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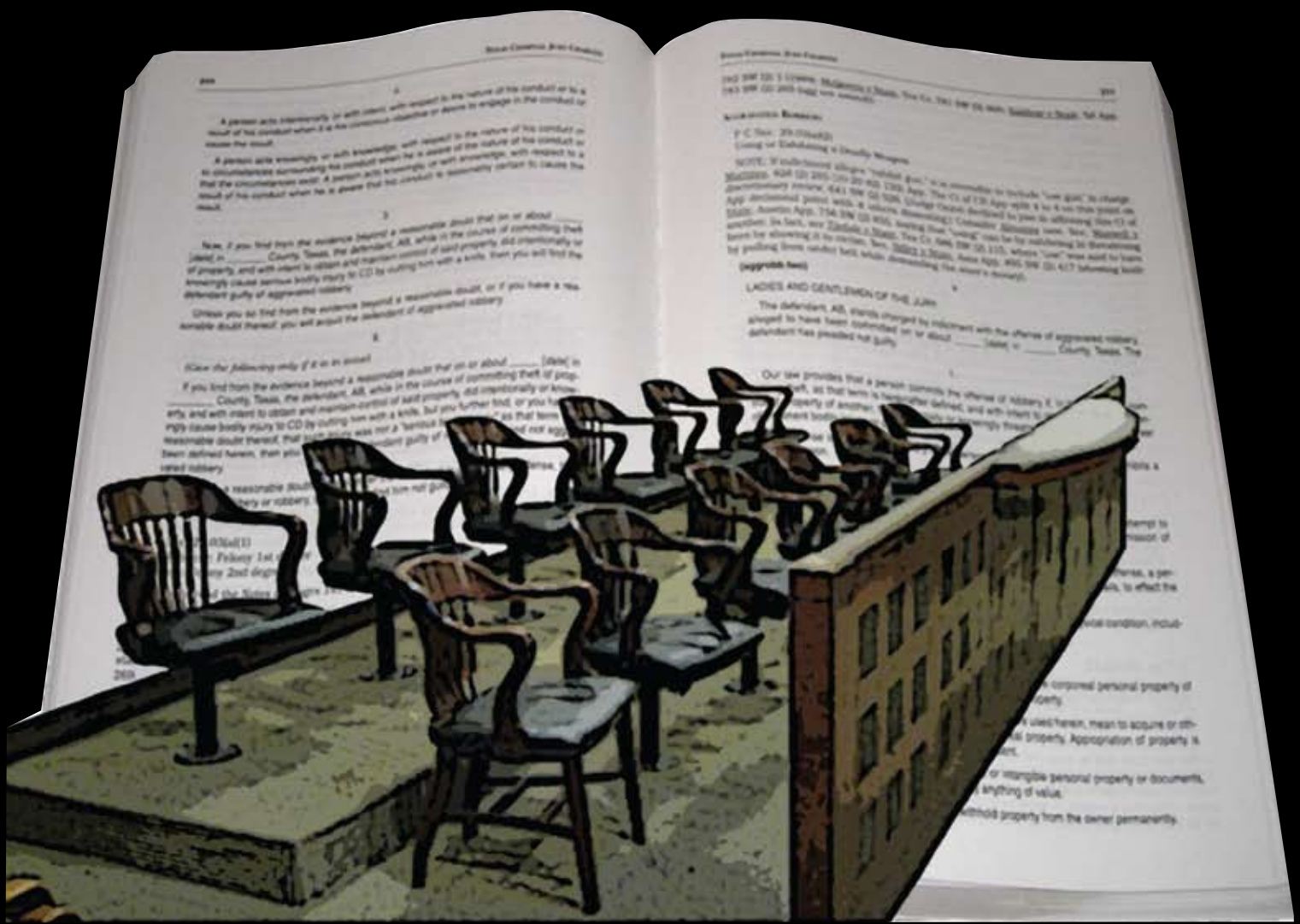
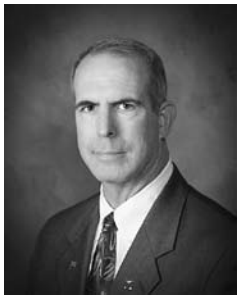
Jury Instructions

INSIDE THIS ISSUE



DECONSTRUCTING *OURSBOURN*
LESSONS LEARNED ABOUT
Cody Lee OURSBOURN, Appellant v. The STATE of Texas.
259 S.W.3d 159
No. PD 1687-06.
Court of Criminal Appeals of Texas.
June 4, 2008
JURY INSTRUCTIONS ON DEFENDANT'S STATEMENTS



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What follows is a deconstruction of the *Oursbourn* case. It is an almost verbatim rendition of the Court's opinion reformatted for emphasis and analysis. *Oursbourn* is the leading case from the Court of Criminal Appeals on jury instructions for a defendant's statements. As such this case is required reading for any one who does trial work.

When the evidence raises an issue of the "**voluntariness**" of a defendant's statement under Article 38.22, the trial judge must give a ***general voluntariness instruction*** under Sections 6 and 7 of that article because it is the "***law applicable to the case***." However, if the judge fails to give the instruction and the defendant fails to object, then the failure to give the instruction is reviewed only for "**egregious harm**" under *Almanza*, 686 S.W.2d 157 (Tex. Crim.App.1985).

The Pertinent Law

Under Article 38.21, "A statement of an accused may be used in evidence against him if it appears that the same was freely and voluntarily made without compulsion or persuasion."

A defendant may claim that his statement was not freely and voluntarily made and thus may not be used as evidence against him under several different theories:

1. **Due Process Clause.**
2. ***Miranda v. Arizona*,** 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)**, as expanded in Article 38.22, §§ 2 and 3 (the Texas confession statute); or**
3. **Article 38.22, § 6 -- general voluntariness;**

It may be **involuntary** under one, two, or all three theories.

A statement that is "involuntary" as a matter of constitutional law is also "involuntary" under Article 38.22, but the converse need not be true.

The theory of involuntariness determines whether and what type of an instruction may be appropriate.

Thus, the first step in deciding upon an appropriate jury instruction is identifying the theory of involuntariness.

A. Claims of involuntariness under the Due Process Clause and *Miranda – Police Overreaching*

A confession may be involuntary under the Due Process Clause only when there is police overreaching. Even if a confession is not the product of a meaningful choice (for example, when it is made in response to hallucinations or to a private person's threat), it is nonetheless "voluntary" within the meaning of the Due Process Clause absent some coercive police activity.

The Supreme Court made this clear in *Colorado v. Connelly*, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (U.S.1986), when it held that if there is no police coercion or overreaching, there is no due-process violation -- even if a suspect is suffering from chronic schizophrenia and is in a psychotic state following the "voice of God" at the time he confesses.

Absent police misconduct causally related to the confession, there is "simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law."

The Due Process Clause is aimed at protecting suspects from police overreaching, not at protecting people from themselves or other private actors.

The same is true for *Miranda* rights and waivers

that apply to custodial-interrogation statements. As the Supreme Court explained in *Connelly*: "*Miranda* protects defendants against government coercion leading them to surrender rights protected by the Fifth Amendment; it goes no further than that."

Thus, the defendant's waiver of his *Miranda* rights, made under the perception of coercion flowing from the "voice of God, . . . is a matter to which the United States Constitution does not speak." As Judge Posner has explained:

> "The significance of the principle of *Connelly*, the principle that the Constitution doesn't protect the suspect against himself, is that if he understands the *Miranda* warnings yet is moved by a crazy impulse to blurt out a confession, the confession is admissible because it is not a product of coercion. The police have given him his *Miranda* warnings in an intelligible form; it is not their fault that he is impulsive."

Statements Found to be Involuntary

Statements that have been found to be involuntary under *Miranda* or the Due Process Clause were collected in *Connelly*; they involve the crucial element of police overreaching and involve fact scenarios such as the following:

> (1) the suspect was subjected to a four-hour interrogation while incapacitated and sedated in an intensive-care unit, *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978);
> (2) the suspect, while on medication, was interrogated for over eighteen hours without food, medication, or sleep, *Greenwald v. Wisconsin*, 390 U.S. 519, 88 S.Ct. 1152, 20 L.Ed.2d 77 (1968);
> (3) the police officers held a gun to the head of the wounded suspect to extract a confession, *Beecher v. Alabama*, 389 U.S. 35, 88 S.Ct. 189, 19 L.Ed.2d 35 (1967);
> (4) the police interrogated the suspect intermittently for sixteen days using coercive tactics while he was held incommunicado in a closed cell without windows and was given limited food, *Davis v. North Carolina*, 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed.2d 895 (1966);
> (5) the suspect was held for four days with inadequate food and medical attention until he confessed, *Reck v. Pate*, 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed.2d 948 (1961);
> (6) the suspect was subjected to five days of repeated questioning during which police employed coercive tactics, *Culombe v. Connecticut*, 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961);
> (7) the suspect was held incommunicado for three days with little food, and the confession was obtained when officers informed him that their chief was preparing to admit a lynch mob into the jail, *Payne v. Arkansas*, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975 (1958);
> (8) the suspect was questioned by relays of officers for thirty-six hours without an opportunity for sleep, *Ashcraft v. Tennessee*, 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192 (1944).

As is evident from these fact scenarios, due-process and Miranda claims of involuntariness generally do not require "sweeping inquiries into the state of mind of a criminal defendant who has confessed." They involve an **objective assessment of police behavior**.

The Constitution leaves voluntariness claims based on the defendant's state of mind "to be resolved by state laws governing the admission of evidence." In Texas, that state law is Article 38.22, the Texas Confession Statute.

B. Claims of involuntariness under the Texas Confession Statute

Article 38.22 of the Code of Criminal Procedure sets out rules governing the admissibility of an accused's written and oral statements that are the product of custodial interrogation. Under our precedents, however, **Section 6** of Article 38.22 applies to both an accused's custodial and non-custodial statements because it provides that only "voluntary" statements may be admitted.

Sections 2 and 3 apply to an accused's custodial-interrogation statements and provide that only "warned and waived" statements may be admitted. That is, an accused's custodial-interrogation statement is not admissible unless, prior to making the statement, he received the warnings provided in Article 15.17 or Article 38.22, § 2(a) or § 3(a) (which incorporate the requirements of Miranda), and he knowingly, intelligently, and voluntarily waived those rights.

Claims of involuntariness under Article 38.22 can be, but need not be, predicated on police overreaching, and

they could involve the "sweeping inquiries into the state of mind of a criminal defendant who has confessed" found in *Connelly* that are not of themselves relevant to due process claims. Article 38.22 is aimed at protecting suspects from police overreaching. But **Section 6** of that article may also be construed as protecting people from themselves because the focus is upon whether the defendant voluntarily made the statement. Period.

Does it appear -- as Article 38.21 requires -- that the statement was freely and voluntarily made without compulsion or persuasion? Or, in the case of a custodial-interrogation statement, did the suspect "knowingly, intelligently, and voluntarily" waive the rights set out in Article 38.22 § 2(a) or § (3)(a)?

These inquiries do not turn solely on police overreaching. The behavior of the police may or may not be a factor. A confession given under the duress of hallucinations, illness, medications, or even a private threat, for example, could be involuntary under Article 38.21 and the Texas confession statute.

The defendant in *Connelly* did not have a valid federal constitutional involuntariness claim, but, had he confessed in Texas, he might have had a viable claim under Articles 38.21 and 38.22. As Professor Dix has noted, "evidence of a defendant's psychological abnormality" (such as *Connelly's* evidence of hallucinations and following God's command) "has its full logical relevance" under Texas law.

Under Articles 38.21 and 38.22 and their predecessors, fact scenarios that can raise a state-law claim of involuntariness (even though they do not raise a federal constitutional claim) include the following:

> (1) the suspect was ill and on medication and that fact may have rendered his confession involuntary, *Rocha v. State*, 16 S.W.3d 1, 20 (Tex.Crim. App.2000);
> (2) the suspect was mentally retarded and may not have "knowingly, intelligently and voluntarily" waived his rights, *Bell v. State*, 582 S.W.2d 800, 812 (Tex. Crim.App.1979); *Casias v. State*, 452 S.W.2d 483, 488 (Tex.Crim. App.1970);
> (3) the suspect "lacked the mental capacity to understand his rights," *Rogers v. State*, 549 S.W.2d 726, 729-30 (Tex.Crim. App.1977);
> (4) the suspect was intoxicated, and he "did not know what he was signing and thought it was an accident report," *Ritchie v. State*, 164 Tex.Crim. 38, 296 S.W.2d 551, 554 (1956).
> (5) the suspect was confronted by the brother-in-law of his murder victim and beaten, *Hamlin v. State*, 39 Tex.Crim. 579, 47 S.W. 656 (1898);
> (6) the suspect was returned to the store he broke into "for questioning by several persons armed `with six-shooters,'" *Warren v. State*, 29 Tex. 369 (1867).

The potential "involuntary" fact scenarios encompassed by Articles 38.21 and 38.22 are broader in scope than those covered by the Due Process Clause or Miranda. Although the Court of Criminal Appeals has held that youth, intoxication, mental retardation, and other disabilities are usually not enough, by themselves, to render a statement inadmissible under Article 38.22, they are factors that a jury, armed with a proper instruction, is entitled to consider.

C. Jury Submission of Voluntariness Instructions

Under Texas statutory law, there are three types of instructions that relate to the taking of confessions:

> **(1) a "general" Article 38.22, § 6 voluntariness instruction;**
> **(2) a "general" Article 38.22, § 7 warnings instruction (involving warnings given under § 2 and § 3); and**
> **(3) a "specific" Article 38.23(a) exclusionary-rule instruction.**

In essence, the **Section 6** "general" instruction asks the jury:

> "Do you believe, beyond a reasonable doubt, that the defendant's statement was voluntarily made? If it was not, do not consider the defendant's confession."

The **Section 7** instruction sets out the requirements of 38.22, § 2 or § 3 and asks the jury to decide whether all of those requirements were met.

The **Article 38.23(a)** "specific" instruction is fact-based:

> For example:
> "Do you believe that Officer Obie held a gun to the defendant's head to extract

his statement? If so, do not consider the defendant's confession."

As noted in *Vasquez v. State*, 225 S.W.3d 541 (Tex. Crim.App.2007), confusion exists about which, if any, jury instruction is appropriate because Texas case law "does not always distinguish, and sometimes blurs, the requirements for getting an instruction under article 38.22 and for getting an instruction under the exclusionary rule of article 38.23."

To clarify the distinction:

- Due process and *Miranda* claims may warrant both "general" and "specific" voluntariness instructions;
- Texas statutory claims warrant only a "general" voluntariness instruction.

It is the defendant's responsibility to delineate which type of "involuntariness" he is claiming: --

- a general (perhaps subjective) lack of voluntariness or
- a specific police-coerced lack of voluntariness

The jury instruction is very different depending upon the type of claim.

The evidence must raise a "voluntariness" issue, and the defendant should request a jury instruction that relates to his theory of involuntariness.

But if the defendant never presents a proposed jury instruction (or fails to object to the lack of one), any potential error in the charge is reviewed only for "egregious harm" under *Almanza*.

1. Article 38.22, § 6 (General Voluntariness) Instructions

Article 38.22, § 6 is a very detailed section that is essentially independent of the other sections contained within Article 38.22 Section 6 provides:

> "In all cases where a question is raised as to the voluntariness of a statement of an accused, the court must make an independent finding in the absence of the jury as to whether the statement was made under voluntary conditions. If the statement has been found to have been voluntarily made and held admissible as a matter of law and fact by the court in a hearing in the absence of the jury, the court must enter an order stating its conclusion as to whether or not the statement was voluntarily made, along with the specific finding of facts upon which the conclusion was based, which order shall be filed among the papers of the cause. Such order shall not be exhibited to the jury nor the finding thereof made known to the jury in any manner. Upon the finding by the judge as a matter of law and fact that the statement was voluntarily made, evidence pertaining to such matter may be submitted to the jury and it shall be instructed that unless the jury believes beyond a reasonable doubt that the statement was voluntarily made, the jury shall not consider such statement for any purpose nor any evidence obtained as a result thereof. In any case where a motion to suppress the statement has been filed and evidence has been submitted to the court on this issue, the court within its discretion may reconsider such evidence in his finding that the statement was voluntarily made and the same evidence submitted to the court at the hearing on the motion to suppress shall be made a part of the record the same as if it were being presented at the time of trial. However, the state or the defendant shall be entitled to present any new evidence on the issue of the voluntariness of the statement prior to the court's final ruling and order stating its findings."

The language "**where a question is raised**" contrasts with the language found in Article 38.22, § 7 and Article 38.23 which speaks of the evidence raising an issue. Because raising a "question" is what triggers the trial court's duty under Section 6 to conduct a hearing outside the presence of the jury, the only reasonable reading of this language is that a "question is raised" when the trial judge is notified by a party or raises on his own an issue about the voluntariness of the confession.

This is the sequence of events that seems to be contemplated by Section 6:

> (1) a party notifies the trial judge that there is an issue about the voluntariness of the confession (or the trial judge raises the

issue on his own);
(2) the trial judge holds a hearing outside the presence of the jury;
(3) the trial judge decides whether the confession was voluntary;
(4) if the trial judge decides that the confession was voluntary, it will be admitted, and a party may offer evidence before the jury suggesting that the confession was not in fact voluntary;
(5) if such evidence is offered before the jury, the trial judge shall give the jury a voluntariness instruction.

It is only after the trial judge is notified of the voluntariness issue (or raises it on his own) that a chain of other requirements comes into play, culminating in the defendant's right to a jury instruction.

Section 6 expressly dictates the content of that instruction to be as follows:

> "unless the jury believes beyond a reasonable doubt that the statement was voluntarily made, the jury shall not consider such statement for any purpose nor any evidence obtained as a result thereof."

Because Section 6 contains its own jury-instruction provision, it is not governed by the jury-instruction provision found in Section 7.

The purpose of **Section 7** is to authorize and require jury instructions regarding the warnings and safeguards for written and oral statements outlined in Article 38.22, § 2 & § 3 (warnings on the right to remain silent, right to counsel, etc).

Consequently, a Section 6 instruction becomes "law applicable to the case" under *Posey v. State,* 966 S.W.2d 57 (Tex.Crim.App.1998), only if the parties actually litigate a Section 6 voluntariness issue before the trial judge. If such litigation occurs (on the admissibility of evidence for example), a jury instruction need not be specifically requested to pass the *Posey* gateway, although a request would still be necessary to obtain the most beneficial harm analysis under *Almanza v. State*.

An interpretation of Section 6 that requires some sort of litigation before it becomes law applicable to the case accords not only with the statutory language but also with common sense. The broad range of voluntariness issues covered by Section 6 could easily be implicated by evidence that would also be relevant for other purposes, and Section 6 does not even require the existence of a factual dispute that might at least obliquely alert the trial judge to the need for an instruction. The Section 6 requirement that voluntariness be litigated in some manner before a jury instruction becomes necessary ensures that the trial judge is on notice that the instruction is required.

For example, the evidence may be undisputed that the defendant did not sleep for 24 hours, or has a low I.Q., or was "high" on drugs at the time he gave his statement. If a reasonable jury could find that the facts, disputed or undisputed, rendered him unable to make a voluntary statement, he is entitled to a general voluntariness instruction when he has raised a question of the voluntariness of his statement.

2. Article 38.22, § 7 (Statutory Warnings) Instructions

If the defendant made his statement as the result of custodial interrogation, he is also entitled -- when **the issue** is raised by the evidence -- to have the jury decide whether he was adequately warned of his rights and knowingly and intelligently waived these rights. Section 7 of Article 38.22 states:

> "When **the issue** is raised by the evidence, the trial judge shall appropriately instruct the jury, generally, on the law pertaining to such statement."

The phrase "the issue" refers to compliance with the statutory warnings set out in both Articles 15.17 (Duties of Arresting Officer and Magistrate) and 38.22, §§ 2 & 3, and the voluntariness of the defendant's waiver of the rights.

For it to be "raised by the evidence" there must be a genuine factual dispute, just as is true under Article 38.23 issues. The same procedures -- including a hearing outside the presence of the jury and the entry of written findings -- that apply to a general voluntariness challenge under Section 6, also apply to a challenge that is made to the sufficiency of warnings and voluntary waiver of the rights communicated by those warnings.

As with Section 6, the trial judge's Section 7 jury instructions are "general" ones that set out the pertinent law and legal requirements of Sections 2 and 3 (or, in an appropriate case, those of Article 15.17).

But suppose there is some evidence that the police held a gun to the head of the defendant -- who, unbeknownst

to the police, had not slept for twenty-four hours -- to extract the confession. In that case, the defendant may also be entitled to a fact-specific, exclusionary-rule instruction, in addition to the two general voluntariness instructions.

3. Article 38.23 (Exclusionary Rule) Instructions – Fact Specific

Article 38.23(a) states:

> "(a) No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case. In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained."

The wording is absolute ("the jury shall be instructed"), just as it is in Article 38.22, but the triggering mechanism is more complex.

As was recently held in *Madden v. State*, the second sentence of Article 38.23 requires a jury instruction only if there is a genuine dispute about a material fact.

A defendant must establish three foundation requirements to trigger an Article 38.23 instruction:

> **(1) the evidence heard by the jury must raise an issue of fact;**
> **(2) the evidence on that fact must be affirmatively contested; and**
> **(3) the contested factual issue must be material to the lawfulness of the challenged conduct in obtaining the statement claimed to be involuntary.**

The defendant must offer evidence that, if credited, would create a reasonable doubt as to a specific factual matter essential to the voluntariness of the statement. This factual dispute can be raised only by affirmative evidence, not by mere cross- examination questions or argument.

For example, the officer in our hypothetical may deny, on cross-examination, that he held a gun to the defendant's head to extract the confession. The implication by counsel, that the officer did perform that act, does not, by itself, raise a disputed fact issue. But if the defendant (or some other witness) testifies that the officer held a gun to his head, then a disputed fact issue exists. And the jury must resolve that disputed fact issue.

If the jury finds that the officer did hold a gun to the defendant's head, the statement is involuntary as a matter of federal constitutional law. If the jury finds the officer did not do so, the statement is not constitutionally involuntary. Of course, if there is no disputed factual issue -- if there is a video definitively showing that the officer did or did not hold a gun to the defendant's head -- the legality of the conduct is determined by the trial judge alone, as a question of law. The legal question would never go to the jury.

Normally, "specific" exclusionary-rule instructions concerning the making of a confession are warranted only where an officer uses inherently coercive practices like those set out in *Connelly*. In Texas, if there is a disputed fact issue about whether this type of coercive practice was employed -- by either an officer or a private citizen -- to wring a confession out of a suspect against his will, a specific exclusionary-rule instruction under Article 38.23 is appropriate.

4. Error in the Failure to Give Appropriate Voluntariness Instructions

When does a trial judge err in failing to give an Article 38.22 or 38.23 jury instruction?

In *Mendoza*, 88 S.W.3d 236, 239 (Tex. Crim. App.2002), the CCA stated:

> "Generally, when evidence from any source raises a defensive issue and the defendant properly requests a jury charge on that issue, the trial court must submit the issue to the jury."

That general statement does not imply the converse -- that the trial court need never submit a jury instruction on a particular defensive issue unless the defendant properly requests one. There is nothing in that sentence or in the rest of the *Mendoza* opinion that states or holds that the trial judge shall instruct the jury to disregard illegally obtained evidence only if the defendant requests a jury charge on that issue.

A defensive issue is not "law applicable to the case" for purposes of Article 36.14 unless the defendant timely

requests the issue or objects to the omission of the issue in the jury charge. Any other holding, the CCA said in *Posey*, would render Article 36.14 -- which also requires a party to make specific objections to the charge -- meaningless, and "might encourage a defendant to retry the case on appeal under a new defensive theory effectively giving him two bites at the apple." The CCA stated that the result in *Posey* "in no way undercuts or limits *Almanza's* analytical framework in cases to which *Almanza* applies," because when "*Almanza* speaks of `errors' of commission and omission in the court's charge, it speaks of issues upon which a trial court has a duty to instruct without a request or objection from either party[.]"

The principle in *Posey* is that no rule or statute requires the trial judge to give instructions on traditional defenses and defensive theories absent a defendant's request. As we recently stated in *Delgado*:

> "The trial judge has an absolute sua sponte duty to prepare a jury charge that accurately sets out the law applicable to the specific offense charged. But it does not inevitably follow that he has a similar sua sponte duty to instruct the jury on all potential defensive issues, lesser-included offenses, or evidentiary issues. These are issues that frequently depend upon trial strategy and tactics."

These are also issues on which instructions are not mandated by any statute. Thus, under *Posey*, it is only when a "requirement of [the] various statutory provisions referenced in Article 36.19 `has been disregarded,'" that the trial court errs in omitting instructions relative to that statute.

But where a rule or statute requires an instruction under the particular circumstances, that instruction is "the law applicable to the case." Such statutes and rules set out an implicit "If-then" proposition: If the evidence raises an issue of [voluntariness, accomplice witness, confidential informant, etc.], then the trial court shall instruct the jury that [whatever the statute or rule requires].

In *Huizar v. State*, 12 S.W.3d 479 (Tex.Crim. App.2000), for example, CCA held that Article 37.07 is "the law applicable" to all non-capital punishment proceedings. Thus, the trial judge must instruct the jury at the punishment phase concerning that law, including the fact that the State must prove any extraneous offenses beyond a reasonable doubt. CCA distinguished *Posey* and explained the difference between instructing the jury on "defensive" issues and instructing them on the law that is applicable to all cases:

> "In *Posey*, we held that "a defensive issue is not [law] `applicable to the case' for purposes of article 36.14 unless the defendant timely requests the issue or objects to the omission of the issue in the jury charge.""

In contrast to a "defense" which depends on the defendant's theory of the case and the evidence presented, applicability of article 37.07 § 3(a) is not contingent on either party's theory of the case. Rather, article 37.07 § 3(a) is a legislatively prescribed burden of proof applicable to extraneous offense and bad act evidence admitted at punishment in all non- capital cases.

Similarly, Articles 38.21-38.23 are legislatively mandated procedures governing the admission and consideration of a defendant's statements. Article 38.21 explicitly states that voluntary statements may be used in evidence "under the rules hereafter prescribed" -- that is, Article 38.22 and Article 38.23.

Article 38.22, § 6 is "the law applicable" to any case in which a "question" is raised and litigated as to the "general" voluntariness of a statement of an accused. As noted above, under that statute, the trial judge must then:

> (1) make an independent determination that the statement was made under voluntary conditions; and then
> (2) instruct the jurors that they shall not consider the statement for any purpose unless they believe, beyond a reasonable doubt, that the statement was made voluntarily.

Article 38.23 is "the law applicable" to any case in which a specific, disputed issue of fact is raised concerning the constitutional voluntariness of the making of the defendant's statement. These are statutorily mandated instructions and the trial judge must include them in the jury instructions when the voluntariness of a defendant's statement is at issue.

What follows is a quick reference chart for the above case, to be used as an aid to deciding which type of jury instruction should be given.

Defensive Theories for Jury Instructions on the State's use of a Defendant's Statement Under Due Process, *Miranda*, Art 38.21, Art 38.22 & Art 38.23(a)

From

***Oursbourn v. State,* 259 S.W.3d 159**

Theory	Due Process	Miranda Rights & Waivers	Art. 38.22 §6 Gen. Ins.	Art. 38.22 § 2, 3 & 7 Rights & Waivers Gen. Ins.	Art. 38.23(a) Exclusionary Rule Fact Specific Ins.
Police Overreaching	YES	YES	YES	YES	YES[1]
Defendant Mental State	NO	NO	YES	YES	YES
Custodial	YES	YES	YES	YES	YES
Non – Custodial	NO	NO	YES[2]	NO	NO
Hearing Outside Presence Jury	YES	YES	YES	YES	YES
Private Actor	NO	NO	YES[3]	YES	YES[4]
Specific / General Instruction	GEN and/or SPECIFIC[5]	GEN and/or SPECIFIC[6]	GEN	GEN	SPECIFIC[7]
Foundational Requirements Art. 38.23(a)	Defendant must establish: (1) the evidence heard by the jury must raise an issue of fact; (2) the evidence on that fact must be affirmatively contested; and (3) the contested factual issue must be material to the lawfulness of the challenged conduct in obtaining the statement claimed to be involuntary[8].				

(Footnotes)

1 Oursbourn v. State, 259 S.W.3d 159, 178 (Tex. Crim.App. 2008).
2 Id at 171, 173.
3 Id at 172, 173.
4 Id at 177, 178, Miles v. State, 241 S.W.3d 28, 36 (Tex. Crim. App. 2007).
5 Id at 174.
6 Id at 174.
7 Id at 176.
8 Id at 177.