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Jurors May Not Pose Written Questions to Witnesses in Criminal Cases.

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RECENT DEVELOPMENT

EVIDENCE—WITNESSES—JURORS MAY NOT POSE WRITTEN QUESTIONS TO WITNESSES IN CRIMINAL CASES. *Morrison v. State*, 845 S.W.2d 882 (Tex. Crim. App. 1992)

In 1991, a jury convicted Steven Morrison of murder and assessed a fifty-year sentence.[1] During the trial, the judge instructed the jurors that they could write down any questions they wanted to ask a witness after he or she had testified.[2] If questions were collected, they would be read to the parties outside the presence of the jury, and the attorneys would have an opportunity to object to the questions.[3] The judge would then rule on the question, and depending upon its admissibility, the jurors would be recalled and the question read to the witness.[4] The parties in the case would be allowed to ask any follow-up questions, provided the questions were limited to the subject matter raised by the juror's question.[5]

According to the facts, the victim was conducting a drug transaction with Morrison in the victim's house.[6] An argument broke out and Morrison chased the victim from the house with a butcher's knife.[7] At trial, the detective who investigated the murder scene testified that he found blood outside the victim's house.[8] After the detective's testimony, a juror submitted a question asking: "Was any of the blood in the hall [Morrison's]?"[9] Morrison objected to the question as calling for hearsay.[10] Although the objection was sustained, the juror's question alerted the prosecution that there might

1. Morrison v. State, 845 S.W.2d 882, 883 (Tex. Crim. App. 1992).
2. *Id.* at 883 n.1.
3. *Id.*
4. *Id.*
5. *Morrison*, 845 S.W.2d at 883.
6. *Id.* at 883 n.2.
7. *Id.*
8. *Id.*
9. *Morrison*, 845 S.W.2d at 883 n.2.
10. *Id.*

have been a question of whether Morrison's actions were taken in self-defense. The trial judge allowed the State to recall the detective, who was then questioned as to Morrison's "physical well-being" on the night of the murder.[11] He was asked further whether he noticed any "wounds, scratches or injuries" on Morrison on the night of the murder.[12] The detective responded that he had not noticed any of these conditions.[13] Morrison, however, maintained a running objection throughout the trial to "the process" of allowing the jurors to submit questions.[14]

On appeal, the Texas Tenth Court of Appeals refused to ban the practice of allowing jurors to submit questions, but held that, in Morrison's case, such practice constituted an improper attorney-juror communication and, therefore, was reversible error.[15] The Texas Court of Criminal Appeals granted Morrison's petition for discretionary review to decide the issue of whether "the trial court abused its discretion in allowing the State to recall a witness to produce evidence on a topic raised by a juror's question."[16] Held — *reversed*. Jurors may not pose written questions to witnesses in criminal cases.[17]

The jury's duty is to ascertain the truth by performing the fact-finding function.[18] In medieval times, jurors accomplished this by taking an active role in producing evidence.[19] In fact, they were generally selected to sit on a jury because they had knowledge of the particular case at bar.[20] However,

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11. *Id.*

12. *Id.*

13. *Morrison*, 845 S.W.2d at 883 n.2.

14. Morrison v. State, 815 S.W.2d 766, 767 (Tex. App.—Waco 1991), *aff'd*, 845 S.W.2d 881, 884 (Tex. Crim. App. 1992).

15. *Id.* at 768-69.

16. *Morrison*, 845 S.W.2d at 883.

17. *Id.* at 884.

18. Harold C. Warner, *The Development of Trial by Jury*, 26 TENN. L. REV. 459, 459 (1959); *see* Dale W. Broeder, *The Functions of the Jury: Facts or Fiction?*, 21 U. CHI. L. REV. 386, 387-88 n.6 (1954) (stating that resolving fact questions is best left to jury); *The Judge-Jury Relationship in State Courts*, 23 ORE. L. REV. 3, 19 (1943) (discussing inherent difficulties of juror determination of facts in cosmopolitan society); Lisa M. Harms, Comment, *The Questioning of Witnesses by Jurors*, 27 AM. U. L. REV. 127, 129 (1977) (discussing need to communicate effectively with jurors to assist them in their duties).

19. *See, e.g.*, Jeffrey S. Berkowitz, Note, *Breaking the Silence: Should Jurors Be Allowed To Question Witnesses During Trial?*, 44 VAND. L. REV. 117, 122 (1991) (stating that kings selected jurors because of their ability to discover facts); Jeffrey Reynolds Sylvester, Comment, *Your Honor, May I Ask a Question? The Inherent Dangers of Allowing Jurors to Question Witnesses*, 7 COOLEY L. REV. 214, 214 (1990) (discussing how jurors were instructed to produce factual information and render verdict).

20. *See, e.g.*, Charles T. Coleman, *Origins and Development of Trial by Jury*, 6 VA. L. REV. 77, 84 (1919) (discussing selection of juries); Jeffrey S. Berkowitz, Note, *Breaking the Silence: Should Jurors Be Allowed To Question Witnesses During Trial?*, 44 VAND. L. REV. 117, 122 (1991) (stating that jurors were selected based on their knowledge of facts of case).

in the eighteenth century, English and American trials evolved into the modern adversarial-trial system.[21] Jurors were no longer active participants but, instead, were to act as a neutral and passive body.[22] The attorneys had the duty to present all evidence at trial, while the jury listened to that evidence and then made a factual determination.[23]

There has been an impetus, especially in the last few decades, to encourage jurors to take a more active role and to question witnesses.[24] Two methods of questioning predominate. First, a juror can directly and orally question the witness. This method has been rejected by many courts because of the difficulties posed by having inadmissible evidence elicited and prejudicial effects created when one party openly objects to a juror's question.[25] The second method allows jurors to write down their questions after a witness has

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21. *See* Stephen Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497, 572-603 (1990) (describing social changes that led to development of modern adversarial procedure); Jack Pope, *The Jury*, 39 TEX. L. REV. 426, 444-47 (1961) (reviewing evolution of adversarial-system juries in colonial America).

22. *See* Jack Pope, *The Proper Function of Jurors*, 16 BAYLOR L. REV. 365, 366-67 (1962) (discussing jury's function). In 1905, the Texas Supreme Court explained:

> In arriving at a verdict a juror should not indulge in any undue pride of personal opinion, and he should not be unreasonable or obstinate, and he should give due consideration to the views and opinions of other jurors, and listen to the arguments with a willingness to be convinced, and to yield to their views, if induced to believe they are correct; but the law does not expect, nor does it tolerate, agreement by a juror upon a verdict unless he is convinced that it is right; in other words, unless it is his verdict, a verdict which his conscience approves, and he, under oath, after a full consideration to be right.

Gulf, C. & S. F. Ry. Co. v. Johnson, 99 Tex. 337, 337, 90 S.W. 164, 165 (Tex. 1905).

23. *See* Jack Pope, *The Proper Function of Jurors*, 16 BAYLOR L. REV. 365, 366-67 (1962) (discussing function of jury during trial); 47 AM. JUR. 2D, *Jury* § 3 (1969) (discussing province of jury); 50 C.J.S., *Juries* § 1 (1947) (stating that jury decides factual issues based on issues presented to it).

24. *See* Allen v. State, 807 S.W.2d 639, 640-41 (Tex. App.—Houston [14th Dist.] 1991) (listing decisions from other jurisdictions adopting jury questioning in past four decades), *rev'd*, 1993 WL 13192 (Tex. Crim. App. 1993).

25. *Allen*, 807 S.W.2d at 641-42. The court wrote:

> Permitting a juror to spontaneously ask a direct oral question of a witness could create substantial problems as follows:
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> 1. It places counsel "in the intolerable condition of offending the juror by objecting or permitting improper or impossible prejudicial testimony to come in without objection;"
> 2. It causes the juror involved to lessen his or her objectivity and causes a premature judgment on some issue of the case;
> 3. It produces tension or actual antagonism between the juror and witness as a result of the interaction.

Id. (citing People v. McAlister, 213 Cal. Rptr. 271, 277 (Cal. Ct. App. 1985)); *see* Stinson v. State, 260 S.E.2d 407, 410 (Ga. Ct. App. 1979) (disapproving of jurors asking direct questions to witnesses); *see also* Jeffrey S. Berkowitz, Note, *Breaking the Silence: Should Jurors Be Allowed To Question Witnesses During Trial?*, 44 VAND. L. REV. 117, 128 (1991) (discussing state courts' reluctance to allow direct jury questioning).

been through direct and cross examination. The questions are then read by the judge outside the jury's hearing, and any party may object. If a question is deemed admissible, it is read to the witness exactly as written. After all questions are read to a particular witness, the parties are allowed follow-up questions on matters raised by the jurors' questions.

Courts and scholars debate the merits of allowing jury questions. Advocates generally cite five reasons for allowing jury questioning. First, such a system allows jurors to better understand evidence presented to them by permitting them to follow up or clarify evidence presented.[26] Second, jury questioning allows juries to obtain evidence that may have been left out accidentally by counsel.[27] Third, jury questioning more deeply involves the jury in the trial.[28] Fourth, jury questioning alerts the parties as to what jurors are thinking, and provides insight into which issues need clarification or further development.[29] Last, allowing jury questioning enhances the jury's confidence in arriving at a verdict.[30]

Opponents of jury questioning contend that there are too many dangers in allowing this. These dangers include upsetting the adversarial system,[31] dis-

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26. *See* United States v. Callahan, 588 F.2d 1078, 1086 (5th Cir.), *cert. denied*, 444 U.S. 826 (1979) (stating that jurors should be allowed to ask questions if they do not understand evidence); People v. Heard, 200 N.W.2d 73, 76 (Mich. 1972) (overturning conviction when judge's preliminary instruction prevented jury questioning because such practice could help unravel confusing testimony); *see also* Lisa M. Harms, Comment, *The Questioning of Witnesses by Jurors*, 127 AM. U. L. REV. 127, 129-34 (1977) (describing how jury questioning promotes better understanding by providing for two-way communication between attorney and jurors).

27. Buchanan v. State, 807 S.W.2d 644, 646 (Tex. App.—Houston [14th Dist.] 1991), *vacated*, 1993 WL 37428 (Tex. Crim. App. 1993); *Allen*, 807 S.W.2d at 642.

28. *See* Michael J. Wulser, *Should Jurors Be Allowed To Ask Witnesses Questions in Criminal Trials?*, 58 UMKC L. REV. 445, 446 (1990) (discussing advantages of allowing jury questioning of witnesses).

29. *Buchanan*, 807 S.W.2d at 646; *Allen*, 807 S.W.2d at 642; *see* Lisa M. Harms, Comment, *The Questioning of Witnesses by Jurors*, 127 AM. U. L. REV. 127, 129-34 (1977) (elaborating on how jury questioning can aid in two-way communication between attorney and jury).

30. Michael J. Wulser, *Should Jurors Be Allowed To Ask Witnesses Questions in Criminal Trials?*, 58 UMKC L. REV. 445, 452 (1990).

31. *See* C. Randall Michel, *Should Jurors Be Allowed To Pose Written Questions to Witnesses During a Trial?*, 55 TEX. B.J. 1020, 1020-21 (1992) (discussing arguments against allowing jury questioning). The adversarial system may be affected in several ways:

1) The jury no longer passively listens to the evidence and might become an advocate for one party. *Allen*, 807 S.W.2d at 643 (Ellis, J., dissenting).

2) The jury may elicit evidence, which assists the prosecution in a criminal case and, thus, overcomes the requirement that, for a conviction, the state must produce evidence beyond a reasonable doubt. *Id.*

3) Jurors might have "premature deliberation" when they lose their impartiality by focusing on answers to their questions without considering other evidence or hearing the judge's instructions. *See* Larry Heuer & Steven Penrod, *Increasing Jurors' Participation in Trials*,

tracting the jury from the trial or evidence presented,[32] and prejudicing the jury or the parties.[33] Although many courts have recognized these problems,[34] all federal[35] and state courts, except Texas courts, that have addressed jury questioning of witnesses, allow it in one form or another.[36]

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12 L. & HUM. BEHAV. 231, 237 (1988) (discussing potential for evolution of "12 angry men syndrome").

32. *See id.* at 237 (stating that jury might upset attorney's strategy of order of presentation of the evidence); H. John Steinbreder, *The $10 Billion Misunderstanding*, FORTUNE, Dec. 23, 1985, at 6 (discussing how jury questioning in Texaco-Pennzoil case had to be stopped because it was unreasonably lengthening trial); *see also* C. Randall Michel, *Should Jurors Be Allowed To Pose Written Questions to Witnesses During a Trial?*, 55 TEX. B.J. 1020, 1021 (1992) (stating that jurors might not listen to testimony while thinking of questions to ask witnesses).

33. *See* United States v. Johnson, 892 F.2d 707, 713 (8th Cir. 1989) (Lay, J., dissenting) (stating that neutrality is disrupted through jury questioning). The *Johnson* court said:

> Allowing juror questioning disrupts juror neutrality, because even a seemingly innocuous response to a seemingly innocuous juror question can sway the jury's appraisal of the credibility of the witness, the party, and the case. The factfinder who openly engages in rebuttal or cross-examination, even by means of a neutral question, joins sides prematurely and potentially closes off its receptiveness to further suggestions of a different outcome for the case. While nothing can assure the jury will remain open-minded to the end, keeping the jury out of the advocacy process increases the probability.

Id.; *cf.* STEPHEN LANDSMAN, THE ADVERSARY PROCESS: A DESCRIPTION AND DEFENSE 3-4 (1984) (stating that neutral and passive jury is necessary to avoid prejudice).

34. *See, e.g.*, United States v. Land, 877 F.2d 17, 19 (8th Cir.), *cert. denied*, 493 U.S. 894 (1989) (expressing reservations on allowing jury questioning but finding it not erroneous); United States v. Polowikchak, 783 F.2d 410, 413 (4th Cir. 1986) (allowing jury questioning even with reservations about its use).

35. United States v. Nivica, 887 F.2d 1110, 1123 n.9 (1st Cir. 1989), *cert. denied* sub nom. Wellington v. United States, 494 U.S. 1005 (1990); *Land*, 877 F.2d at 29; DeBenedetto v. Goodyear Tire and Rubber Co., 754 F.2d 512, 516 (4th Cir. 1985); *Callahan*, 588 F.2d at 1086; United States v. Gonzalez, 424 F.2d 1055, 1056 (9th Cir. 1970); United States v. Witt, 215 F.2d 580, 588 (2d Cir.), *cert. denied* sub nom. Talanker v. United States, 348 U.S. 887 (1954).

36. *See Allen*, 807 S.W.2d at 640-41 (listing all foreign jurisdictions allowing jury questioning). For cases in other jurisdictions adopting jury questioning of witnesses, see State v. LeMaster, 669 P.2d 592, 598 (Ariz. Ct. App. 1983) (Arizona); Nelson v. State, 513 S.W.2d 496, 498 (Ark. 1974) (Arkansas); *McAlister*, 213 Cal. Rptr. at 276 (California); Yeager v. Greene, 502 A.2d 980, 985 (D.C. 1985) (District of Columbia); Ferrara v. State, 101 So. 2d 797, 801 (Fla. 1958) (Florida); Storey v. State, 278 S.E.2d 97, 98 (Ga. Ct. App. 1981) (Georgia); Carter v. State, 234 N.E.2d 650, 652 (Ind. Ct. App. 1968) (Indiana); Rudolph v. Iowa Methodist Medical Ctr., Inc., 293 N.W.2d 550, 555-56 (Iowa 1980) (Iowa); Stamp v. Commonwealth, 253 S.W. 242, 246 (Ky. 1923) (Kentucky); *Heard*, 200 N.W.2d 73, 75 (Mich. 1972) (Michigan); Sparks v. Daniels, 343 S.W.2d 661, 667 (Mo. Ct. App. 1961) (Missouri); State v. Rodriguez, 762 P.2d 898, 901-02 (N.M. Ct. App. 1982) (New Mexico); People v. Knapper, 230 A.D. 487, 245 N.Y.S. 245, 251 (N.Y. App. Div. 1930) (New York); State v. Kendall, 57 S.E. 340, 341 (N.C. 1907) (North Carolina); State v. Sheppard, 128 N.E.2d 471, 499 (Ohio Ct. App. 1955), *aff'd*, 135 N.E.2d 340 (Ohio 1956) (Ohio); Krause v. State, 132 P.2d 179, 182 (Okla. Crim. 1942) (Oklahoma); Boggs v. Jewel Tea Co., 109 A. 666, 667 (Pa. 1920)

Texas trial-court judges have wide discretion in conducting the trial.[37] This must, however, be accomplished in a neutral and unprejudicial manner.[38] For instance, a judge may not comment on the weight of the evidence or question a witness in an partial manner.[39] Additionally, contrary to all other jurisdictions, Texas trial judges may not call their own witnesses.[40] Therefore, Texas courts have had little experimentation with jury questioning. In the 1970s, Judge E.E. Jordan allowed jurors to question witnesses in various cases.[41] Although the Texas Court of Criminal Appeals was presented with the opportunity, it declined to rule directly on jury questioning.[42] Over the last few years, Texas courts, both civil and criminal, have begun to experiment with jury questioning. This practice has been approved by several Texas Courts of Appeals as being within the trial court's discretion.[43]

(Pennsylvania); State v. Barrett, 297 S.E.2d 794, 796 (S.C. 1982) (South Carolina), *cert. denied*, 460 U.S. 1045 (1983); Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978) (Tennessee); State v. Johnson, 784 P.2d 1135, 1144-45 (Utah 1989) (Utah).

37. *See* TEX. R. CIV. EVID. 611(a) (granting court reasonable control over mode and order of presenting evidence in civil trials); TEX. R. CRIM. EVID. 610(a) (granting court reasonable control over mode and order of presenting evidence in criminal cases); TEX. JUR. 3D, *Trial* § 47 (1989) (stating "a judge has great discretion in controlling the trial . . . .").

38. *See* Crawford Chevrolet, Inc. v. McLarty, 519 S.W.2d 656, 664 (Tex. Civ. App.—Amarillo 1975, no writ)(stating that judges must refrain from making unnecessary comments or remarks during trial, which might influence jurors).

39. *See* Hargrove v. Fort Worth Elevator Co., 276 S.W. 426, 427-28 (Tex. Comm'n. App. 1925, holding approved) (finding trial judge's questioning of witness prejudicial in that it influenced jurors by discrediting witness); Kelly Salvage Co. v. Neel, 262 S.W. 189, 189-90 (Tex. Civ. App.—San Antonio 1924, no writ) (finding judges' questioning of witness deprived party of fair trial). However, a judge may question witness in an impartial manner in order to clarify an issue. Brewer v. State, 572 S.W.2d 719, 721 (Tex. Crim. App. 1978); Munoz v. State, 485 S.W.2d 782, 784 (Tex. Crim. App. 1972).

40. *See* HULEN D. WENDORF ET AL., TEXAS RULES OF EVIDENCE MANUAL VI-98 (1991) (stating that Texas has no comparable provision to Federal Rule of Evidence 614, which allows judge to call witness). Federal Rule of Evidence 614(a) provides: "The court may, on its own motion or at the suggestion of a party, call witnesses. . . ." FED. R. EVID. 614(a).

41. *See* Pless v. State, 576 S.W.2d 83, 85 (Tex. Crim. App. 1978) (stating that trial court allowed jurors orally to question witnesses); Carr v. State, 475 S.W.2d 755, 757 (Tex. Crim. App. 1972) (discussing trial court's allowance of juror questioning).

42. *See Pless*, 576 S.W.2d at 85 (finding any error concerning trial court's allowing jurors to question witnesses orally not properly preserved); *Carr*, 475 S.W.2d at 757 (finding that any impropriety of trial court's allowance of juror questioning was not preserved by objection).

43. *See* Morrison v. State, 815 S.W.2d 766, 769 (Tex. App.—Waco 1991), (stating that it is within trial court's sound discretion whether and how juries question witnesses) *aff'd*, 845 S.W.2d 882 (Tex. Crim. App. 1992); Velasquez v. State, 815 S.W.2d 842, 846 (Tex. App.—Corpus Christi 1991, no writ) (agreeing with analysis that trial judge controls mode of presentation of evidence, thus, allowing judge to permit jury questioning); *Allen*, 807 S.W.2d at 642 (questioning of witnesses by jurors within trial judge's discretion).

However, Judge Maloney, writing for the majority opinion in *Morrison*, stated that the practice of allowing jurors to pose questions to witnesses is inconsistent with our adversarial system.[44] Judge Maloney noted that the primary function of the jury is truth determination, but also acknowledged that, at times, due process and other individual rights override the truth-finding function.[45] Allowing questions by the jury increases the chances that jurors will form conclusions or settle on a particular legal theory before having an opportunity to hear all evidence and to be instructed by the judge on the law of the case.[46] Judge Maloney concluded that, because any benefits from permitting jury questioning are far outweighed by their costs, such practice will not be allowed.[47] Judge Maloney noted further that judicial implementation of procedural safeguards would be ineffective to eliminate any dangers from the process.[48] Absent a clear mandate from the legislature, no attempts to allow this practice should be made by the judiciary.[49]

Judge Miller joined in the opinion, but specifically noted that the legislature is free to enact a criminal procedure for allowing jury questioning.[50]

Judge Clinton reviewed past cases in Texas and determined that there is no indication that jury questioning is the preferred procedure and, in fact, there is substantial evidence that the practice is specifically rejected.[51] He further determined that there is no authorization of jury questioning "by any source of hierarchical governance."[52] Judge Clinton reviewed relevant law review articles on the subject and concluded there is a lack of proof that jury questioning enhances jury truth determination.[53] The judge condemned the practice after noting that there is potential, as exemplified by *Morrison*, for jury questioning to aid in the conviction of criminal defendants.[54]

Judge Campbell wrote a dissenting opinion disagreeing with the majority's arguments that trial courts do not have the power to allow jurors' questions and that the dangers of such a procedure are outweighed by the benefits.[55] The judge cited Article 5, Section 1 of the Texas Constitution as authority granting Texas trial courts the discretion to allow jury questioning.[56] By referring to studies and practices in other jurisdictions, Judge Campbell also

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44. Morrison v. State, 845 S.W.2d 881, 884 (Tex. Crim. App. 1992).
45. *Id.*
46. *Id.* at 887.
47. *Id.* at 887-88.
48. *Morrison*, 845 S.W.2d at 887-88.
49. *Id.* at 889.
50. *Id.*
51. *Id.* at 889-90.
52. *Morrison*, 845 S.W.2d at 892.
53. *Id.*
54. *Id.* at 894-95.
55. *Id.* at 900.
56. *Morrison*, 845 S.W.2d at 900.

countered the majority's assertion that the inherent dangers allowing jury questioning cannot be circumvented by procedural safeguards.[57] Judge Campbell outlined a procedure to test the validity of allowing jurors to question witnesses.[58] Assuming this procedure is followed and there is no positive legislation preventing such a practice, Judge Campbell asserted that a juror's questioning of a witness is within a trial judge's discretion because such a practice enhances the fair and efficient administration of justice.[59] In fact, he implied that a trial judge must allow jury questioning, absent legislative prohibition.[60]

Judge Benavides, in a dissenting opinion, stressed the benefits of allowing jury questioning.[61] After acknowledging the trepidation that many courts have with permitting jurors to question witnesses and recognizing Texas's fierce aversion to disrupting the adversarial system, Judge Benavides felt that benefits from such a procedure outweigh any dangers to the adversarial system,[62] particularly when an adversarial process is applied to the questioning.[63] After determining that the question in the instant case was neutral and no core values of the adversary system were affirmatively undermined, Judge Benavides stated that the jury's question was not reversible error.[64]

An analysis of the Court's opinion reveals that the case was erroneously decided. The concurring justices' assertion that there is no "authoriz[ation] [in Texas] by any source in the order of hierarchical governance" for the practice of jury questioning is correct only to the point of exact authorization. The concurring opinions, as well as the majority opinion, fail to discuss Texas Rule of Criminal Evidence 102, which provides: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of *growth* and *development* of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."[65] The Texas Legislature authorized the adoption of the Texas Rules of Criminal Evidence.[66] Rule 102 specifically grants the judiciary the power to experiment with the Texas Rules of Evidence.[67] Therefore, it seems apparent that, contrary to the assertions made in the concurring opin-

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57. *Id.* at 901.
58. *Id.*
59. *Id.* at 902.
60. *Morrison*, 845 S.W.2d at 902.
61. *Id.*
62. *Id.* at 903-04.
63. *Id.* at 905.
64. *Morrison*, 845 S.W.2d at 905-06.
65. TEX. R. CRIM. EVID. 102 (emphasis added).
66. *See* Act of Aug. 26, 1985, 69th Leg., R.S., ch. 685, § 5, 1985 Tex. Gen. Laws 2472, 2473 (current version at TEX. GOV'T CODE ANN. § 22.109(a)-(b) (Vernon 1988)) (adopting Texas Rules of Criminal Evidence).
67. TEX. R. CRIM EVID. 102. Rule 102 provides: "These rules shall be construed to

ions, there has been authorization by "a source in the order of hierarchical governance" to develop and advance the rules of evidence in Texas, just as the trial court attempted to do in *Morrison*. Furthermore, it seems that, absent legislation condemning jury questioning, trial courts should be free to allow such a practice.

Even without Texas Criminal Rule 102, there is implicit authorization in the Texas Constitution[68] and the Texas Rules of Evidence[69] for the jury-questioning procedure.[70] Texas Rule of Criminal Evidence 610(a)(1) & (2) provides: "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, [and] (2) avoid needless consumption of time. . . ."[71] Jury questioning has generally been recognized as more effective in ascertaining the truth[72] and, in the long run, in saving time at trial.[73] This theory, that a trial court

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secure [the] . . . *promotion* of *growth* and *development* of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." *Id.* (emphasis added).

68. *See* TEX. CONST. art. 5, § 1 (defining powers of Texas judges). Article 5, Section 1 gives judges the power (1) to receive evidence; (2) to decide the issues of fact raised by the proceedings; (3) to decide the relevant questions of law; (4) to enter a final judgment on the facts and law; and (5) to execute the final judgment and sentencing. *Id.* Included in these powers are all powers reasonable and necessary for their execution. State v. Johnson, 821 S.W.2d 609, 612-13 (Tex. Crim. App. 1991). Therefore, it appears that a trial court may allow jury questioning if determined to be reasonable and necessary to discover the truth. Furthermore, it seems apparent that the judiciary, contrary to the *Morrison* majority opinion assessment, may allow such a procedure without specific legislative authorization.

69. *See* Buchanan v. State, 807 S.W.2d 644, 645 (Tex. App.—Houston [14th Dist.] 1991) (stating that jury questioning is authorized in the Texas Rules of Criminal Evidence), *vacated*, 1993 WL 37428 (Tex. Crim. App. 1993); Allen v. State, 807 S.W.2d 639, 641 (Tex. App.—Houston [14th Dist.] 1991) (stating that jury questioning is consistent with general rule that trial judge may control examination of witnesses), *rev'd*, 1993 WL 13192 (Tex. Crim. App. 1993).

70. *See Buchanan*, 807 S.W.2d at 645 (finding authorization for jury questioning in Texas Rules of Criminal Evidence); *Allen*, 807 S.W.2d at 641 (finding that TEX. R. CRIM. EVID. 610(a) grants trial court discretion to allow jury questioning).

71. TEX. R. CRIM. EVID. 610(a)(1)-(2).

72. *See* United States v. Callahan, 588 F.2d 1078, 1086 (5th Cir.), *cert. denied*, 444 U.S. 826 (1979) (finding that jury questioning makes "good common sense"). The United States Court of Appeals for the Fifth Circuit stated:

> There is nothing improper about the practice of allowing occasional questions from jurors to be asked of witnesses. If a juror is unclear as to a point in the proof, it makes good common sense to allow a question to be asked about it. If nothing else, the question should alert trial counsel that a particular factual issue may need more extensive development. Trials exist to develop the truth.

Id.

73. *See* Michael J. Wulser, *Should Jurors Be Allowed To Ask Witnesses Questions in Criminal Trials?*, 58 UMKC L. REV. 445, 454 (1990) (stating that allowing jurors to question witnesses could speed up deliberation time as jurors would not have to consider unclear evi-

has discretion to allow jurors to question witnesses, has been adopted in federal courts[74] and in every other state.[75] By allowing jurors to submit questions for witnesses, Texas would simply be accepting a practice that has been adopted by all federal courts and the vast majority of state courts.

The majority opinion in *Morrison* justified its departure from the norm by contending that the inherent dangers of jury questioning outweigh the benefits of the procedure. However, the majority's concerns about the effects of jury questioning were not confirmed by field tests of the practice.[76] Although participating judges and attorneys entered these tests with many of the same worries expressed by the *Morrison* court,[77] the results of the tests show that such fears are groundless. Although only some of the perceived benefits of jury questioning were confirmed in the test,[78] none of the per-

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dentiary points). In fact, studies show that juries voted for acquittal on the first jury ballot more often in cases when they were allowed to ask witnesses questions. Larry Heuer & Steven Penrod, *Increasing Jurors' Participation in Trials*, 12 L. & HUM. BEHAV. 231, 238 (1988).

74. *E.g.*, DeBenedetto v. Goodyear Tire & Rubber Co., 754 F.2d 512, 516 (4th Cir. 1985); *Callahan*, 588 F.2d at 1086; United States v. Witt, 215 F.2d 580, 588 (2d Cir.), *cert. denied* sub nom. Talanker v. United States, 348 U.S. 887 (1954).

75. *See Allen*, 807 S.W.2d at 640-41 (finding that all other jurisdictions that address issue have adopted jury questioning); *see also* Jeffrey S. Berkowitz, Note, *Breaking the Silence: Should Jurors Be Allowed To Question Witnesses During Trial?*, 44 VAND. L. REV. 117, 128 (1991) (stating that only Georgia has rejected jury questioning). Georgia has only rejected direct questioning of witnesses by juries, not indirect questioning by written questions. *See* Storey v. State, 278 S.E.2d 97, 98 (Ga. App. 1979) (approving of jurors' asking indirect questions to witnesses).

76. *See* Larry Heuer & Steven Penrod, *Increasing Jurors' Participation in Trials*, 12 L. & HUM. BEHAV. 231, 257-58 (1988) (discussing conclusions of their experiment with jury questioning). The study concluded by confirming the perceived advantages of jury questioning: providing feedback to attorneys and alleviating juror doubts about evidence. *Id.* at 258. There was no confirmation of increased satisfaction or the uncovering of important evidence. *Id.* None of the perceived disadvantages—delaying the trial, upsetting attorney strategy, annoying the trial process, fostering reluctance of counsel to object, embarrassing or angering the jury—was confirmed. *Id.*

77. *See id.* at 237-38 (1988) (listing perceived disadvantages, which the study was examining). The perceived disadvantages to jury questioning, which the field test was attempting to measure, were: 1) jury questioning might upset the speed or decorum of the trial; 2) jury questioning might cause jurors to lose objectivity by becoming over-involved (the "twelve angry men syndrome"); 3) jury questioning might upset trial strategy; 4) the procedure might be too cumbersome; 5) inappropriate questions might be asked, which could lead to problems with attorneys' objections. *Id.*

78. *See id.* at 237-38 (1988) (discussing findings of perceived advantages, which the study was examining). The test confirmed that jury questioning did alleviate jurors' doubts about evidence and did provide attorneys with useful feedback about what issues need further clarification. *Id.* at 257-58. However, the test was unable to confirm that jury questioning increased juror satisfaction with the judicial system or that it uncovered important evidence. *Id.* It should be noted, however, that several times jurors have uncovered important evidence that might have otherwise been omitted. *See* Morrison v. State, 815 S.W.2d 766, 766-67 (Tex. App.—Waco 1991) (questioning by jury revealed issue of self-defense), *aff'd*, 1992 WL 367513

ceived dangers were confirmed.[79] The field-test results support the following assertions:

1. With the appropriate procedure for allowing jury questioning, any compromise of the adversarial system can be effectively minimized.[80]
2. The benefits of allowing jury questioning outweigh any dangers posed by such questions.[81]

None of the opinions in *Morrison* adequately discusses the attorney-jury communication that occurred in the case. Allowing jury questioning provides a more effective two-way communication between the attorney and the jury.[82] This communication provides an indication as to what evidentiary point the jury does not understand or believe.[83] This is of critical importance to an attorney. A problem may arise, as in *Morrison*, when the jury question can be perceived as an impermissible communication.[84] However,

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(Tex. Crim. App. 1992); *see also* Jeffrey S. Berkowitz, Note, *Breaking the Silence: Should Jurors Be Allowed To Question Witnesses During Trial?*, 44 VAND. L. REV. 117, 118 (1991) (describing important evidence elicited by jury questioning at trial).

79. *See* Larry Heuer & Steven Penrod, 12 L. & HUM. BEHAV. 231, 257-58 (1988) (concluding that no disadvantages to jury questioning were supported by test results).

80. *See id.* at 257-58 (concluding that test results revealed no disadvantages, while some advantages were confirmed). The tester gave the following instructions for jury questioning:

> In this trial, we request that you allow the jurors to direct written questions to any witness. After direct and cross examination of each witness is complete, please ask jurors to submit any additional questions they may have, in writing, to you. If you find any such questions patently objectionable, decline to ask it and explain to the jury that no adverse inference should be drawn from your ruling. If the question is facially acceptable, confer with counsel and rule on any objection (outside the hearing of the jury) raised before posing the question to the witness. If an objection is sustained, explain to the jury that no adverse inference should be drawn from your ruling.

Id. at 240. This procedure resulted in a system that produced no confirmable disadvantages from jury questioning. *See id.* at 257-58 (discussing findings of study).

81. *See id.* at 257-58 (listing findings of test on jury questioning). By finding that some of the perceived advantages to jury questioning were confirmed and no disadvantages could be confirmed, there is apparent support to say that the benefits of jury questioning outweigh any costs.

82. *See* Jeffrey S. Berkowitz, *Breaking the Silence: Should Jurors Be Allowed To Question Witnesses During Trial?*, 44 VAND. L. REV. 117, 119 (1991) (describing benefits of two-way communication between attorney and jury); Michael J. Wulser, *Should Jurors Be Allowed To Ask Witnesses Questions in Criminal Trials?*, 58 UMKC L. REV. 445, 452 (1990) (stating that unless messages are very simple, one-way communication usually is ineffective).

83. *See* Brian Wice, *There's Nothing Wrong with Juror Questioning*, TEX. LAWYER, Feb. 22, 1993, at 18 (analogizing to students who attempt to improve their understanding by asking teachers questions). One must also realize that juror questioning can be equally as beneficial to the defense, as the prosecution.

84. *See Morrison*, 815 S.W.2d at 768-69 (finding that juror's question "tipped off" prosecution and was impermissible communication between attorney and jury). In *Morrison*, the court stated that the jury's inadmissible question signaled the prosecution that the jury was concerned with a self-defense issue. *Id.* at 769. This was deemed no different than the jury's

a judge's control over the procedure should effectively eliminate any such communication.[85]

The Court of Criminal Appeals incorrectly decided *Morrison*. The court's attempts to justify the condemnation of jury questioning have been rejected universally by all other American courts, effectively countered in commentary, and unsubstantiated by field tests. Furthermore, the court's prohibition of jury questioning is contrary to the grant of power that the Texas Legislature, at a minimum, implied a trial court could exercise. The court's prohibition disallows an effective procedure. This prohibition could further burden Texas trial courts' attempts to explore other potentially beneficial courtroom procedures.

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asking the prosecution to "[p]lease prove whose blood was in the hall." *Id.* Because such a request would be impermissible, the court found that there was an impermissible communication between the prosecution and the jury. *Id.*

85. *See Morrison*, 815 S.W.2d at 768-69 (refusing to rule jury questioning impermissible even after finding abuse of discretion in allowing communication between jury and attorney).