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

[Insert instructions for underlying offense.]

Sufficiency of Testimony of Covert Agent

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

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

[Include the following if raised by the evidence.]

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

Application of Law to Facts

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

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

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

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

COMMENT

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

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

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

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

Tex. Code Crim. Proc. art. 38.141.

In 2008, the court of criminal appeals explained:

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

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

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

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

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

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

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

[Insert instructions for underlying offense.]

Sufficiency of Testimony of Covert Agent

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

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

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

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

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

Application of Law to Facts

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

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

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

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

[Include the following if raised by the evidence.]

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

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

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

COMMENT

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

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

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

Tex. Code Crim. Proc. art. 38.141.

In 2008, the court of criminal appeals explained:

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

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

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

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

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

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

[Insert instructions for underlying offense.]

Sufficiency of Testimony of Inmate Witness

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

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

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

[Include the following if raised by the evidence.]

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

Application of Law to Facts

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

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

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

COMMENT

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

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

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

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

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

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

[Insert instructions for underlying offense.]

Sufficiency of Testimony of Inmate Witness

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

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

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

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

[Include the following if raised by the evidence.]

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

Definitions

Correctional Facility

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

Application of Law to Facts

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

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

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

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

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

COMMENT

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

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

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

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

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

CPJC 9.2 The Corpus Delicti Rule

Committee's Position. The corpus delicti rule requires independent evidence of a crime's commission besides a defendant's admission to the offense before that statement can be used to convict him. Critics of this common law rule argue it is both under- and over-inclusive. *Miller v. State*, 457 S.W.3d 919, 924–25 (Tex. Crim. App. 2015). The federal courts and several other states have abolished the doctrine in favor of a "trustworthiness standard." *Miller*, 457 S.W.3d at 925, 927 (citing *Opper v. United States*, 348 U.S. 84, 93 (1954), *Smith v. United States*, 348 U.S. 147, 156–57 (1954), *United States v. Calderon*, 348 U.S. 160, 167 (1954)). Nevertheless, the doctrine remains the law in Texas. *Miller*, 457 S.W.3d at 926.

Whether a jury instruction is appropriate for this judge-made rule of evidentiary sufficiency is another question. The Committee concluded that a judge rarely errs in refusing to give the instruction and that trial courts should usually be advised against giving it. Despite these concerns, the Committee felt that a pattern corpus delicti instruction would help guide trial courts that wished to give it in a particular case.

While some members initially favored a comprehensive instruction specific to the offense that would operate as an additional application paragraph and instruct the jury on what elements formed the corpus delicti for that offense, the Committee ultimately decided that—if a trial judge persisted in giving a corpus delicti instruction—a simpler instruction like the following was preferable:

> A person cannot be convicted of a crime based only on his uncorroborated, out-of-court statements. You may only rely on the defendant's out-of-court statements if you find there is other evidence which, considered alone or with these statements, shows that the crime charged occurred. This other evidence does not have to show that the defendant was the one who committed the offense. But if you do not believe that any evidence other than the defendant's out-of-court statements shows that a [*crime charged, e.g.*, murder] occurred, you will find the defendant "not guilty."

What Kind of Statements Require Corroboration. The corpus delicti rule only applies when a defendant has made an out-of-court statement. *Carrizales v. State*, 414 S.W.3d 737, 743 (Tex. Crim. App. 2013) (holding corpus delicti rule does not apply when no defendant statement at issue). The rule does apply to both full confessions and other defendant admissions. *See Franks v. State*, 90 S.W.3d 771 (Tex. App.—Fort Worth 2002, pet. ref'd); *Bradford v. State*, 515 S.W.3d 433, 440 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd) (citing cases).

The corpus delicti rule does not apply to in-court confessions. *Martin v. State*, 3 S.W.2d 90, 90 (Tex. Crim. App. 1927). Nor does the rule apply to extraneous offenses

introduced at a trial's punishment stage. *Bible v. State*, 162 S.W.3d 234, 246–47 (Tex. Crim. App. 2005).

Analyses of Appellate Opinions. The Committee located two lines of precedent about when a corpus delicti instruction should be given. The first group of cases held that a trial court does not err if it refuses to instruct a jury on the corpus delicti rule when it is established by other evidence. *Baldree v. State*, 784 S.W.2d 676, 686–87 (Tex. Crim. App. 1989); *Willard v. State*, 11 S.W. 453 (Tex. Crim. App. 1889). The second group of cases reversed for failure to give the instruction, but without any reasoning why a jury instruction would best remedy the evidentiary insufficiency. *Johnson v. State*, 36 S.W.2d 748, 750 (Tex. Crim. App. 1931); *Silva v. State*, 278 S.W. 216 (Tex. Crim. App. 1925); *Dunlap v. State*, 98 S.W. 845, 846 (Tex. Crim. App. 1906).

In 1990, the court of criminal appeals stated in a footnote in *Gribble v. State*, 808 S.W.2d 65, 72 n.15 (Tex. Crim. App. 1990), that "when evidence independent of the confession *is* alone sufficient to prove corpus delicti, the jury need not even be instructed that an extrajudicial confession must be corroborated." The court observed that this principle likely began as "an isolated holding of harmlessness based on overwhelming evidence," and that over time, it "transformed . . . into a general doctrine of no error based on the sufficiency of evidence." *Gribble*, 808 S.W.2d at 72 n.15. Appellate courts continue to apply the rule that sufficient evidence of the corpus delicti other than the defendant's extrajudicial statement obviates the need for a jury instruction. *See, e.g.*, *Lara v. State*, 487 S.W.3d 244, 249 (Tex. App.—El Paso 2015, pet. ref'd); *Aguilera v. State*, 425 S.W.3d 448, 458 (Tex. App.—Houston [1st Dist.] 2011, no pet.).

CPJC 10.1 Instruction—*Allen* Charge

All of you are equally honest and conscientious jurors who have heard the same evidence. All of you share an equal desire to arrive at a verdict.

If this jury finds itself unable to arrive at a unanimous verdict, it will be necessary for the court to declare a mistrial and discharge the jury. The case will still be pending, and it is reasonable to assume that it will be tried again before another jury at some future time. Any such future jury will be empaneled in the same way this jury has been empaneled and will likely hear the evidence that has been presented to this jury. The questions to be determined by that jury will be the same questions confronting you, and there is no reason to hope the next jury will find these questions any easier to decide than you have found them.

Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors.

During your deliberations, you should not hesitate to reexamine your own views and change your opinion if you become persuaded that it is wrong. However, you should not change an honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors or for the mere purpose of returning a verdict.

With this additional instruction, you are requested to continue deliberations in an effort to arrive at a verdict that is acceptable to all members of the jury, if you can do so without doing violence to your conscience. Do not do violence to your conscience, but continue deliberating.

COMMENT

Background. An *Allen* charge instructs a deadlocked jury to continue deliberating to reach a verdict if the jurors can conscientiously do so and is usually given in response to a specific request from the jury. *West v. State*, 121 S.W.3d 95, 107 (Tex. App.—Fort Worth 2003, pet. ref'd); *Jackson v. State*, 753 S.W.2d 706, 712 (Tex. App.—San Antonio 1988, pet. ref'd). *See Allen v. United States*, 164 U.S. 492, 501 (1896). This supplemental charge "reminds the jury that if it is unable to reach a verdict, a mistrial will result, the case will still be pending, and there is no guarantee that a second jury would find the issue any easier to resolve." *Barnett v. State*, 189 S.W.3d 272, 277 n.13 (Tex. Crim. App. 2006). Both the United States Supreme Court and the Texas Court of Criminal Appeals have sanctioned the use of an *Allen* charge. *See Allen*, 164 U.S. at 501–02; *Howard v. State*, 941 S.W.2d 102, 123 (Tex. Crim. App. 1996).

The Supreme Court initially approved five "elements" of an *Allen* charge: (1) that in a large proportion of cases, absolute certainty could not be expected; (2) that, although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, jurors should examine the question submitted with "a proper regard and deference to the opinions of each other"; (3) that it was the jurors' duty to decide the case if they could conscientiously do so; (4) that jurors should listen, with a disposition to be convinced, to each other's arguments; and (5) that, "if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority." *Allen*, 164 U.S. at 501.

Allen was decided as a matter of the Supreme Court's supervisory power over the federal courts and not as a matter of constitutional law. *See Allen*, 164 U.S. at 501–02; *Tucker v. Catoe*, 221 F.3d 600, 609 n.5 (4th Cir. 2000). Thus, a trial court will generally not err by failing to submit an *Allen* charge.

The Danger of Coercion. Modern courts have repeatedly expressed concern that the jury instructions in *Allen v. United States* may interfere with jury deliberations and coerce a verdict. The Supreme Court has rejected any use of coercion in the charge. *See Lowenfield v. Phelps*, 484 U.S. 231, 237–38; *Jenkins v. United States*, 380 U.S. 445, 446 (1965) ("[T]he principle that jurors may not be coerced into surrendering views conscientiously held is so clear as to require no elaboration."). The Fifth Circuit court of appeals has followed suit:

> There is no justification whatever for its coercive use. The jury system rests in good part on the assumption that the jurors should deliberate patiently and long, if necessary, and arrive at a verdict—if, but only if, they can do so conscientiously. It is improper for the court to interfere with the jury by pressuring a minority of the jurors to sacrifice their conscientious scruples for the sake of reaching agreement.

Green v. United States, 309 F.2d 852, 853–54 (5th Cir. 1962). In civil cases, the Texas Supreme Court has also disapproved any use of coercion and has rejected language directed at minority jurors. *See Stevens v. Travelers Insurance Co.*, 563 S.W.2d 223, 228 (Tex. 1978).

Improper coercion may arise from the text of the charge itself or from the circumstances in which the charge is given. *Howard*, 941 S.W.2d at 123 (citing *Lowenfield*, 484 U.S. at 237). An *Allen* charge may be facially coercive if it conveys the court's opinion on the case or pressures jurors into reaching a particular verdict. *Arrevalo v. State*, 489 S.W.2d 569, 571 (Tex. Crim. App. 1973); *West*, 121 S.W.3d at 107–08. It

should not tell the jury that one side or the other possesses superior judgment, nor tell one side to distrust its judgment. *See West*, 121 S.W.3d at 109.

The context in which an *Allen* charge is given may render an otherwise facially proper charge coercive. For example, if the jury voluntarily offers a polling of the members, subsequently giving an *Allen* charge is likely to be found not coercive. However, if the trial court *sua sponte* polls the jury and then issues an *Allen* charge, the context may render the charge itself coercive even if by its plain language it is not. *Compare Howard*, 941 S.W.2d at 123–24, *with Barnett v. State*, 161 S.W.3d 128, 134–35 (Tex. App.—Fort Worth 2005), *aff'd*, 189 S.W.3d 272. Thus, trial courts should refrain from polling the jury or singling out jurors. In the event that a jury offers polling information unsolicited, the Committee recommends trial courts exercise caution, lest a jury takes the *Allen* charge as a statement of the trial court's opinion of the case.

The Committee recommends that trial courts and practitioners follow the trend to omit coercive elements of the charge, especially those directed at minority viewpoints in the jury. *See Lowenfield*, 484 U.S. at 237; *Howard*, 941 S.W.2d at 123; *Barnett*, 189 S.W.3d at 277 n.13. At most, a charge that "suggests that all jurors reevaluate their opinions in the face of disparate viewpoints cannot be said to be coercive on its face." *Howard*, 941 S.W.2d at 123. Nevertheless, the Committee believes the better practice to be the omission of coercive elements, and a review of caselaw indicates that a trial court will not be reversed by following this path. The pattern charge reflects this advice.

Procedure. An *Allen* charge should be given in writing and in open court, and it should be first submitted to the parties for objections and exceptions. *Verret v. State*, 470 S.W.2d 883, 887 (Tex. Crim. App. 1971). *See* Tex. Code Crim. Proc. art. 36.27. An oral communication alone would be improper. *Verret*, 470 S.W.2d at 887.

A trial court does not need to wait until the jury indicates it is deadlocked to give an *Allen* charge. *See Loving v. State*, 947 S.W.2d 615 (Tex. App.—Austin 1997, no pet.). Some authorities believe that giving the *Allen* charge as part of the court's general charge will inoculate against possible coercion. *See Loving*, 947 S.W.2d at 619; *see also* American Bar Association, Criminal Justice Section, Criminal Justice Standards Committee, Standard 15-5.4(a) [hereinafter ABA Standard]. Then, if the jury is unable to agree, repetition of the *Allen* language already given would be appropriate. *See* ABA Standard 15-5.4(b). This approach is not without its critics. *See, e.g.*, *Green*, 309 F.2d at 853–54. The Texas Court of Criminal Appeals has yet to opine on this split. *See Henderson v. State*, 593 S.W.2d 954, 957 (Tex. Crim. App. 1980). The Committee recommends not including *Allen* language in the general charge.

An *Allen* charge may be used at the guilt–innocence phase and at the punishment phase of a trial. *See Deaton v. State*, No. 03-08-00455-CR, 2009 WL 1811068, at *8–11 (Tex. App.—Austin June 26, 2009, pet. ref'd) (not designated for publication); *Hairston v. State*, No. 14-04-01016-CR, 2006 WL 1026880, at *2–3 (Tex. App.—

Houston [14th Dist.] Apr. 20, 2006, pet. ref'd) (not designated for publication). If given at punishment, and if the charge mentions the possibility of mistrial, the charge need not specify that the mistrial would apply to the punishment stage only, though it might be better practice to do so. *Draper v. State*, 335 S.W.3d 412, 417 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd).

Texas law imposes no time limits on the amount of time a jury may deliberate, when an *Allen* charge may be given, or when mistrial may be declared, absent an abuse of discretion. *Guidry v. State*, 9 S.W.3d 133, 155 (Tex. Crim. App. 1999). It is not error to give an *Allen* charge before a jury has unequivocally stated it is deadlocked. *Olvera v. State*, No. 13-13-00464-CR, 2014 Tex. App. LEXIS 7764, at *5 (Tex. App.—Corpus Christi July 17, 2014, no pet.) (not designated for publication); *Loving*, 947 S.W.2d at 620; *see Black v. State*, No. 05-10-01558-CR, 2012 WL 206501, at *2 (Tex. App.—Dallas Jan. 25, 2012, pet. ref'd) (not designated for publication). Thus, a judge can generally give no *Allen* charge, one *Allen* charge, or several, and trial courts will not err by refusing to give an *Allen* charge.

CPJC 12.4 Instruction—Jury Punishment on a Plea of Guilty

Members of the jury,

The defendant, [*name*], has pleaded guilty of the offense of [*offense*]. You are instructed to find the defendant guilty. You must also determine the sentence to be imposed on the defendant.

Both sides will soon present final arguments on sentencing. Before they do so, I must now give you the instructions you must follow in determining the defendant's sentence.

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

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

GENERAL PRINCIPLES

Jury as Fact Finder

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

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

Evidence

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

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

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

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

While you should consider only the evidence, you are permitted to draw reasonable inferences from the testimony and exhibits that are justified in the light of common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts that have been established by the evidence.

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

Admitted Exhibits

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

Testimony

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

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

Defendant's Right to Remain Silent

The defendant has a constitutional right to remain silent. The defendant may testify on his own behalf. The defendant may also choose not to testify. The defendant's decision not to testify cannot be held against him, and it is not evi-

dence of guilt. You must not speculate, guess, or even talk about what the defendant might have said if he had taken the witness stand or why he did not. The foreperson of the jury must immediately stop any juror from mentioning the defendant's decision not to testify.

[Include the following only if evidence of unadjudicated wrongful acts is admitted.]

Burden of Proof for Wrongful Acts

During the trial, you heard evidence that the defendant may have committed wrongful acts that did not result in any criminal charges or that did not result in criminal convictions. [*If requested by a party and permitted by judge, include judge's description of specific acts.*] You are not to consider any evidence of any particular wrongful act unless you find, beyond a reasonable doubt, that the defendant did, in fact, commit that wrongful act. Those of you who believe the defendant did the wrongful act may consider it.

Assessing the Punishment

In arriving at the amount of punishment, you must decide the sentence by a full, fair, and free expression of the opinion of the individual jurors. You must not decide the sentence by lot or by chance. For example, you may not agree beforehand to be bound by the result of a procedure by which each juror gives the number of years the juror thinks should be served, these are then added, and the result is divided by twelve.

To reach a verdict, all twelve of you must agree.

RULES THAT CONTROL DELIBERATIONS

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

The foreperson should conduct the deliberations in an orderly way. Each juror has one vote, including the foreperson. The foreperson must supervise the voting, vote with other members on the verdict, and sign the verdict sheet.

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

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

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

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

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

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

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

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

SPECIFIC LAW APPLICABLE TO THIS CASE

[Insert appropriate specific instructions. Continue with the following verdict form or use a verdict form tailored to the case, ensuring it also includes a finding of guilt.]

VERDICT

We, the jury, find the defendant, [*name*], guilty of the offense of [*offense*]. We assess the defendant's punishment at: (select one)

_____ confinement [by the Texas Department of Criminal Justice/in a state jail/in the county jail] for a term of ____ years] and no fine.

_____ confinement [by the Texas Department of Criminal Justice/in a state jail/in the county jail] for a term of ____ years and a fine of $_____.

_____

Foreperson of the Jury

_____

Printed Name of Foreperson

COMMENT

When the defendant pleads guilty (or *nolo contendere*) and goes to the jury for punishment—a procedure commonly called a "slow plea"—the general practice is to present the indictment or information and have the defendant enter his plea before the jury. The punishment hearing follows, with the court instructing the jury to find the defendant guilty and assess punishment. Verdict forms generally set out that the jury finds the defendant guilty.

Whether it is necessary to have the jury find the defendant guilty is not clear; however, it may be prudent. In addition, the Committee recommends that instead of separate guilt and punishment phase instructions, the jury should be given only one set of jury instructions that includes a combined verdict form, incorporating both the guilty finding and the jury's recommended sentence. This is the procedure adopted in *Holland v. State*, 761 S.W.2d 307 (Tex. Crim. App. 1988). There, the defendant pleaded guilty to capital murder before a jury. He argued that it was error to instruct the jury to return a guilty verdict and then answer the special issues in the same jury instructions because it ruined the bifurcated nature of the proceedings. He argued there must be two separate deliberations or at least a separation of guilt from punishment. The court of criminal appeals stated that there was nothing wrong with the combined jury instructions: "it is proper for the trial judge in his charge to [1] instruct the jury to return a verdict of guilty, [2] charge the jury on the law as to the punishment issues, and then [3] instruct them to decide only those issues." *Holland*, 761 S.W.2d at 313; *see also Fairfield v. State*, 610 S.W.2d 771 (Tex. Crim. App. 1981).

Holland appears to be the standard for the general practice of instructing juries on a "slow plea." However, *Fuller v. State*, 253 S.W.3d 220 (Tex. Crim. App. 2008), indicates that no formal guilty verdict is necessary, even in a death penalty case. In *Fuller*, the trial court instructed the jury, orally and in writing, to find the defendant guilty, but the only verdict form submitted to the jury was for the special issues. No verdict on guilt was returned. The defendant argued that he did not receive a trial by jury. The court of criminal appeals stated that "[i]n all cases where a defendant enters a plea of guilty before a jury, no issue of the defendant's guilt is submitted to the jury." *Fuller*, 253 S.W.3d at 227 (quoting *Brinson v. State*, 570 S.W.2d 937 (Tex. Crim. App. 1978)). Despite *Fuller*'s holding, the court did not encourage the procedure the trial court had followed, noting that it "did not create the clearest format for the jury to follow." *Fuller*, 253 S.W.3d at 227 n.24.

A final word of caution: trial judges should not (in the case of a slow plea) accept a defendant's guilty plea outside the jury's presence, as occurred in *Guajardo v. State*, No. 05-15-00365-CR, 2016 WL 1615609 (Tex. App.—Dallas Apr. 20, 2016, no pet.) (not designated for publication). While the court of appeals affirmed the conviction, it held the trial court was without authority to find the defendant guilty since, without a jury trial waiver, only a jury could find the defendant guilty. Thus, when a defendant has not waived his right to a jury trial in a felony, the guilty plea should be made to the

jury, not to the court. *See also In re State ex rel. Tharp*, 393 S.W.3d 751 (Tex. Crim. App. 2012) (explaining that Tex. Code Crim. Proc. art. 37.07's bifurcated procedure only applies to jury trials on a plea of not guilty).

VII. Intoxication Offenses

CPJC 12.26 General Comments on Intoxication Offenses

Approach to Instructions Specific to Intoxication Offenses. The basic intoxication offenses in chapter 49 of the Texas Penal Code present some special problems in applying the Committee's approach to punishment stage instructions. Consequently, the Committee undertook to draft punishment stage instructions for several of these offenses.

The most basic offense, of course, is driving while intoxicated under Tex. Penal Code § 49.04. Very similar in structure are the offenses of flying while intoxicated, under Tex. Penal Code § 49.05; boating while intoxicated, under Tex. Penal Code § 49.06; and assembling or operating an amusement ride while intoxicated, under Tex. Penal Code § 49.065. These are all class B misdemeanors with special provisions for minimum period of confinement. All can be enhanced to class A misdemeanors with an increased minimum period of confinement under Tex. Penal Code § 49.09(a).

For felony DWI status under Tex. Penal Code § 49.09(b), the prior intoxication-related offenses are elements of the offense of felony DWI and must be submitted to the jury during the guilt-innocence phase. *Gibson v. State*, 995 S.W.2d 693, 696 (Tex. Crim. App. 1999). At the time of publication, it was unsettled whether this would also hold true for class A DWI-second offense. The court of criminal appeals granted review on this issue in *Oliva v. State*, PD-0398-17 (submitted Nov. 1, 2017). Because *Oliva* was still pending at the time this volume went to press, the Committee set out punishment instructions for both possibilities. CPJC 12.34 through CPJC 12.37 treat the prior intoxication conviction as a punishment phase issue. CPJC 12.33 can be used where the prior conviction has already been determined at the guilt phase. Practitioners requiring guilt-phase instructions that make the prior intoxication conviction an element of the offense rather than a punishment enhancement can fashion such instructions based on CPJC 40.16, Felony Driving While Intoxicated, in *Texas Criminal Pattern Jury Charges—Intoxication, Controlled Substance & Public Order Offenses*.

Driving while intoxicated and assembling or operating an amusement ride while intoxicated provide for an increased minimum period of confinement on proof at the penalty stage of possession of an open container of alcohol. Tex. Penal Code §§ 49.04(c), 49.065(c).

Fine-Only Punishment. The Committee encountered an initial question regarding the options open to a sentencing jury in a prosecution of many of the chapter 49 offenses.

Driving while intoxicated, flying while intoxicated, boating while intoxicated, and assembling or operating an amusement ride while intoxicated each have a minimum

term of confinement of seventy-two hours. Tex. Penal Code §§ 49.04(b), 49.05(b), 49.06(b), 49.065(b). Driving while intoxicated with an open container and assembling or operating an amusement ride with an open container have a minimum term of confinement of six days. Tex. Penal Code §§ 49.04(c), 49.065(c). These offenses are all class B misdemeanors. Tex. Penal Code §§ 49.04(b), 49.05(b), 49.06(b), 49.065(b).

There appears to be a conflict with the mandatory confinement provisions in these sections of the Penal Code and the punishment options for class B misdemeanors. Class B misdemeanors "shall be punished by: (1) a fine not to exceed $2,000; (2) confinement in jail for a term not to exceed 180 days; or (3) both such fine and confinement." Tex. Penal Code § 12.22. Some Texas jurisdictions, giving effect to section 12.22, give juries the option of assessing only fines.

The Committee concluded that chapter 49 requires assessment of some period of confinement. Some case law supports this. *State v. Magee*, 29 S.W.3d 639, 639–40 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd) (trial court erred in sentencing defendant convicted of driving while intoxicated to fine only). *Accord Harvey v. State*, No. 01-04-00525-CR, 2005 WL 2615280, at *5 (Tex. App.—Houston [1st Dist.] Oct. 13, 2005, no pet.) (not designated for publication); *State v. Turner*, No. 05-03-01263-CR, 2004 WL 308507, at *1 (Tex. App.—Dallas Feb. 19, 2004, no pet.) (not designated for publication).

The instructions for these offenses, then, do not permit a sentencing jury to assess a fine only.

Open Container Provision. The open container accusation applies to only the first-offender offenses of class B misdemeanor driving while intoxicated and assembling or operating an amusement ride while intoxicated. Tex. Penal Code §§ 49.04(c), 49.065(c). The effect of finding the open container accusation true is that the minimum confinement is increased from three days to six days. Tex. Penal Code §§ 49.04(c), 49.065(c). Because prosecutors often charge alternative paragraphs, the Committee addressed the situation of an information alleging driving while intoxicated or assembling or operating an amusement ride while intoxicated with a prior conviction paragraph and with an open container paragraph. The jury instructions tell the jury that on finding the prior conviction true, it need not determine whether the open container accusation is true.

Special Definition of "Final" Conviction. Several parts in chapter 49 of the Texas Penal Code make special provision for enhancing offenses by proof of prior convictions. Section 49.09(a) provides for enhancing basic class B misdemeanor offenses to class A misdemeanors by proving one prior conviction. Section 49.09(b) provides for enhancing these offenses to felony status. Neither statutory provision explicitly requires the prior convictions to be final.

Tex. Penal Code § 49.09(d), however, refers to certain circumstances in which a conviction "is a final conviction [for purposes of § 49.09]," which strongly implies a

requirement of finality. This is consistent with traditional Texas case law, discussed earlier in this chapter, which holds that the term *conviction* means *final conviction*.

The Committee concluded that Texas law requires convictions used to enhance intoxication offenses to be final.

The Committee also concluded that the same approach should be taken here as is proper in other enhancement situations. The instructions should tell the jury that the conviction must be final. They should not elaborate on that requirement, or define finality, unless the evidence presents an issue concerning finality.

If the facts raise an issue of finality, the definition of that term should take notice of section 49.09(d). Under that provision, a conviction for driving while intoxicated that occurs on or after September 1, 1994, is a final conviction, whether the sentence for the conviction is imposed or probated. Tex. Penal Code § 49.09(d). Probated convictions can be used for the purpose of enhancement as long as those convictions are for offenses committed on or after January 1, 1984. *See Ex parte Serrato*, 3 S.W.3d 41 (Tex. Crim. App. 1999).

The definition used might be something along the following lines:

> **Final Conviction**
>
> A final conviction is the entry of a judgment reflecting the defendant's conviction of an offense and the imposition or suspension of a sentence for that offense.
>
> *[Include the following if the evidence indicates an appeal may have been taken.]*
>
> If an appeal was taken by the defendant, the conviction is final only if after that appeal the conviction was affirmed and a mandate affirming the conviction was issued by the appellate court.

If the enhancement offense at issue was committed before January 1, 1984, the definition of *final* must be modified by removing the phrase "or suspension." It might also be supplemented with an explanation that the state can prove finality by evidence that community supervision or probation was revoked and sentence ultimately imposed.

Suspension of Driver's License. A driver's license is automatically suspended on conviction of driving while intoxicated, intoxication assault (if the defendant used a motor vehicle in the commission of the offense), or intoxication manslaughter. Tex. Transp. Code § 521.341(3), (4).

Suspension is not permitted if the jury has "recommended that the license not be revoked." Tex. Transp. Code § 521.344(d)(1). Jury recommendation that the license not be suspended is set out in Tex. Code Crim. Proc. art. 42A.407(a).

Jury submission does not require that the defendant establish on the record that the defendant holds a driver's license. *Hernandez v. State*, 842 S.W.2d 294 (Tex. Crim. App. 1992).

The instruction and verdict form should include the provisions in the instruction at CPJC 12.38 in this chapter if—

1. the defendant has been convicted of—
    a. driving while intoxicated (not enhanced to a class A misdemeanor or a third-degree felony), or
    b. intoxication assault (if the defendant used a motor vehicle in the commission of the offense), or
    c. intoxication manslaughter; and
2. the conviction is not for an offense relating to the operation of a motor vehicle while intoxicated that was committed within five years of the commission of a prior offense relating to the operation of a motor vehicle while intoxicated; and
3. the jury is instructed that it may recommend community supervision.

CPJC 12.33 Instruction—Misdemeanor [Driving/Flying/Boating/Assembling or Operating Amusement Ride] While Intoxicated—Offense Enhancement (One Prior DWI Conviction)

[As of the publication date of this volume, it was unsettled whether the prior offense for DWI-second was a guilt or punishment issue. See CPJC 12.26, General Comments on Intoxication Offenses.]

You have found the defendant, [*name*], guilty of [*offense, e.g.*, the enhanced offense of driving while intoxicated].

Relevant Statutes

This offense is punishable by—

1. a term of confinement in the county jail for no less than thirty days and no more than one year, or

2. a term of confinement in the county jail for no less than thirty days and no more than one year and a fine of no more than $4,000.

Application of Law to Facts

You are therefore to determine and state in your verdict—

1. the term of confinement in the county jail to be imposed on the defendant for no less than thirty days and no more than one year, or

2. the term of confinement in the county jail to be imposed on the defendant for no less than thirty days and no more than one year and a fine to be imposed on the defendant of no more than $4,000.

VERDICT

We, the jury, having found the defendant, [*name*], guilty of [*offense, e.g.*, the enhanced offense of driving while intoxicated], assess the defendant's punishment at: (select one)

_____ confinement in the county jail for a term of _____ days and no fine.

_____ confinement in the county jail for a term of _____ days and a fine of $_____.

Foreperson of the Jury

Printed Name of Foreperson