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Jury Instructions

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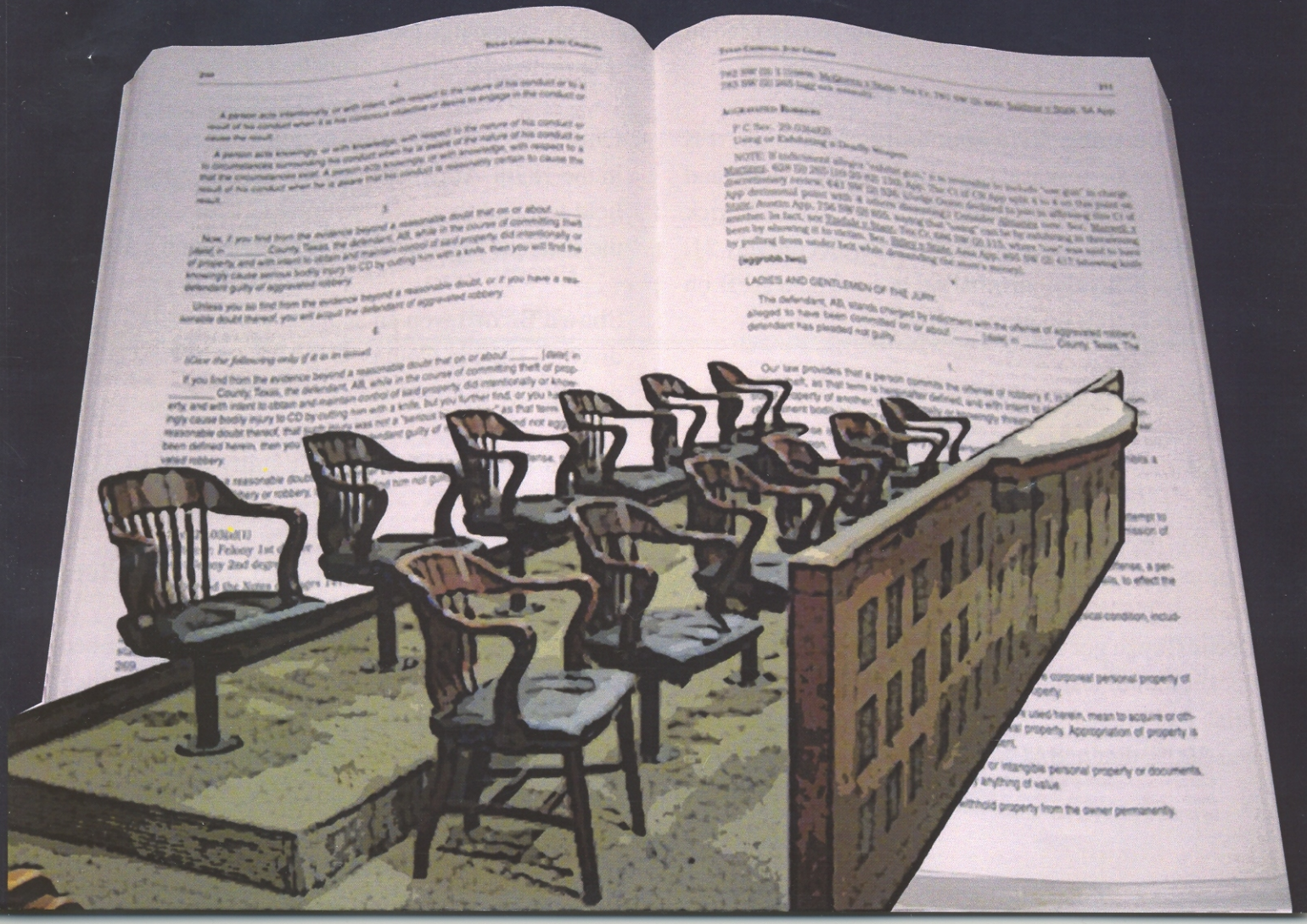

THE RED-HEADED STEP-CHILD:
JURY CHARGE PRACTICE IN TEXAS CRIMINAL CASES

Mark Stevens

> I'm no idealist to believe firmly in the integrity of our courts and in the jury system – that is no ideal to me, it is a living, working reality. Gentlemen, a court is no better than each man of you sitting before me on this jury. A court is only as sound as its jury, and a jury is only as sound as the men who make it up. I am confident that you gentlemen will review without passion the evidence you have heard, come to a decision, and restore this defendant to his family. In the name of God, do your duty.[1]

No doubt about it, jury charge practice gets little respect from Texas criminal lawyers. It's largely a matter of timing. After both sides rest and close, we think about one thing, and one thing only: the final argument. We are channeling Atticus Finch. That's why we became trial lawyers. We're just not cut out (we insist) for plowing through a long, dry jury charge to determine if it "distinctly set[s] forth the law applicable to the case,"[2] or if it improperly comments on the weight of the evidence, or if it does whatever else it should or should not do. Especially not in those last few precious moments when we struggle to come up with just the right phrase or sentence that will cut the heart out of the prosecutor's case.

That's what we tell ourselves, anyway. Let me suggest that the lowly jury charge deserves better. While the final argument is certainly an important and a dramatic persuasive tool, the court's charge is also an indispensable vehicle for delivering your defensive theories to the jury. And, just in case the jury does not return the two-word verdict you want, a charge error might save you on appeal. This paper offers a few practice tips that are easy to do, that will improve your approach to jury charge issues, and that won't at all diminish the power of your final argument.

1.
Don't Wait To The Last Minute To Work On The Charge

Here's what happens in courtrooms around this state, probably every day: Shortly after the evidence concludes, just as you are putting the final touches on the summation you are about to make, the bailiff slides the court's proposed charge across the table to

you. "Oh, yeah, the jury charge," you suddenly remember. Maybe you glance at it and spot a few typos. Quickly, though, you shove it aside to get back to the fun stuff, the stuff that will be quoted in tomorrow's newspaper. The stuff they write novels about. Argument. Nobody ever wrote a novel about a jury charge.

Later, though – when the judge is reading the charge to the jury, or when the prosecutor is quoting from it in her argument, or when you read the writ of habeas corpus that claims you were ineffective – you realize for the first time that something crucial was misstated or missing entirely from the charge, and that your case was gutted as a result. Then, of course, it's too late.

So don't wait to the last minute to think about the charge. Start much earlier. Start well before trial begins. If you have a self-defense case, look at the various statutory defenses provided in chapter 9 of the Penal Code, and the cases annotated under those statutes. Consult useful secondary sources.[3] Go to the form books (which are discussed later in this paper) and prepare your own proposed jury instructions on issues important to your case. Don't assume that the court's proposed charge will submit the issues that you need - the way you need them submitted - to win your case.

Even if you are exceptionally fast on your feet, and also willing to quit working on your argument just before you are about to argue, it is a bad idea to wait to the end to think about the charge. If you don't know how the case should be submitted to the jury in order for you to win, you can't do any of those things that must be done for you to win. You cannot effectively investigate, negotiate with the state, advise your client, file and litigate pre-trial motions, voir dire the jury, cross-examine witnesses, or direct your own witnesses.

While preparing this paper I spoke with probably the best writ lawyer in Texas and he mentioned a case he is litigating now. It was a murder case tried several years ago in another city that got national attention at the time. From the beginning, the trial lawyer's sole defense was "accident," and he selected the jury and developed the evidence accordingly. When he requested a jury charge, though, the judge and the prosecutor informed him – probably for the first time – that our appellate courts had long ago explicitly and decisively determined there was no longer a defense of "accident" in Texas.[4] Unfortunately for the lawyer, and for his client, no charge on accident was given, no defense of accident was argued, and no one was found "not guilty" that day.

You don't want to be where this trial lawyer will be soon – on the witness stand in a highly publicized writ hearing being asked by a very aggressive lawyer why you built your entire "defense" around a theory that has not been a defense in Texas for 35 years. Find out early on if you have instructions, or definitions, or theories you need submitted

to the jury to win your case, and make sure that the law entitles you to their submission.

2.
If You Don't Get The Charge You Want, Object

Experienced criminal lawyers are rarely surprised when the trial court refuses some or all of the instructions they think themselves entitled to. When this happens (not *if* it happens) it helps to know how to preserve error. There are several different methods.

a. Objections, written or dictated

You may object to the charges the trial court gives or refuses to give, "in writing, distinctly specifying each ground of objection." [5] The requirement of a written objection is also satisfied if dictated to the court reporter, in the presence of court and prosecutor, before the charge is read to the jury.[6]

b. Special requested jury instructions

And you may, but you don't have to, submit a special requested jury instruction. This can also be done in writing, or by dictation to the court reporter.[7]

I lodge some sort of protest in almost every case I try, either by objection or special requested jury instruction. I have seen lawyers submit an *entire* "Court's Charge," complete from beginning to end, with all the definitions, instructions, boilerplate, and verdict forms the defense proposes. I never do that. For one thing, it is a waste of time; most trial courts neither want nor need that much help from the defense and can be trusted to get at least some of the submissions correctly. For another, this is an inferior way to preserve error. Don't ask the appellate courts to read through your entire proposed charge to determine if only a small part of it should have been given. I believe it preferable to submit, either in writing or by dictation, special requested jury instructions which target specific issues not given, or given improperly, by the court. A sample special requested jury instruction submitting a proposed instruction on the defendant's failure to testify is included as Appendix A.

c. Limiting instructions

Judges are required, when requested, to give an appropriate limiting instruction when they admit evidence which is admissible to one party but not another, or for one purpose, but not another.[8] When two defendants are jointly tried, and a piece of evidence, say a confession, is admissible against one, but not the other, the judge must give a limiting instruction that "restrict[s] the evidence to its proper scope."[9] When an

extraneous offense is admitted against a defendant for some limited purpose under Rule 404(b), the judge must, when requested to do so, instruct the jury only to consider the evidence for the appropriate limited purpose.

In *Rankin v. State*, the court of criminal appeals decided that a party has a right to have the jury instructed *contemporaneously*, as soon as the limited evidence comes in, as well as at the end of the case, in the court's charge. "Limiting instructions given for the first time during the jury charge thus do not constitute an efficacious application of Rule 105(a) since it allows for the possibility that evidence will be used improperly in clear contravention to the purpose of the rule."[10]

Whether to request a contemporaneous limiting instruction rightfully should be a strategy decision. In some cases, you might agree with the court in *Rankin* that a contemporaneous instruction is the only way to meaningfully limit the evidence. Other times, though, a good lawyer might reasonably fear that a contemporaneous instruction will only draw undue attention to damaging evidence, thereby causing more harm than good to the defendant. Strategy decisions are always tough, but even more than usual here, due to a line of cases beginning with *Hammock v. State*.[11] There, because "appellant failed to request a limiting instruction when he first had the opportunity to do so, [the witness's] testimony concerning appellant's prior jail experiences was admitted for all purposes. . . . [Hence] a limiting instruction on the evidence in the charge was not warranted." The danger after *Hammock*, then, is that a strategy decision to forego a contemporaneous limiting instruction might result later in an inability to complain about the omission of this instruction from the jury charge. Beware.

d. Put your objections and requests on the record

Remember, an error is not an error unless it is recorded by the court reporter. Trial courts frequently prefer to discuss the jury charge informally, off the record, and there is usually no need to decline an invitation to do so, initially. You must be diligent, though, to assure that, once the informal discussions are completed, any remaining objections to the charge are put on the record.

e. Don't object until all the evidence is in

Sometimes a prosecutor or judge will ask you to disclose defenses or strategies prematurely, before the evidence is closed, so that they can immediately begin work on the charge. "Counsel, tell me if your client is going to testify, so that, if he's not, we can prepare a failure-to-testify charge." Or: "Counsel, do you anticipate requesting a charge on defense of third persons?"

You must firmly resist these efforts to have you prematurely disclose information about your case. Premature disclosure gives the prosecutor an advantage she is not entitled to. And with all due respect to the time-conscious court, it is usually no concern of yours whether the jury charge is given at 3:00 p.m. or 3:30 p.m.

Not only do you have a right not to prematurely disclose your strategies, you cannot possibly *know* what your objections or requests to the charge will be until both sides have rested and closed, and you should not make any objections or requests before then. If the *judge* persists, and you feel that further resistance on your part will end up hurting your client, offer to submit whatever jury instructions you are confident will be requested, *in camera*, with no disclosure to the prosecution.[12] If this reasonable request does not satisfy the judge, let her hold you in contempt and call SACDLA's Strike Force to defend you.

3.
Some Good Charge Objections

Article 36.14 of the Code of Criminal Procedure says that the court's charge should "distinctly set[ ] forth the law applicable to the case; not expressing any opinion as to the weight of the evidence, not summing up the testimony, discussing the facts or using any argument in his charge calculated to arouse the sympathy or excite the passions of the jury." There are many ways a charge can be objectionable. Here are just a few:

a. Commenting on the weight of the evidence

Although I have not done a mathematical analysis, it seems to me that "comment on the weight of the evidence," has long been the most successful jury charge objection on appeal. Candidly, I'm not exactly sure what it means. If the purpose of the jury charge is to "clearly apply the law to the very facts of the case," [13] it may be that every charge comments on the evidence, to some extent at least. In any event, this is my default objection: When I can't think of any other objection to something I don't like in a jury charge, I object that it is a comment on the weight of the evidence.

The most recent case from the court of criminal appeals is *Bartlett v. State*.[14] There the court held that the trial court impermissibly commented on the weight of the evidence when it instructed the jury that it could consider the defendant's failure to take the breath test. "By singling out that evidence, the trial court violated Articles 36.14, 38.04, and 38.05 of the Code of Criminal Procedure and committed a jury-charge error."[15] *Bartlett* identified three circumstances when it is appropriate to single out evidence: when the law directs the attachment of a certain amount of weight to evidence, such as accomplice witness testimony, or evidence admitted for a limited purpose; when the law

has created a statutory presumption; and, when evidence is contingent on the admissibility of certain facts that it is up to the jury to decide. Evidence not in one of these three categories should not be singled out. "A judicial instruction that singles out a particular piece of evidence, but does not serve one of the legally authorized purposes set out above, risks impinging upon the 'independence of the jury in its role as trier of the facts, a role long regarded by Texans as essential to the preservation of their liberties.' Even a seemingly neutral instruction may constitute an impermissible comment on the weight of the evidence because such an instruction singles out that particular piece of evidence for special attention."[16]

b. Failure to distinctly apply the law to the facts of the case

Jury instructions are supposed to instruct on the law, not the facts. In *Daniell v. State*, [17] the jury sent a note at the punishment phase asking which "local correctional facilities" were available, and the trial court answered that it was not aware of any in that county, but that some may be available nearby. The court of criminal appeals said that was an impermissible comment on the weight of the evidence. "This instruction was not of a legal nature, but was a factual matter."[18]

c. Authorizing conviction on theory not alleged in charging instrument

In *Dowden v. State*, the charge quoted the entirety of the robbery and aggravated robbery statutes, including portions that were neither pled in the indictment, nor proven at trial. "This practice at best is useless and at worst may confuse and mislead the jury and, therefore, prejudice a defendant. This Court in the past has had occasion to caution against the enumeration in the charge of portions of a statute that could not be relied upon for a conviction." [19]

d. Result-oriented crimes should not be submitted as nature-of-conduct crimes.

The trial court errs when it instructs the jury in a result-oriented crime, such as injury to a child, that it can also convict based on the nature of conduct.[20]

4.
Hard Arguments, And Soft Ones

The primary purpose of a "hard" argument is to persuade. The "soft" argument is meant to preserve error.

a. When to argue hard

Often the trial court's decision to give or refuse a defensive instruction is crucial; if you don't get the instruction you have no real chance of winning. For example, if your client is charged with unlawful carrying a weapon and the only defense you put on at trial is that he was "traveling," you are likely to lose if you don't get an instruction that traveling is a defense. I have had just this sort of case.[21] Other times I have been desperate for instructions on self-defense, accomplice witnesses, or certain lesser included offenses. In these case-dispositive situations you must argue "hard" for the instructions. Prepare a written special requested jury instruction that submits the issue exactly as you want it submitted. Find cases that support your position and bring copies for the court and prosecutor. Remind the judge of the "well-known legal principle that a defendant is entitled to an affirmative defensive instruction on every issue raised by the evidence, regardless of whether it is strong, feeble, unimpeached, or contradicted, and even if the trial court is of the opinion the testimony is not entitled to belief."[22]

b. When to argue soft

On the other hand, there are times when you might believe that the trial court's proposed instruction is erroneous, but that the erroneous instruction is more likely to impress an *appellate court* than a correct charge on the same subject would help you persuade the *jury* at trial. For example, your client might be charged with something that is clearly a "result" oriented crime, such as murder.[23] If the judge insists on instructing under both "result," and "nature of conduct" theories, you might validly believe that this is certain error on appeal, and therefore likely to win a reversal, but of relatively minor importance to a jury, and therefore unlikely to matter if corrected.[24] In such a case, you might choose to argue "soft." Make a timely and specific objection, but don't worry about bringing copies of supporting cases to court. If the trial court is unpersuaded by your soft argument, stop talking, and raise it on appeal if your client is convicted.

5.
Make Sure You Have Enough Time To Read The Court's Proposed Charge

Article 36.14 guarantees you a "reasonable time to examine the" charge before it is read to the jury. [25] Obviously, "reasonable" will depend on the length and complexity of the charge in question. Judges are sometimes anxious to wrap up the case by the time it

gets to the charge conference, so keep this statute in mind if you feel you are being rushed.

The more preparation you have done on the charge, the less time you will need to spend on it when the judge is breathing down your neck. Whenever I am trying an unfamiliar offense, or if I'm in a court I've never been in before, I try to get a copy of a charge that court has used in a recent case involving the same offense, before the trial begins.

When you finally do get to read the court's proposed charge in your case, read it carefully. Never take it for granted that the charge will be error-free. Not even the most basic components are safe. Surprisingly, there are a number of appellate decisions involving the trial court's inadvertent failure to include a "not guilty" verdict form with the charge.[26] Clearly the trial lawyers in those cases never looked at the verdict forms, no doubt having just assumed that the court would not forget something so important. You most certainly don't want to be memorialized forever in the Southwestern Reporter as the trial lawyer who let that happen.

6.
Argue The Charge

Hopefully, the court's charge in your case will submit all your defensive instructions and issues just as you want them submitted. When this happens, let the jury know that this is the "court's charge." It is one thing for you, the advocate, to explain the law of self-defense to the jury. It is much more effective to hold up a copy of the court's charge in your argument and remind the jury that "Judge Harle is the judge of the law, the expert on the law, and that *Judge Harle* tells you that 'in determining the existence of real or apparent danger, you should consider all the facts and circumstances in evidence before you, all relevant facts and circumstances surrounding the killing, if any, the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the defendant at the time, and, in considering such circumstances, you should place yourselves in the defendant's position at that time and view them from her standpoint alone.'"

Even if you don't get all the instructions you want, every charge contains useful boilerplate, such as an instruction explaining that the prosecutor has the burden of proving the case beyond a reasonable doubt. Again, it is one thing for the advocate to argue that she has no burden of proof. I would much rather remind the jury that, "it's not me, it's *Judge Garrahan* who tells you that "the law does not require a defendant to prove her innocence or produce any evidence at all."

7.
Fundamental Error Lives

Once upon a time criminal defense lawyers talked about "laying behind the log." This meant that on some issues we could choose not to object at all at trial, then raise the issue for the first time on appeal, and win, if the issue was both meritorious and "fundamental." Although Texas law still claims that "fundamental errors affecting substantial rights" may be raised on appeal even though not raised in the trial court, [27] as a practical matter, almost nothing has been found to rise to the level of "fundamental."

One well-accepted exception to the disappearance of fundamental error jurisprudence is found in jury charge law. In *Almanza v. State*,[28] the court of criminal appeals wrote this:

> we have concluded that Article 36.19 actually separately contains the standards for both fundamental error and ordinary reversible error. If the error in the charge was the subject of a timely objection in the trial court, then reversal is required if the error is "calculated to injure the rights of defendant," which means no more than that there must be some harm to the accused from the error. In other words, an error which has been properly preserved by objection will call for reversal as long as the error is not harmless.
>
> On the other hand, if no proper objection was made at trial and the accused must claim that the error was "fundamental," he will obtain a reversal only if the error is so egregious and created such harm that he "has not had a fair and impartial trial"-in short "egregious harm."[29]

Since *Almanza* was decided in 1984, hundreds of decisions have been written distinguishing the notions of "egregious" and "some" harm, and it is beyond the scope of this paper to even summarize that discussion here. Two points, though, are important.

First, although there are a number of cases that have been reversed for egregious error where there was no trial objection, you should never, ever, try to "lay behind the log" in your trial, confident that you can win on appeal without objection. Courts strongly disfavor reversing without objection, and will resist doing so in your case too, if there is any way to do so. *It will rarely, if ever, be a smart trial strategy to purposefully fail to object at trial to an erroneous jury instruction.*

Second, if you handle a case on appeal, hopefully one tried by someone else, and you think a charge was given or refused erroneously, but there was no objection below,

look to *Almanza* and its extensive progeny, and try to argue that the error was egregiously harmful to your client. Although *Almanza* should not play a part in your trial strategy, if the trial lawyer messed up and failed to object, the appellate lawyer may still have an argument on appeal, despite the general rule against fundamental error, when the erroneous charge egregiously harmed the defendant.

8.
Good Sources Are Essential

Our State Bar has created a committee, chaired by Tarrant County prosecutor Alan Levy, whose purpose it is to prepare pattern jury charges in criminal cases. The committee has completed its first volume of Texas Criminal Pattern Jury Charges, which it anticipates publishing in the early summer, 2009. The proposed pattern instructions are posted at *www.TexasBarCLE.com/cle/PMPortal.asp*, and are worth reading. The committee is now working on additional instructions which it plans to publish in succeeding volumes.

I don't know whether or when the courts will accept the pattern jury charges. Until more is known, we have two resources that have been used here for years: *Texas Criminal Jury Charges*, by Judge Elizabeth Berry, Judge George Gallagher, and Paul McClung (James Publishing Incorporated), and *Texas Practice*, Volumes 7, 7A and, 8 by Judge Tom Blackwell, Judge Michael McCormick, and Betty Blackwell (West Publishing Company). These books are generally good, and the first, known to most everyone as *McClungs*, has achieved almost biblical status. Even if you don't agree with this assessment - and I certainly don't - you must recognize that almost every judge in Texas does. You simply cannot be a serious criminal trial lawyer in Texas without access to both sets of books.

9.
Good Sources, Yes; But Not Really Biblical

Although you have to have *McClungs*, and the McCormick and Blackwell books, and you will need to get the Bar's pattern instructions when they are published, none of these, of course, are truly divinely inspired. There are several recorded instances in which instructions recommended in the form books have been held erroneous, and this will no doubt occur again in the future. Additionally, it is not uncommon at all to find that the form books have not even made an effort to cover some offenses, defenses, and limiting instructions. When you believe the form instruction is inadequate, or when you can't find an instruction that you think applies in your particular case, do not hesitate to propose your own instruction.

Although I rely heavily on the form books, I have written a number of instructions myself that do not follow the models. One, which is attached to this paper as appendix A, concerns the failure to testify. The form books propose an instruction that tracks article 38.08 of the Code of Criminal Procedure. I think the form instruction is a bad one, because it imposes a penalty on the defendant when it tells the jury that he is "*permitted* to testify in his own behalf," although he is not required to. My proposed instruction omits this language. I argue that, while article 38.08 may accurately state the law, this statute has nothing to do with charging the jury. I have made this argument in dozens of cases in the last few years, and have been successful more often than not.

10.
Unanimity: The Hottest Jury Instruction Issue Going

The Texas Constitution and Texas statutes require that criminal juries be unanimous.[30] In *Ngo v. State*,[31] appellant had been charged with credit card abuse, and the jury charge authorized his conviction *disjunctively,* if it found *either* that he stole the credit card, *or* that he received the card, *or* that he fraudulently presented the card. The court of criminal appeals held that the disjunctive submission there deprived appellant of his right to a unanimous verdict. "When the State charges different criminal acts, regardless of whether those acts constitute violations of the same or different statutory provisions, the jury must be instructed that it cannot return a guilty verdict unless it unanimously agrees upon the commission of any one of these criminal acts."[32]

If the rule in *Ngo* sounds simple enough, know that subsequent cases have badly obscured it.[33] I find it impossible to reconcile these cases and will not attempt to do so in this paper. Any time your charge disjunctively submits anything, I recommend that you carefully consider a unanimity objection. Cite the relevant portions of the Texas Constitution and the Code of Criminal Procedure (TEX. CONST. Art. V, § 13; TEX. CODE CRIM. PROC. ANN. arts 36.29(a), 37.02, 37.03, & 45.034-45.036), and object that the charge denies your client his right to a unanimous verdict. Add an objection under the Federal Due Process Clause, even though, to date, the Supreme Court has not recognized this right. Preserve the issue and let the appellate courts battle it out.

Conclusion

Don't be distracted just because a large part of every jury charge includes seemingly insignificant boilerplate and archaic, almost impenetrable form-book jargon. Each charge also contains powerful opportunities to win your case. Limiting instructions might cause the jury to disregard an accomplice witness, or your client's confession, or damaging extraneous evidence. Submission of a lesser included offense might result in a conviction and sentence far less severe than hoped for by the state. Defensive charges,

such as self-defense and defense of third persons, might get you and your client a not guilty verdict. Figure out as soon as possible how to get the charges you need to win, and how you will object if they are refused. And you will still have time to prepare and make a final argument Atticus would be proud of.

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1. *To Kill A Mockingbird*, Harper Lee, 234 (Harper Collins 1960)

2. TEX. CODE CRIM. PROC. ANN. art. 36.14.

3. My favorite is *Criminal Offenses and Defenses in Texas*, by Gerald S. Reamey, a professor at St. Mary's University School of Law.

4. *See Williams v. State*, 630 S.W. 2d 640, 644 (Tex. Crim. App. 1982)("There is no law and defense of accident in the present penal code and the bench and bar would be well advised to avoid the term 'accident' in connection with offenses defined by the present penal code").

5. TEX. CODE CRIM. PROC. ANN. arts. 36.14 & 36.15.

6. *Id*.

7. *Id*.

8. TEX. R. EVID. 105(a).

9. *Id*.

10. 974 S.W. 2d 707, 712 (Tex. Crim. App. 1996).

11. 46 S.W.3d 889, 894-95 (Tex. Crim. App. 2001).

12. Federal courts regularly require that proposed jury instructions be submitted early, sometimes before trial begins. Your submission should be done *in camera*.

13. *Antunez v. State*, 647 S.W. 2d 649, 650 (Tex. Crim. App. 1983); *see also* TEX. CODE CRIM. PROC. ANN. art. 36.14(charge must "distinctly set[ ] forth the law applicable to the case").

14. 270 S.W.3d 147 (Tex. Crim. App. 2008).

15. *Id*. at 154.

16. *Id*. at 151-52. *See e.g., LaPoint v. State*, 750 S.W. 2d 180, 183 (Tex. Crim. App. 1986)(court impermissibly commented on the weight of the evidence when it instructed that a

burglarious entry at nighttime raises the presumption of intent to commit theft); *Russell v. State*, 749 S.W. 2d 77, 80 (Tex. Crim. App. 1988)(court impermissibly commented on weight when it instructed the jury that it was not bound by expert testimony); *Mercado v. State*, 718 S.W. 2d 291, 293 (Tex. Crim. App. 1986)(court impermissibly commented by instructing the jury it may infer intent to kill from the use of a deadly weapon); *Drewett v. State*, 704 S.W. 2d 43, 45 (Tex. Crim. App. 1986)(instruction that jury could not consider arresting officer's failure to videotape defendant in DWI case was improper comment).

17. 848 S.W.2d 145 (Tex. Crim. App. 1993).

18. *Id*. at 146-47.

19. 537 S.W.2d 5, 7 (Tex. Crim. App. 1976).

20. *E.g., Alvarado v. State,* 704 S.W.2d 36, 39 (Tex. Crim. App. 1985).

21. *Birch v. State*, 948 S.W. 2d 880 (Tex. App.-- San Antonio 1997, no pet.)(reversing conviction for unlawfully carrying handgun because trial court did not instruct on the traveling defense).

22. *Sanders v. State,* 707 S.W. 2d 78, 80 (Tex. Crim. App. 1986).

23. *E.g., Cooper v. State,* 842 S.W.2d 414, 421 (Tex. App.-- Beaumont 1992, pet. ref'd).

24. To be sure, this will be a highly individualized determination on the part of trial counsel. There may well be such cases in which a proper instruction would be crucial to a not guilty verdict, in which effective counsel would argue for it "hard."

25. TEX. CODE CRIM. PROC. ANN. art. 36.14.

26. *E.g., Berghahn v. State*, 683 S.W.2d 697, 698-701 (Tex. Crim. App. 1984)(error not reversible where trial counsel made no objection to omission of "not guilty" verdict form).

27. TEX. R. EVID. 103(d).

28. 686 S.W.2d 157 (Tex. Crim. App. 1984).

29. *Id*. at 171.

30. TEX. CONST. Art. V, § 13; TEX. CODE CRIM. PROC. ANN. arts 36.29(a), 37.02, 37.03, & 45.034-45.036).

31. 175 S.W. 3d 738, 744 (Tex. Crim. App. 2005).

32. *Id*.

33. *E.g., Landrian v. State*, 268 S.W.3d 532, 538-39 (Tex. Crim. App. 2008)(jury need not be unanimous as to whether the aggravated assault was because serious bodily injury was caused, or because a deadly weapon was used); *Huffman v. State*, 267 S.W.3d 902, 909 (Tex. Crim. App. 2008)(failure to stop and render aid jury not required to unanimously find whether defendant failed to stop, failed to remain, or failed to return); *Pizzo v. State*, 235 S.W. 3d 711, 719 (Tex. Crim. App. 2007)(jury must unanimously decide in indecency with a child case whether appellant touched breasts or genitals); *Stuhler v. State*, 218 S.W. 3d 706, 719 (Tex. Crim. App. 2006)(jury charge violated appellant's right to a unanimous verdict because it disjunctively authorized his conviction for injury to a child if he caused serious bodily injury, *or* serious mental deficiency, *or* impairment, *or* injury); *White v. State*, 208 S.W. 3d 467, 469 (Tex. Crim. App. 2006)(jury need not unanimously decide whether underlying felony in felony murder case was evading arrest or unauthorized use of a vehicle); *Jefferson v. State*, 189 S.W. 3d 305, 315-16 (Tex. Crim. App. 2006)(jury need not agree on act or omission that comprised the course of conduct element of injury to child); *Hisey v. State*, 161 S.W. 3d 502, 503 (Tex. Crim. App. 2005)(capital murder jury charge erroneous because it did not require jury to unanimously agree upon one of the three different criminal acts – murder of the mother, or murder of the father, or murder of both, but not during the same scheme or course of conduct); *Murphy v. State*, 2006 WL 1096924 *21 (Tex. Crim. App. 2006)(not designated for publication)(jury need not unanimously agree on alleged theories of culpability and party liability); *Minjarez v. State*, 2005 WL 3061981 *10-11 (Tex. Crim. App. 2005)(not designated for publication)(jury need not unanimously decide which of the underlying felonies were committed in capital murder case).

NO. 2005-CR-0000

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	227th JUDICIAL DISTRICT
JOE SMITH	)	BEXAR COUNTY, TEXAS

DEFENDANT'S SPECIAL REQUESTED JURY INSTRUCTION NUMBER FIVE

In this case the defendant has elected not to testify, and you are instructed that you cannot and must not refer to or allude to the fact throughout your deliberations or take it into consideration for any purpose whatsoever as a circumstance against the defendant.

Respectfully submitted:

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(210) 226-1433
(210) 223-8708 fax
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_____

MARK STEVENS

Attorney for Defendant

Appendix A

CERTIFICATE OF SERVICE

I certify that a copy of Defendant's Special Requested Jury Instruction Number Five has been delivered to the District Attorney's Office, Bexar County Justice Center, San Antonio, Texas, on this the ___ day of October, 2007.

_____
MARK STEVENS

ORDER

On this the ___ day of October, 2007, came to be considered Defendant's Special Requested Jury Instruction Number Five, and said Instruction is hereby

(GRANTED) (DENIED)

_____
JUDGE PRESIDING

Appendix A