CAUSE NO. _____

STATE OF TEXAS	§	IN THE DISTRICT COURT
V.	§	209TH JUDICIAL DISTRICT
JOHN DOE	§	HARRIS COUNTY, TEXAS

ACCUSED'S MOTION FOR TRIAL COURT
TO QUESTION AND EDUCATE JURY PANEL DURING VOIR DIRE ON THE LAW

TO THE HONORABLE JUDGE OF SAID COURT:

INTO COURT comes the Defendant, by and through his undersigned counsel, and respectfully request this Honorable Court to question and educate the jury panel during voir dire on the fundamental legal principles. In support thereof the Accused would show:

I.

The Accused requests the trial court question and educate the jury panel during voir dire on the fundamental legal principles of reasonable doubt, burden of proof, return of indictment by grand jury, presumption of innocence, and opinion in accordance with Texas Code of Criminal Procedure, Art. 35.17, which provides in relevant part:

> Art. 35.17. VOIR DIRE EXAMINATION
>
> 2. In a capital felony case in which the State seeks the death penalty, **the court shall propound to the entire panel of prospective jurors questions concerning the principles, as applicable to the case on trial, of reasonable doubt, burden of proof, return of indictment by grand jury, presumption of innocence, and opinion.** Then, on demand of the State or defendant, either is entitled to examine each juror on voir dire individually and apart from the entire panel, and may further question the juror on the principles propounded by the court (emphasis added).

Presumption of innocence and proof beyond a reasonable doubt are cardinal principles of a right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Howard v. Fleming, 191 U.S. 126

(1903). Texas law also recognizes and guarantees this requirement of a fair trial in Texas Penal Code, Sec. 2.01, which provides:

> Sec. 2.01. PROOF BEYOND A REASONABLE DOUBT. All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that he has been arrested, confined, or indicted for, or otherwise charged with, the offense gives rise to no inference of guilt at his trial.

II.

Since these legal principles are required to be included in the trial court's jury instructions at the conclusion of the case, the Accused requests that the trial court question and educate the jury during jury selection on these fundamental legal principles so that jurors can view the evidence with a true understanding of the presumption of innocence meaning. The problem is that most potential jurors do not understand these important and fundamental concepts when they are viewing the evidence. Specifically, even the U.S. Supreme Court has held that "[w]hile the legal scholar may understand that the presumption of innocence and the prosecution's burden of proof are logically similar, the ordinary citizen may draw significant additional guidance from an instruction on the presumption of innocence." Taylor v. Kentucky, 436 U.S. 478, 483-85 (1978).

A retired federal district court judge, Hon. Mark. W. Bennett, acknowledged potential jurors lack of understanding of the presumption of innocence and proof beyond a reasonable doubt in his published article entitled "The Presumption of Innocence and Trial Court Judges: Our Greatest Failing" in the *The Champion*, April, 2015. Judge Bennett opines "…there is no way jurors can give the accused the 'full benefit' of the presumption if the trial judge does not help them understand and internalize its meaning." This article is attached with permission from Judge Bennett as Exhibit "1". Judge Bennett's article illustrates how a trial judge can educate and question potential

jurors to understand and give the full benefit of these bedrock principles of the American criminal justice system.

If a juror is not educated on these fundamental legal principles until he/she receives the jury charge, it is too late. A juror needs to understand their role prior to trial and the lens by which to view the evidence presented. Their full understanding of these fundamental legal requirements plays a critical role in guaranteeing the Accused a fair trial. Fundamental legal requirements such as presumption of innocence, reasonable doubt, the burden of proof, etc. should be explained by the trial court, as jurors give special weight to the language and conduct of the trial judge. The trial court's voir dire on these topics would also shorten the state and defense's individual questioning.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the Accused prays that his Motion be granted and that the trial court question and educate the jury panel during voir dire on the fundamental legal principles of reasonable doubt, burden of proof, return of indictment by grand jury, presumption of innocence, and opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing motion has been delivered to the prosecutor assigned to this case on September 29, 2022.

DOUG MURPHY

EXHIBIT "1"

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The Presumption of Innocence and Trial Court Judges: Our Greatest Failing

FORMER JUDGE MARK W. BENNETT

Republished from The Champion.

As my more than 20-year career as a federal trial court judge winds down, I feel a sense of urgency to write about judges and their role in educating potential jurors about the presumption of innocence in jury selection. I have nothing but a wellspring of admiration for my federal and state court colleagues on the trial bench. They are the bedrock of the best system for delivering justice known to humankind. As a group, however, we have woefully failed to assist potential jurors in internalizing the meaning of the presumption of innocence. The hope of all judges is that each juror selected will be committed to giving the accused the full benefit of the presumption of innocence. Unless we judges dramatically improve our efforts to explain the presumption, however, our hope will not be realized. The presumption of innocence is, along with its sister, proof beyond a reasonable doubt, the Holy Grail of the criminal justice system.

The Full Benefit

As a new trial court judge in 1994, I quickly realized that jurors lacked the information necessary to give the accused the "full benefit" of the presumption of innocence. In one of my first criminal jury trials, after giving what I thought was an outstanding explanation of the presumption, I discovered how little the potential jurors actually understood. I decided to ask a question I had asked in my first criminal trial, in July 1975, when I was a newly minted member of the bar. I picked a prospective juror at random and stated: "Please take a very good look at defendant Thomas Collins." I paused and then asked: "Does he look guilty or not guilty?" The juror responded, as hundreds have since: "I have no idea, I haven't heard any of the evidence yet." I proceeded to ask six or so prospective jurors the same question. Their responses were all eerily similar. I instantly knew I had been a total failure in assuming that the potential jurors actually understood the presumption.

Of course, there is no way jurors can give the accused the "full benefit" of the presumption if the trial judge does not help them understand and internalize its meaning. If judges think that simply defining the presumption of innocence or

sprinkling a few platitudes about its importance is enough, I implore that they ask the members of the jury pool if the defendant looks guilty or not guilty. I am confident each judge will discover, as I did, that we vastly overestimate the ability of lay folks to fully appreciate and apply the most important presumption in law.

Let me explain what I mean by the "full benefit" of the presumption. If a defense lawyer does not ask any potential jurors any questions in voir dire, does not give an opening statement, does not cross-examine any government witnesses, does not utter a single objection, does not offer any exhibits or witnesses, the defendant does not testify, and that same lawyer waives closing argument, are jurors still able to give the accused the full measure of the presumption of innocence? Do the potential jurors, at their core, truly believe that the accused is absolutely not guilty? If not, we as trial judges have failed - miserably. This is what I mean by the full benefit of the presumption.

Like a Steel Curtain

So what do I do? I start, like most of my colleagues, by explaining some important elements of the presumption of innocence. I explain that the presumption is so important that it applies in every criminal case from Maine to California and Hawaii to Florida. It applies in all 94 federal district courts and all state courts. The presumption, and "reasonable doubt" (which I also explain in great detail), are, for my money, the two most important concepts in the American judicial system. It is because of these two bedrock principles that our system of justice is envied around the world.

In visual terms, I explain that the presumption is like a steel curtain that surrounds the accused1 except it is transparent, so we cannot actually see it. I tell potential jurors that the presumption surrounds the accused throughout the entire trial. I explain that the only way the presumption can be overcome is if the prosecution can produce enough evidence, beyond all jurors' reasonable doubts, to completely chip away the steel curtain. I explain that the presumption may, all by itself, be sufficient to find the accused not guilty.

Using my hands as the scales of justice, I explain that in civil cases the parties start even and the party filing the suit has to prove its case by just a slight movement of the scales - as if a feather has been placed on one. I then move my hands very far apart to demonstrate that the presumption requires that the scales start very far apart. So far, so good - but I assume (and hope) that most judges do this and more.

Shake a Hand

Here comes the innovative part. It happens immediately after my "trick" question when I tell potential jurors to take a good look at the accused and ask several prospective jurors if the accused looks guilty. I stand up, leave the bench, make my way into the well of the courtroom, walk directly over and shake the accused's hand, instantly spin around, and walk up within a few feet of the front row of the prospective jurors. I assure you there is shock and awe in the courtroom. The potential jurors are wide-eyed and several mouths are gaping. I then state as confidently as I can: "I just shook hands with an accused that is absolutely not guilty. I believe this to my core and each of you must believe it, too, or you cannot sit on this jury." As my words sink in, I walk slowly back to the bench. After taking my seat, I say: "Here is your free pass off jury duty. If any of you cannot give the accused the full benefit of the presumption of innocence, you can stand up and walk out the courtroom doors because you are free to leave. You serve your country just as well as those that are selected because you are being honest about your inability to give the accused the full benefit of the presumption of innocence."

Then I go into all of the scenarios mentioned above about the defense lawyer not doing anything and the accused not testifying. I ask the potential jurors if this would affect their ability to give the accused the full benefit of the presumption of innocence. Next, I ask this question: "If you were charged with a crime and believed you were not guilty, would you want to testify?" There are many reasons a particular defendant would not want to testify. I explore these reasons. I ask the prospective jurors, especially if they said they would want to testify, if, in the event the accused does not testify, they can promise not to ever hold it against the accused and not to discuss it with their fellow jurors during deliberations. Then, to re-emphasize how serious I am about the presumption, I repeat: "As I said, any of you are free to leave if, for whatever reason, you are unable to give the accused the full benefit of the presumption."

Potential jurors hear about my father, a World War II veteran who fought in the Pacific for our enduring freedoms. I tell them that shortly after I was confirmed as a judge, my father came and watched an early criminal trial. After the trial, my father told me that he was proud of me for going out of my way to make sure the parties got a fair trial because that was one of the precious freedoms for which he and others had fought. I ask the potential jurors if they have loved ones who have served in the military or alternative service. I close

this portion of the voir dire by asking if they agree that, by giving the accused the full benefit of the presumption of innocence, they honor all who have served and are serving our country. I then move on to "reasonable doubt" and a colorful reasonable doubt chart that I display in my PowerPoint voir dire.2

The Presumption -And the Grand Jury?

While not directly related to the presumption of innocence, I find it is easier for potential jurors to fully embrace it if a judge explains the nature of the grand jury. "Can you explain the difference between the grand jury and a trial jury?" I ask potential jurors. The explanations vary from not so bad to humorous. After listening to their answers, I ask a series of questions. "How much time do you think I spend between the grand jury and trial juries?" Asking several potential jurors in a row, the average guess is about 50 percent. The potential jurors are shocked when I state: "Actually, I have never been in the grand jury room, even though it is right below this courtroom." I pause, and then I say, "That was a white lie. I was once in the grand jury room about 10 years ago when they were not in session - to pick out new furniture!" That statement is always met with smiles and laughs.

I then ask how often the defense lawyer and defendant are present during a grand jury session. The potential jurors are always very surprised to find out that the defendant and defense lawyer are not present either.

Next, I hold up the Federal Rules of Evidence book and explain that they are mandatory in every trial, civil or criminal, in every federal court across the land. I follow up by asking if any of the potential jurors have heard of the rule against hearsay, and then I ask one to define it. I receive many excellent explanations. I then ask if they think the Rules of Evidence apply in the grand jury. Despite having already been told there is no judge, accused, or defense lawyer present, a surprising number of potential jurors think the Rules of Evidence apply. I explain that they do not apply. To drive this point home, I explain that a grand jury could indict someone based on the following: "A witness named Sam tells the grand jurors that he heard from Sally, that Bill said, that Frank uses methamphetamine." They are again shocked, and we chat about the different purposes of the grand jury versus what they will be doing as trial jurors. In my view, this is mission critical. Why? It is critical because many people arriving at the courthouse think that after the grand jury indicts an individual, the actual trial is not very important because the defendant has already been indicted by this august body - the grand jury. If prospective jurors still think that it is difficult to give the accused the full benefit of the presumption of innocence, they are excused.

A Better Mousetrap

We have to work hard in jury selection because most potential jurors actually believe in the presumption of guilt and not the presumption of innocence - that is, unless they are on trial or a loved one is the defendant on trial. That is a scenario they have a hard time fathoming.

I hope this article stimulates judges and lawyers to discuss this important issue. We need to collectively brainstorm about how to create the better mousetrap to help jurors give the accused the full benefit of the presumption of innocence. I do not pretend to have the answers, but I believe to my core that just defining the presumption is woefully inadequate. If we are serious about jurors fully understanding and applying this bedrock principle, we must do more. Much more.

Notes

1. 1 use the actual name of the defendant, but for purposes of this article I use "accused."

1. 1 have used a juror evaluation form in every civil and criminal jury trial in my career. As part of my empowerment approach, during jury selection I explain to the jurors that after their verdict I will give each juror a self-addressed stamped envelope and an evaluation form to take home, fill out, and return. It includes evaluations of me as the trial judge, the jury instructions, and the lawyers. It evaluates the lawyers on each stage of the trial and well as demeanor, sincerity, competence, and preparation. The evaluation includes several openended questions about what impressed them the most and least, and how the lawyer could improve. In commenting on a criminal defense lawyer in a recent trial, a juror wrote: "I took the 'burden of proof' very seriously and we deliberated a long time about this." The juror said the defense lawyer "didn't do much to help convince me. He had no impact on my consideration. . . . Presumed innocence did more for the defendant than his lawyer." This did not do much for the lawyer's confidence when this evaluation was sent to him, but for me it reinforced my approach to the presumption and the burden. (A copy of the juror evaluation form is on file with the author.)

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O R D E R

On this day came on to be heard the Accused's Motion for Trial Court to Question and Education Jury Panel During Voir Dire on the Law, it is hereby in all things,

GRANTED DENIED

SIGNED, ENTERED and ORDERED on this ___ day of _____, 2022.

_____
JUDGE PRESIDING