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Reasonable Double Definitional Instruction Results in Abolishing Exclusion of Outstanding Reasonable Hypothesis as Standard of Review in Circumstantial Evidence Cases.

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CRIMINAL LAW—DEFINITIONAL INSTRUCTION—REASONABLE DOUBT DEFINITIONAL INSTRUCTION RESULTS IN ABOLISHING "EXCLUSION OF OUTSTANDING REASONABLE HYPOTHESIS" AS STANDARD OF REVIEW IN CIRCUMSTANTIAL EVIDENCE CASES. *Geesa v. State*, 820 S.W.2d 154 (Tex. Crim. App. 1991).

Douglas Alan Geesa, a repeat felony offender, was convicted of the offense of unauthorized use of a motor vehicle. Geesa's conviction was based entirely upon circumstantial evidence.[1] The jury assessed punishment at forty years imprisonment in the Texas Department of Criminal Justice, Institutional Division. The court of appeals applied the "reasonable-hypothesis-of-innocence analytical construct," dictated by 136 years of precedent, and found the evidence failed to exclude every reasonable hypothesis other than guilt.[2] Thus, based on insufficiency of the evidence, the court of appeals reversed the conviction and ordered the trial court to enter a judgment of acquittal.[3] However, the court of criminal appeals reversed the court of appeals and remanded the case for a new trial. The court of criminal appeals determined that the "reasonable-hypothesis-of-innocence analytical construct" is no longer an appropriate standard of review in evaluating circumstantial evidence cases.[4] In addition, and in response to its decision to abandon the "reasonable-hypothesis-of-innocence analytical construct," the

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1. The crucial element in obtaining a conviction for the offense of unauthorized use of a motor vehicle is establishing that the defendant operated the vehicle. A summary of the evidence adduced at trial which linked the defendant to the vehicle is as follows:

> The police were summoned after a witness observed a truck, containing two men, pull into and park at a closed Texaco service station. The reporting witness provided the police with a description of the occupants' clothing but was unable to describe their faces. The witness told the police that one of the men in the truck was wearing a white T-shirt and cream-colored pants. This description matched the clothing worn by Geesa who was found at the southwest corner of the premises. After determining the truck was stolen, Geesa was arrested. Geesa denied having any knowledge of the truck and claimed to have walked to the Texaco station. However, Geesa's fingerprints were found on three packages of cigarettes located on the dashboard inside the truck. The arresting officer testified that his dispatcher told him that the driver of the vehicle was wearing a white T-shirt and cream-colored pants; however, at trial, the reporting witness did not recall telling anyone which of the two men was the driver.

Geesa v. State, 820 S.W.2d 154, 176-78 (Tex. Crim. App. 1991).

2. *Geesa*, 820 S.W.2d at 177.

3. *Id.*

4. *Id.* at 155.

court of criminal appeals held that a definitional instruction on "reasonable doubt"[5] is essential for all cases tried after November 6, 1991.[6]

As early as 1855, Texas courts recognized the distinction between circumstantial and direct evidence.[7] Direct evidence occurs when a witness with personal knowledge testifies as to disputed facts.[8] Circumstantial evidence, on the other hand, assumes a witness has no personal knowledge of the disputed facts, but is aware of other facts and circumstances which, when tendered into evidence, may permit the factfinder to infer whether or not the disputed facts existed.[9] The inference establishing the disputed facts is permitted upon showing that a reasonable relationship can be deduced between the known facts and those facts sought to be ascertained.[10]

In 1855, the Texas Supreme Court, then empowered with criminal juris-

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5. The definitional instruction of "reasonable doubt" as mandated by the court provides:

> 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 a person has been arrested, confined, or indicted for, or otherwise charged with, the offense gives rise to no inference of guilt at his trial. The law does not require a defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.
>
> The prosecution has the burden of proving the defendant guilty and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and if it fails to do so, you must acquit the defendant.
>
> It is not required that the prosecution prove guilt beyond all possible doubt; it is required that the prosecution's proof excludes all "reasonable doubt" concerning the defendant's guilt.
>
> A "reasonable doubt" is a doubt based on reason and common sense after a careful and impartial consideration of all the evidence in the case. It is the kind of doubt that would make a reasonable person hesitate to act in the most important of his own affairs.
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> Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.
>
> In the event you have a reasonable doubt as to the defendant's guilt after considering all the evidence before you, and these instructions, you will acquit him and say by your verdict "Not Guilty".

Geesa, 820 S.W.2d at 162.

6. The author expresses no opinion as to whether or not limited prospectivity is the proper conclusion in giving effect to a new rule.

7. *See* Henderson v. State, 14 Tex. 503, 512-13 (1855) (direct evidence is not only means of establishing main fact).

8. *See* Rodriguez v. State, 617 S.W.2d 693, 694 (Tex. Crim. App. 1981) (definition of direct evidence). *See generally* 1 CHARLES E. TORCIA, WHARTON'S CRIMINAL EVIDENCE § 6 at 4-6 (13th ed. 1972) (discussing direct and circumstantial evidence).

9. *See* Rodriguez v. State, 617 S.W.2d 693, 694 (Tex. Crim. App. 1981) (definition of circumstantial evidence).

10. *Id.*

diction, adopted the *Commonwealth v. Webster*[11] standard for review of convictions based upon circumstantial evidence in *Henderson v. State*.[12] The standard, in its simplest form, provides that a reviewing court shall not uphold the defendant's conviction if the evidence supports an inference other than a finding of guilt.[13] In adopting this standard of review, the *Henderson* court implicitly gave its approval to the use of a cautionary jury instruction on the law of circumstantial evidence in cases where the conviction would rest wholly on circumstantial evidence, according to Justice Maloney.[14] By 1857, failure to include a proper cautionary jury instruction resulted in a reversal where circumstantial evidence was the basis of the conviction.[15] It was not until 1879, however, that a specific cautionary jury instruction was required in cases based wholly on circumstantial evidence.[16] The cautionary jury instruction in circumstantial evidence cases provided, in part, that the evidence must eliminate all other reasonable hypotheses other than the defendant's guilt with moral certainty.[17]

However, some 125 years later in 1983, the Texas Court of Criminal Appeals abolished the long-standing tradition of including a cautionary jury instruction in circumstantial evidence cases in *Hankins v. State*.[18] The *Hankins* majority reasoned that the language contained in a 1954 United States Supreme Court opinion, *Holland v. United States*,[19] was controlling and adopted the language as its own.[20] The *Holland* Court determined an additional jury instruction in circumstantial evidence cases is misleading and incorrect if the jury has been properly instructed on reasonable doubt.[21] In effect, the court recognized that circumstantial evidence is often as persua-

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11. 59 Mass. (5 Cush.) 295 (1850).

12. *Henderson*, 14 Tex. at 514.

13. *See, e.g.*, Butler v. State, 769 S.W.2d 234, 238 (Tex. Crim. App. 1989); Carlsen v. State, 654 S.W.2d 444, 449 (Tex. Crim. App. 1983); Freeman v. State, 654 S.W.2d 450, 456 (Tex. Crim. App. 1983); Denby v. State, 654 S.W.2d 457, 464 (Tex. Crim. App. 1983); Wilson v. State, 654 S.W.2d 465, 471-72 (Tex. Crim. App. 1983).

14. *Geesa*, 820 S.W.2d at 159 n.5.

15. Burrell v. State, 18 Tex. 713, 734-35 (1857).

16. Hunt v. State, 7 Tex. Ct. App. 212, 236 (1879).

17. *See* Hankins v. State, 646 S.W.2d 191, 207 (Tex. Crim. App. 1983) (Onion, J., dissenting) (furnishes cautionary jury instruction for circumstantial evidence cases).

18. *Hankins*, 646 S.W.2d at 197. *See generally* Jeffrey S. Alley, Note, *Elimination of the Texas Cautionary Circumstantial Evidence Charge*: Hankins v. State, *646 S.W.2d 191 (Tex. Crim. App. 1983)*, 15 TEX. TECH L. REV. 459, 472-73 (1984) (criticizing court of criminal appeals for failing to suggest alternative to cautionary jury charge in circumstantial evidence cases after abolishing it); Donald L. Gaffney, Note, *The Circumstantial Evidence Charge in Texas Criminal Cases: A Retrograde Doctrine*, 55 TEX. L. REV. 1255 (1977) (Texas cautionary jury charge in circumstantial evidence cases).

19. 348 U.S. 121 (1954).

20. *Hankins*, 646 S.W.2d at 199.

21. *Holland*, 348 U.S. at 139-40.

sive as direct evidence.[22] Although the *Hankins* majority expressly abolished the additional jury instruction for circumstantial evidence cases, it failed to comment on the standard to be applied in reviewing cases based wholly on circumstantial evidence.[23]

Prior to *Hankins*, the Supreme Court had decided another important decision relevant to the standard of review in circumstantial evidence cases. In *Jackson v. Virginia*,[24] the United States Supreme Court set forth the exclusive standard of review for analyzing attacks targeted at sufficiency of the evidence.[25] This decision was rendered twenty-five years after *Holland* but four years prior to Texas abolishing the additional cautionary jury instruction in circumstantial evidence cases. The *Jackson* Court held that in reviewing insufficiency of the evidence claims the focus is not whether the jury was properly instructed, but to ascertain whether the transcript of the record plausibly supports a finding of guilt beyond a reasonable doubt.[26] More specifically, the Supreme Court held that the appropriate standard for reviewing insufficiency of the evidence claims in either direct or circumstantial cases is whether, upon considering the evidence in the light most advantageous to the State, a rational trier of fact could have found the crucial elements of the offense beyond a reasonable doubt.[27]

The court of criminal appeals later confronted the *Jackson* decision head-on in *Griffin v. State*, and announced that the standard of review in *Jackson* is binding, but such standard constitutes only a minimum for upholding convictions.[28] Moreover, the *Griffin* court recognized that states may permissibly set higher standards of review than that provided in the Federal Constitution.[29] The *Griffin* decision came two years after *Jackson* but two years prior to *Hankins*. Thus, from 1879 until 1983 the Texas Court of Criminal Appeals specifically and unequivocally upheld the use of a cautionary jury instruction for circumstantial evidence cases and the exclusion of the reasonable-hypothesis-of-innocence analytical construct as the appropriate standard of review for such cases.

Although the *Hankins* majority abolished the cautionary jury instruction in circumstantial evidence cases, it explicitly retained the reasonable-hypothesis-of-innocence analytical construct standard of review in its later decisions.[30] In fact, the court of criminal appeals decisions (commonly referred

22. *Hankins*, 646 S.W.2d at 198.
23. *Id.* at 217 (Onion, J., dissenting).
24. 443 U.S. 307 (1979).
25. *Id.* at 318-19.
26. *Id.* at 318.
27. *Id.* at 319.
28. Griffin v. State, 614 S.W.2d 155, 159 (Tex. Crim. App. 1981).
29. *Id.* at 155 n.5.
30. *E.g.*, *Butler*, 769 S.W.2d at 238 n.1. The following cases compose the *Carlsen* quartet:

to as the *Carlsen* quartet) discussing the standard contain identical language and all provide:

> Still, we are *unable to devise or discover any reason, compelling or otherwise, for abandoning the utilitarian "exclusion of outstanding reasonable hypothesis" analysis for applying the above "standard of review" in circumstantial evidence cases.* By the nature of circumstantial evidence, in order to determine it rationally establishes guilt beyond a reasonable doubt, a process of elimination must be used.[31]

In *Butler v. State*,[32] the court of criminal appeals further reiterated its holding that the *Carlsen* quartet contains the appropriate standard of review for circumstantial evidence cases.[33]

Although the court of criminal appeals established a standard of review for circumstantial evidence convictions, it had never defined reasonable doubt, either statutorily or by jury charge, prior to *Geesa*.[34] In fact, on many occasions since the beginning of Texas jurisprudence, courts have specifically and categorically denied adopting such a jury instruction.[35] As recently as *Hankins*, the Texas Court of Criminal Appeals acknowledged that it is an insignificant distinction that federal jurisdictions require a definitional instruction of reasonable doubt while Texas does not.[36]

Now ironically, two years after upholding the exclusion of the outstanding reasonable hypothesis as an appropriate standard of review in circumstantial cases, the majority in *Geesa* has abolished the practice of employing such a standard in analyzing sufficiency of the evidence attacks.[37] Furthermore, as a result of eliminating this standard of review, the court of criminal appeals now finds it necessary to require a jury instruction defining reasonable doubt.[38]

Although *Geesa* uproots firmly established Texas jurisprudence, the ma-

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Carlsen, 654 S.W.2d at 449; *Freeman*, 654 S.W.2d at 456; *Denby*, 654 S.W.2d at 464; *Wilson*, 654 S.W.2d at 471-72.

31. *Carlsen*, 654 S.W.2d at 449; *Freeman*, 654 S.W.2d at 455; *Denby*, 654 S.W.2d at 464; *Wilson*, 654 S.W.2d at 471-72 (emphasis added).

32. 769 S.W.2d 234 (Tex. Crim. App. 1989).

33. *Id.* at 238 n.1.

34. *Geesa*, 820 S.W.2d at 161 n.10.

35. Texas has, however, employed a nondefinitional charge on reasonable doubt since 1974. *Geesa*, 820 S.W.2d at 161 n.10. The following decisions have refused the invitation to adopt a definitional instruction for reasonable doubt. *E.g.*, Pigg v. State, 162 Tex. Crim. 521, 523, 287 S.W.2d 673, 674 (1956); Sagu v. State, 94 Tex. Crim. 14, 16, 248 S.W. 390, 391 (1923); Lenert v. State, 63 S.W. 563, 565 (Ct. Crim. App. 1901); Massey v. State, 1 Tex. Ct. App. 563, 570 (1877); *see Hankins*, 646 S.W.2d at 208 (Onion, J., dissenting) (Texas decisions which have refused to adopt a definition of reasonable doubt).

36. *Hankins*, 646 S.W.2d at 199 n.1.

37. *Geesa*, 820 S.W.2d at 161.

38. *Id.* at 162.

jority reasoned their decision was justified. First, the *Geesa* majority concluded the dichotomy in the law created by the *Hankins* decision must be mended.[39] The majority reasoned that because juries no longer receive a cautionary instruction in circumstantial evidence cases, it is improper for appellate courts to apply the exclusion of the reasonable hypothesis theory.[40] Judge Maloney maintains that the jury instruction and standard of review are two interdependent concepts which are unable to exist independently.[41] Secondly, the majority maintains that the exclusion of the outstanding reasonable hypothesis has proved to be confusing and difficult to apply by some reviewing courts.[42] Lastly, the majority asserts that the United States Supreme Court and other jurisdictions have expressly disapproved of the reasonable hypothesis theory.[43] Thus, in an apparent effort to comply with *Jackson*, the majority declared it is imperative to provide a definitional instruction of reasonable doubt in all cases tried after November 6, 1991.[44]

Justice Clinton's dissent criticizes the majority's reasoning for deviating from an established and workable standard.[45] He suggests that the majority's reasoning is flawed in that the reasonable hypothesis of innocence analytical construct was simply a process of elimination utilized by appellate courts.[46] The process enabled appellate courts to determine if the evidence contained in the record met the constitutional minimum set forth in *Jackson* by answering the question: Whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt after viewing all the evidence in the light most favorable to the prosecution.[47] Clinton argues that the application of the reasonable hypothesis theory could result in obtaining a higher threshold than that mandated by *Jackson*, but that states are within their right to provide greater protection to their residents than that guaranteed by the federal Constitution. This is not to say that the ultimate standard of review in circumstantial and direct evidence cases is different; but, that different approaches can be utilized in determining whether the evidence complies with the *Jackson* criterion.[48] The point being, that prior to *Geesa*, a process existed for appellate courts to "conduct an evidentiary analysis in making the critical inquiry and in answering the

39. *Id.* at 159.
40. *Id.*
41. *Id.* at n.5.
42. *Geesa*, 820 S.W.2d at 160.
43. *Id.* at 160-61.
44. *Id.* at 162.
45. *Id.* at 175 (Clinton, J., dissenting).
46. *Id.* at 171 (Clinton, J., dissenting).
47. *Geesa*, 820 S.W.2d at 167 (Clinton, J., dissenting).
48. *Id.* at 171 (Clinton, J., dissenting).

relevant question prescribed in *Jackson v. Virginia*."[49] The dissent also counters the majority's argument by citing decisions in which appellate courts have successfully and properly applied the reasonable hypothesis theory to support its argument that the previous standard was indeed workable.[50] Furthermore, the dissent maintains that disapproval of the reasonable hypothesis theory is not a new phenomena as the majority implies. In fact, such criticism existed long before the court of criminal appeals decided the *Carlsen* quartet, and despite its unpopularity, the Court made a conscious decision to uphold the exclusion of the reasonable hypothesis theory.[51] Lastly, Justice Clinton noted requiring such a definition is an act which the court of criminal appeals, since its existence, has steadfastly refused to do.[52]

At the onset, Texas adopted the exclusion of the reasonable hypothesis as a standard of review some years prior to requiring a cautionary jury instruction in circumstantial evidence cases.[53] Furthermore, for the last eight years, this standard of review has continued to be utilized in reviewing insufficiency of the evidence claims even though the court of criminal appeals chose to eliminate the practice of including a cautionary jury instruction in circumstantial evidence cases. The fact that the "exclusion of the reasonable hypothesis" standard of review existed independently and successfully without the cautionary jury instruction, raises the question: Why has the majority now decided that the two concepts are interdependent and that the "exclusion of the reasonable hypothesis standard" cannot possibly exist without the cautionary jury instruction when it has existed independently for many years? Although the two concepts were used together for well over a hundred years, that in itself does not necessarily make them interdependent.

Since its very existence, Texas has consciously and specifically refused to provide a definitional instruction for reasonable doubt.[54] One must assume the courts' conscious exclusion was for a valid reason—perhaps inclusion of such a definition would overcomplicate a jury's thought process and fail to give jury members credit for some rational thought process. Additionally, since 1855, Texas courts have consistently and successfully applied the "exclusion of the reasonable hypothesis analysis" as the standard of review in

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49. *Id.* at 174 (Clinton, J., dissenting).

50. *Butler*, 769 S.W.2d at 240; *see also Geesa*, 820 S.W.2d at 172 (Clinton, J., dissenting) (decisions utilizing exclusion of reasonable hypothesis); Garrett v. State, 682 S.W.2d 301, 304-05 (Tex. Crim. App. 1984) (proper use of exlusion of reasonable hypothesis by appellate court). *But see*, Goff v. State, 777 S.W. 2d 418, 420-21 (1987) (improper application of exclusion of reasonable hypothesis by appellate court).

51. *Geesa*, 820 S.W.2d at 172 (Clinton, J., dissenting).

52. *Id.* at 174 (Clinton, J., dissenting).

53. *Hankins*, 646 S.W.2d at 207 (Onion, J., dissenting).

54. *Geesa*, 820 S.W.2d at 161 n.10.

circumstantial evidence cases.[55] However, the real tragedy in *Geesa* is not that the majority has ignored 136 years of precedent followed by fourteen appellate courts, but that it has completely failed to provide a standard for appellate courts to follow in reviewing sufficiency of the evidence challenges. Appellate courts are now left to conjure up their own standards of review leaving a potential inconsistency in how the *Jackson* requirements will be achieved and applied in Texas. Judge Onion, in *Hankins*, criticized the majority for abolishing the cautionary jury instruction without commenting on the proper standard of review for circumstantial evidence cases.[56] The confusion the court of criminal appeals then chose to clarify after *Hankins* in the *Carlsen* quartet has now been reborn in *Geesa*—What exactly is or will be the appropriate standard to be applied when reviewing the sufficiency of the evidence convictions based on circumstantial evidence to achieve the constitutional requirements set forth in *Jackson*?

A simple analogy illustrates the point. It was not uncommon for doctors to use ordinary table knives and meat cleavers for surgery on their patients during the Civil War. As technology progressed scalpels replaced meat cleavers in the operating room. Today, in many instances, laser beams have replaced the use of scalpels. The exclusion of the reasonable hypothesis, when adopted, was a tool used by reviewing courts to determine if the evidence was sufficient to uphold a conviction in circumstantial evidence cases much like table knives and meat cleavers were used as surgical instruments. Over the years, the courts refined the exclusion of the reasonable hypothesis into a more delicate and precise instrument to achieve the *Jackson* criteria much like the scalpel becoming a more refined surgical instrument. Today, the Texas Court of Criminal Appeals discards the laser beam and scalpel (a workable standard of review) without any advance in technology (a more refined standard of review) to take the laser beam's and scalpel's place. The court has neither developed or suggested a tool to replace the exclusion of the reasonable hypothesis theory.

The *Geesa* majority has embarked into new and dangerous territory by eliminating the exclusion of the reasonable hypothesis as a standard of review in circumstantial evidence cases without providing a replacement standard of review, and by adopting a definitional instruction of reasonable doubt. The danger has not necessarily resulted from emasculating the long-standing standard of review, or even from adopting a definitional instruction of reasonable doubt; the danger lies in the majority's failure to provide the appropriate method for reviewing insufficiency of the evidence attacks. Without instruction, appellate courts will have no guidance in their attempts to achieve the *Jackson* mandate in analyzing insufficiency of the evidence

55. *Id.* at 172 (Clinton, J., dissenting).

56. *Hankins*, 646 S.W.2d at 217 (Onion, J., dissenting).

claims. One cannot attempt to speculate what impact will result from discarding a tried and true tool that has been in use for over a hundred years with no alternatives. But in future decisions, the *Geesa* majority would be wise to take heed in the old adage "if it ain't broke, don't fix it."

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