenhall, for assaulting a public servant. *See Tex. Pen. Code § 22.01(b)(1)*. The case went to trial before a petit jury. At trial the State presented evidence that on March 6, 1997, appellant assaulted a deputy sheriff on duty during appellant's divorce trial. In his defense, appellant presented evidence, including his own testimony, to the effect that (1) approximately six weeks before the assault, appellant's physician informed him that he was diabetic and placed him on a daily regimen of insulin injections; (2) his physician told him little regarding the appropriate diet for control of his illness; (3) in the hours before the assault, he received an insulin injection but failed to eat much afterward, leading to a decrease in his blood sugar; (4) the assault occurred during a brief episode in which he was unconscious or semi-conscious due to hypoglycemia (*i.e.*, low blood sugar); and (5) he "did not knowingly, intentionally, or recklessly try to cause [the victim] harm."

> n1 We discuss only those facts essential to our decision today. The court of appeals' opinion contains a more elaborate discussion of the facts. *See Mendenhall v. State, 15 S.W.3d 560* (Tex.App.-Waco 2000).

At the close of the evidence, appellant asked the trial court to instruct the jurors on the defense of insanity due to involuntary intoxication, but the trial court refused. The trial court did instruct the jurors, however, that they could not convict appellant unless they believed beyond a reasonable doubt that his assaultive conduct was intentional, knowing, or reckless.

In closing argument, appellant argued that his "illness" was "the cause of him losing control" and that his assaultive conduct on the day in question was not intentional, knowing, or reckless. The jurors rejected appellant's argument and found him guilty as charged.

On appeal appellant argued that the trial court erred in refusing to instruct the jury on the insanity defense because there was some evidence that, at the time of the alleged offense, he was insane due to involuntary intoxication. The Tenth Court of Appeals agreed and held that the trial court erred in refusing to instruct the jury on the insanity defense

because the record contained some evidence that, at the time of the alleged offense, appellant was "incapable of conforming his conduct to the requirements of the law." *Mendenhall v. State, 15 S.W.3d 560, 566* (Tex.App.-Waco 2000). The court of appeals also held, however, that the trial court's error was harmless because the evidence raising the insanity defense was "tenuous" while the evidence undermining it was "substantial." *Id. at 567.*

We granted review of the court of appeals' decision, pursuant to appellant's petition for discretionary review, to determine whether the court of appeals erred in holding that the trial court's error in refusing to instruct the jury on the insanity defense was harmless. *See Tex. R. App. Proc. 66.3(b).* Later, on our own initiative, we granted review of the court of appeals' decision to determine, in the first instance, whether the court of appeals erred in holding that the trial court erred in refusing to instruct the jury on the insanity defense. *See Tex. R. App. Proc. 67.1.*

From 1974 to 1983, *Texas Penal Code § 8.01(a)* provided that "it is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of mental disease or defect, either did not know that his conduct was wrong or was incapable of conforming his conduct to the requirements of the law he allegedly violated." In *Torres v. State, 585 S.W.2d 746, 749 (Tex.Crim.App. 1979),* we held that the defense of insanity due to involuntary intoxication was "implicit" in the language of § 8.01(a). n2 In other words, we held that, under § 8.01(a), it was an affirmative defense to prosecution that, at the time of the alleged offense, the defendant, as a result of a mental defect caused by involuntary intoxication, either did not know that his conduct was wrong or was incapable of conforming his conduct to the requirements of the law he allegedly violated. We further held that, for the purposes of § 8.01(a), intoxication was "involuntary" if the defendant "exercised no independent judgment or volition in taking the intoxicant." n3 *Ibid.*

n2 Other jurisdictions have also held that their insanity statutes encompass the defense of insanity due to involuntary intoxication. *See* W. LaFave & A. Scott, *Substantive Criminal Law* § 4.10(f) (1986 & Supp. 2002).

n3 *But see* Annot., *When Intoxication Deemed Involuntary so as to Constitute a Defense to Criminal Charge, 73 A.L.R.3d 195, 199 (1976)* ("The courts have considered one to be involuntarily intoxicated when he has become intoxicated through the fault of another, by accident, inadvertence, or mistake on his part, or because of a physiological or psychological condition beyond his control.").

In 1983 the Legislature amended § 8.01(a) by adding the word "severe" and by deleting the words "either" and "or was incapable of conforming his conduct to the requirements of the law he allegedly violated." Section 8.01(a), as amended, now provides that "it is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of [*818] severe mental disease or defect, did not know that his conduct was wrong." Although the 1983 amendment to § 8.01(a) does not change our view that the Legislature intended § 8.01(a) to encompass the defense of insanity due to involuntary intoxication, the precise nature of that defense has clearly changed. It is now an affirmative defense to prosecution that, at the time of the alleged offense, the defendant, as a result of a severe mental defect caused by involuntary intoxication, did not know that his conduct was wrong. It is no longer an affirmative defense to prosecution that, at the time of the alleged offense, the defendant, as a result of a mental defect caused by involuntary intoxication, was incapable of conforming his conduct to the requirements of the law he allegedly violated.

In this case, the court of appeals held that the trial court erred in failing to instruct the jury on the defense of insanity due to involuntary intoxication. But, under § 8.01(a), is the insanity defense available to a defendant who was unconscious or semi-conscious at the time of the alleged offense, so that it might be said of him that he did not know his conduct was wrong only because he did not consciously know of his conduct at all? We conclude the answer to that question is "no."

We have carefully reviewed the legislative history of § 8.01(a), and nothing in it suggests that any legislators intended for the insanity defense to apply to persons who were unconscious or semi-conscious at the time of the alleged offense. See *Boykin v. State, 818 S.W.2d 782 (Tex.Crim.App. 1991).* Also, the fact that two other defenses - the no-mental-state defense and the no-voluntary-act defense - are readily available to persons who were unconscious or semi-conscious at the time of the alleged offense suggests that the Legislature did not intend for the insanity defense also to apply to them. That is, persons who were unconscious or semi-conscious at the time of the alleged offense may argue either that they lacked the *mens rea* necessary for criminal liability, *see Tex. Pen. Code § 6.02(a),* or that they did not engage in a voluntary act, *see Tex. Pen. Code § 6.01(a).* n4 See *Alford v. State, 866 S.W.2d 619, 625 (Tex.Crim.App. 1993)* (Clinton, J., concurring) ("voluntary" act means conscious act).

n4 In their treatise on criminal law, Professors LaFave and Scott explain:

A defense related to but different from the defense of insanity is that of unconsciousness, often referred to as automatism: one who engages in what would otherwise be criminal conduct is not guilty of a crime if he does so in a state of unconsciousness or semi-consciousness. Although this is sometimes explained on the ground that such a person could not have the requisite mental state for commission of the crime, the better rationale is that the individual has not engaged in a voluntary act.

W. LaFave & A. Scott, *Substantive Criminal Law* § 4.9 (1986).

The court of appeals erred in holding that the trial court erred in failing to instruct the jurors on the affirmative defense of insanity due to involuntary intoxication. Consequently, we need not consider the court of appeals' determination that the trial court's "error" was harmless. n5

n5 Since appellant's petition concerns the court of appeals' harmless error analysis, we dismiss it as improvidently granted. *See Tex. R. App. Proc. 69.3.*

We affirm the judgment of the court of appeals.

JAMES EUGENE BIGBY, Appellant v. THE STATE OF TEXAS, Appellee

No. 71,234

COURT OF CRIMINAL APPEALS OF TEXAS

892 S.W.2d 864; 1994 Tex. Crim. App. LEXIS 116

November 2, 1994, Delivered

SUBSEQUENT HISTORY:

As Amended November 10, 1994. As Corrected November 16, 1994. Second Amendment December 7, 1994. Second Correction April 19, 1995. Rehearing denied by, 12/07/1994
US Supreme Court certiorari denied by *Bigby v. Texas, 515 U.S. 1162, 132 L. Ed. 2d 860, 115 S. Ct. 2617, 1995 U.S. LEXIS 4346 (1995)*
Habeas corpus proceeding at, *Remanded by Bigby v. Cockrell, 2003 U.S. App. LEXIS 15007* (5th Cir. Tex., July 28, 2003)

PRIOR HISTORY:

Appeal from Criminal District Court No. 3 of Tarrant County, Tx.

DISPOSITION:

The judgment of the trial court is affirmed.

COUNSEL:

For Appellant: David L. Richards, Michael Logan Ware, Fort Worth, Tx.

For Appellee: Tim Curry, D. A. & Charles M. Mallin & Robert Mayfield, Asst. D. A's., Fort Worth, Tx., Robert Huttash, State's Attorney, Austin, Tx.

JUDGES: EN BANC. Meyers, Judge --- White, Judge concurring opinion joined by Presiding Judge McCormick & Judges Miller, Overstreet & Maloney --- Baird, Judge concurring opinion joined by Miller, Judge --- Clinton, Judge dissenting opinion, Judge Campbell not participating

OPINIONBY: MEYERS

OPINION:

Appellant was found guilty of capital murder on March 12, 1991, for the murder of a father and his infant son. Tex. Penal Code. Ann. § 19.03(a)(6) (West 1990). The jury affirmatively answered the submitted special issues, and the trial court sentenced appellant to death. *Tex. Code Crim. Proc. Ann. art. 37.071(b)* (West 1990). Appeal to this court is automatic. *Tex. Code Crim. Proc. Ann. art. 37.071(h)* (West 1990). We will affirm.

I. SUFFICIENCY OF THE INSANITY DEFENSE

In the first point of error, appellant contends the jury's rejection of his insanity defense at trial was so against the great weight and preponderance of the evidence as to be manifestly unjust. At trial a criminal defendant has the burden to prove his insanity by a preponderance of the evidence and, in this case, appellant mounted a considerable insanity defense. *Tex. Penal Code Ann. § 8.01(a)* and § 2.04(d); *Meraz v. State, 785 S.W.2d 146, 154 (Tex. Crim. App. 1990).*

The State argues that this Court does not have the power to conduct a factual review of this nature, and in the alternative, that the evidence is not so against the great weight and preponderance so as to be manifestly unjust.

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B. FACTUAL REVIEW

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Appellant killed his friend, Mike Trekell, and his friend's sixteen month-old son, Jayson, sometime after 6:00 p.m. on December 23, 1987. On December 26th appellant was apprehended at a motel in Tarrant County. Acting on information of appellant's whereabouts, the police dispatched a S.W.A.T. team and a negotiator to the motel. The negotiator, Detective Ansley, contacted appellant through the door of appellant's room. Eventually, appellant cracked the door, and the two spoke. Appellant said to the detective, "I know I am guilty and so do you." Detective Ansley, unsure if he had heard appellant correctly, asked appellant to repeat the statement. Appellant did. After further negotiations, appellant surrendered and was arrested. Subsequent to his arrest, appellant confessed:

> for the past 14 months I have felt that Mike [Trekell) has been conspiring against me and trying to discredit me concerning a lawsuit I have against Frito Lay. I had been thinking about getting back at him for a while and it has been on my mind when I -- and it was on my mind when I came to his house that night. While Mike was fixing the steaks I went over by him, and the next thing I knew I shot Mike with a Ruger .357 Magnum, with 158 grain silver tips. When I shot Mike he was sitting at the kitchen table. He never saw the gun and didn't know I was going to shoot him.
>
> I don't know why, but after I shot Mike I took some cellophane from the refrigerator and went into Jayson's room. I wrapped the cellophane around Jayson's head and suffocated him. I then filled the sink up with water and placed Jayson face down into the water. I just left him there.
>
> I then left the trailer and got into my car and drove around for a while. I threw the cellophane out but I am not sure where. After I got to the motel room I couldn't sleep. I took a lot of medication trying to force sleep on myself. I was disturbed and kept thinking about what I had done to the baby. It bothered me a lot. I regret killing the baby but not the other. I thought the police would come in the apartment and shoot me.

There is no disagreement by the parties at trial that appellant was suffering from a delusion concerning his former employer, Frito Lay, and its worker's compensation insurance company. The nature and effects of this delusion and whether appellant knew his conduct on Christmas was wrong were contested issues in the trial.

In 1985, appellant began working for the Frito Lay Company. He assisted in the maintenance of their fleet of delivery trucks. After a year on the job appellant injured his back. Because of the incapacitating effects of the injury, he filed a worker's compensation claim with Frito Lay. This claim eventually erupted into a lawsuit between the parties.

Appellant became convinced that Frito Lay and its worker's compensation insurance company were conspiring against him to prevent any collection on his claim. Appellant believed that he had gathered enough data on the insurance company to have the company suspended from operating in Texas, and as a result, the insurance company was prepared to "take him out." The number of "conspirators" grew slowly eventually including some close friends and family members. The defensive theory of insanity was that appellant killed Trekell to protect himself from these conspirators.

As time progressed after his accident so did appellant's paranoia. Appellant informed his father, a former postal worker, that the conspirators were trying to kill him by infusing through the air conditioning vent of his apartment a poisonous "green gas." He also told his father that his apartment was "bugged," or electronically monitored. His father testified that the alleged recording devise was actually a connecting block for a modular telephone. Despite all the evidence of paranoia, appellant's father believed appellant knew the difference between right and wrong.

Both of appellant's civil worker's compensation attorneys testified at trial. His first attorney withdrew because of appellant's financial demands and because of appellant's desired increased role in the investigation of the case. Appellant had informed this attorney that Frito-Lay had people following him.

Appellant's second attorney had also been informed by appellant of his beliefs that certain Frito-Lay people were following him, trying to poison him through the emission of a poisonous green gas, and recording his conversations. During the attorney's representation of appellant, appellant rammed his car into the automobile of one of the insurance investigators who had been following him. Criminal mischief charges were filed against appellant on this basis, and he plead guilty. Appellant's worker's compensation attorney filed a motion for new trial to set aside that plea on the basis that appellant was not competent when he entered the plea of guilty. In only a few instances in his seventeen years as an attorney, had he thought a client was insane or incompetent and filed the necessary pleadings.

There was considerable psychiatric evidence introduced at trial. Five different psychiatric professionals testified during the trial concerning appellant's past and present mental condition. Appellant's psychiatric treatment began in 1986 when he first was referred to a psychiatrist, Dr. Eudaly, Jr., by his medical doctor, Dr. Saifee. In September of 1986, appellant was admitted for severe depression to the psychiatric floor of Saint Joseph Hospital. This was the first of appellant's three separate hospitalizations for psychiatric care prior to the commission of the crime at issue today.

At St. Joseph appellant was diagnosed as having a schizoaffective disorder. n6 This diagnosis was ruled out after appellant's second hospitalization. Appellant was released in October, and Dr. Eudaly continued to meet with appellant every three to four weeks. Appellant also began seeing Dr. Koechel once a week.

n6 Dr. Eudaly testified that "schizoaffective disorder" is a "term that is used to designate a condition which has some mixed features. Primarily it's in the category of emotional disturbance such as depression, but it's also used to indicate that there probably is some element of thinking disturbance associated with their present condition."

Appellant was admitted in July of 1987 to Oak Bend Hospital. He remained there until mid-October of 1987. There was some evidence at trial that his departure was premature and may have been due to appellant's lack of insurance and not his mental improvement. n7

n7 There was considerable testimony concerning a drug, Prolixin, prescribed at Oak Bend. Several of the mental health experts testified, including Dr. Eudaly, that Prolixin was generally prescribed to treat psychotic symptoms and specifically schizophrenia. This was the reason the drug was prescribed upon appellant's first hospitalization. However, in this instance Dr. Eudaly prescribed Prolixin for use as a booster for the antidepressant drugs which had also been prescribed. When appellant was arrested at the hotel he was in possession of nine prescription medications including Prolixin.

In December of 1987, appellant was re-admitted to Saint Joseph where he undertook a series of electro-shock therapy. This type of therapy, Dr. Eudaly testified, was employed when medical treatment has failed. Some time after appellant's third and final electro-shock treatment, appellant left the hospital and returned to his home. He phoned the hospital to inform the nursing staff that he no longer needed treatment. When so informed, Dr. Eudaly indicated that he believed appellant's exit was premature, however, he decided to wait a day to see if appellant would change his mind. The next day Dr. Eudaly and appellant spoke over the phone concerning appellant's status. After their discussion Dr. Eudaly dismissed appellant from the hospital's care.

Later that month appellant killed his friend Trekell and Trekell's infant son. Dr. Eudaly testified that appellant did not "suffer from a severe mental disease or defect such that he could not tell or did not know his conduct was wrong."

Appellant's three other expert witnesses, doctors Griffith, Grigson, and Finn, all testified to the contrary. Each said that appellant was suffering from a severe disease or defect such that he could not or did not know his conduct was wrong. The State also had an expert, Dr. Coons, who testified that appellant was legally sane. Much of the "battle of the experts" involved disputes concerning the prescription of certain drugs and whether, as Dr. Coons testified, appellant's hallucinations were in fact the result of amphetamine abuse. Appellant had a past history of amphetamine abuse, although the extent of this abuse was uncertain.

While several of appellant's experts testified that appellant could not or did not know his conduct was wrong, several did testify that appellant knew his conduct was illegal. This is also supported by appellant's first statements to Detective Ansley at his apprehension. Appellant stated, "I know I am guilty and so do you." This evinces an understanding by appellant that he knew his conduct was illegal, whether or not he believed it to be or would have characterized it as "wrong."

C. LAW OF INSANITY

Section 8.01 of the Penal Code provides for the affirmative defense of insanity:

> (a) It is an affirmative defense to prosecution that, at the time of the conduct changed, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong.

The issue of insanity is not strictly medical; it also invokes both legal and ethical considerations. See *Graham v. State, 566 S.W.2d 941, 948-949 (Tex. Crim. App. 1978)* (en banc); *Taylor v. State, 856 S.W.2d 459, 468-469* (Tex. App.--Houston [1st Dist] 1993, pet. granted). In deciding the ultimate issue of sanity, only the jury can join the non-medical components that must be considered in deciding the ultimate issue. *Graham, 566 S.W.2d 941 at 949.* Otherwise the issue of sanity would be decided in the hospitals and not the courtrooms. Ibid. "Ultimately the issue of insanity at the time of the offense excusing criminal responsibility lies in the province of the jury, not only as to the credibility of the witnesses and the weight of the evidence, but also as to the limits of the defense itself." *Id., at 952.* However, this does not preclude a factual review of the jury's determination. As this Court stated in Graham,

> The limits of many defenses are left to the jury. Such limits are usually expressed in terms that leave to the jury the application of norms that are not readily susceptible to reduction to a concise factual formula. The jury in this sense participates in determining the law as well as the facts. Many defenses exhibit this characteristic through the incorporation of a standard of "reasonable belief." [cites omitted.] According to the standard and the scope of the issue, the degree of discretion accorded the jury in resolving the issue on undisputed facts will vary. Before such a decision may be overturned on appeal, the fact issue must be undisputed or resolved to one end of the spectrum, and that fact determination must be found to lie outside the realm of discretion accorded the jury under the applicable standard, be it "reasonable belief," "reasonable firmness," "likely to cause," or some other.

566 S.W.2d at 952, n. 3.

In the instant cause both the State and the defense produced medical experts who testified concerning appellant's sanity at the time he committed the crime. Appellant's father testified that he believed appellant knew the difference between right and wrong when he committed the multiple murders. This evidence of sanity is also buttressed by appellant's own statements upon his arrest at the motel. Appellant informed the officer that he knew he was guilty. There is no question that appellant's evidence of his delusions was extensive. However, this does not resolve the question of appellant's "legal" sanity. The jury's determination of the fact issue of sanity does not appear to be resolved or undisputed to one end of the spectrum, nor does that determination appear to be beyond the realm of discretion afforded to the jury. See *Graham, 566 S.W.2d at 852.*

Several expert witnesses testified appellant knew his conduct was illegal, however, these experts contended that appellant did not know the act was "morally" wrong. In other words, appellant believed that regardless of society's views about this illegal act and his understanding it was illegal, under his "moral" code it was permissible. This focus upon appellant's morality is misplaced. The question of insanity should focus on whether a defendant understood the nature and quality of his action and whether it was an act he ought to do. *Zimmerman v. State, 85 Tex. Cr. R. 630, 215 S.W. 101, 105 (1919)* (on rehearing). By accepting and acknowledging his action was "illegal" by societal standards, he understood that others believed his conduct was "wrong." n8

> n8 Appellant's argument and his expert's testimony present a stronger defense under the old insanity defense. Prior to 1983 it was a defense to a crime if a defendant knew his conduct was "wrong," but nevertheless he was incapable of conforming his conduct to the requirements of the law. *Tex. Penal Code Ann. § 8.01* (1974). However, this defense was eliminated in August of 1983.

Therefore, upon our review we do not believe the evidence preponderates to such an extent in favor of appellant that the jury's implicit finding was so against the great weight and preponderance of the evidence that it was manifestly unjust. Appellant's first point of error is overruled.

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The judgment of the trial court is affirmed.

MEYERS, Judge

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DELIVERED: November 2, 1994

Campbell, J., not participating.

CONCURBY: WHITE; BAIRD

*****concurring opinions deleted*****