St. Mary's Law Journal

Volume 29 | Number 2 Article 1

1-1-1998

Indictments and Informations in Texas: The Conduct/Evidence Pleading Conundrum.

Robert R. Barton

ARTICLES

INDICTMENTS AND INFORMATIONS IN TEXAS: THE CONDUCT/EVIDENCE PLEADING CONUNDRUM

ROBERT R. BARTON*

* Professor of Law and The Hardy Professor of Trial Advocacy, St. Mary's University School of Law; Senior District Judge; L.L.B., The University of Texas, 1960.

The author expresses appreciation to Professor Gerald S. Reamey, St. Mary's University School of Law, for reviewing a draft of this Article and making editorial suggestions, and to St. Mary's Law School student research assistants Michael Dimmitt and Robert Nida for their valuable help.

I. INTRODUCTION (INDICTMENT AND INFORMATION)

In the prosecution of a criminal case in Texas, the State's primary pleading is an indictment or information.[1] In an indictment or information,[2] there are two basic and simple rules for the charging of an offense. First, the defendant must be given adequate notice to prepare a defense[3] and to plead the judgment from the trial of the case in bar to a subsequent prosecution for the same offense.[4] Second, the State is not required to plead evidentiary matters.[5]

---

1. *See* TEX. CODE CRIM. PROC. ANN. art. 27.01 (Vernon 1989) (stating that "[t]he primary pleading in a criminal action on the part of the state is the indictment or information"); *see also* TEX. CODE CRIM. PROC. ANN. art. 1.05 (Vernon 1979) (mandating that a felony offense must be prosecuted upon an indictment returned by the grand jury); TEX. CODE CRIM. PROC. ANN. art. 21.23 (Vernon 1989) (providing that the same requirements of certainty that apply to an indictment apply to an information); TEX. PEN. CODE ANN. § 1.07(a) (Vernon 1994) (defining a "felony"); TEX. PEN. CODE ANN. § 1.07(a)(31) (Vernon 1994) (defining a "misdemeanor"); Mayberry v. State, 168 Tex. Crim. 537, 538, 330 S.W.2d 203, 204 (1959) (stating that the prosecution of a misdemeanor offense initiated in a county court must be upon an information); Cross v. State, 646 S.W.2d 514, 515 (Tex. App.—Dallas 1982, pet. ref'd) (applying indictment standard of certainty to information).

2. *See* TEX. CONST. art. V, § 12 (defining indictment and information).

3. *See* TEX. CONST. art. I, § 10 (providing that "[i]n all criminal prosecutions the accused . . . shall have the right to demand the nature and cause of the accusation against him. . . ."); TEX. CODE CRIM. PROC. ANN. art. 21.11 (Vernon 1989) (providing that the commission of the offense must be charged "with that degree of certainty that will give the defendant notice of the particular offense with which he is charged. . . ."); Ferguson v. State, 622 S.W.2d 846, 849 (Tex. Crim. App. [Panel Op.] 1981) (noting that any inquiry about the adequacy of notice begins with the observation that a defendant's right to notice of an accusation against him is based upon constitutional principles); *see also* U.S. CONST. amend. VI (stating that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation. . . ."); TEX CODE CRIM. PROC. ANN. art. 21.02(7) (Vernon 1989) (stating that the "offense must be set forth in plain and intelligible words").

4. *See* TEX. CODE CRIM. PROC. ANN. art. 21.04 (Vernon 1989) (providing that an indictment must be sufficiently certain to "enable the accused to plead the judgment that will be given upon it in bar of any prosecution for the same offense"); *see also* U.S. CONST. amend. V (providing that "[n]o person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb. . . ."); TEX. CONST. art. I, § 14 (prohibiting persons from being "twice put in jeopardy" for the same offense); TEX. CODE CRIM. PROC. ANN. art. 1.10 (Vernon 1989) (stating that "[n]o person for the same offense shall be twice put in jeopardy of life or liberty. . . ."); TEX. CODE CRIM. PROC. ANN. art. 27.05 (Vernon 1989) (providing that a defendant's only special plea is one barring further prosecution for the same offense after acquittal or conviction).

5. *See, e.g.*, Thomas v. State, 621 S.W.2d 158, 161 (Tex. Crim. App. [Panel Op.] 1980); Phillips v. State, 597 S.W.2d 929, 935 (Tex. Crim. App. [Panel Op.] 1980); Bedwell v. State, 142 Tex. Crim. 599, 600, 155 S.W.2d 930, 931 (1941). *See generally* 41 GEORGE E. DIX & ROBERT O. DAWSON, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 20.107,

The simplicity of these rules exists more in their statement than in their application because, as hereinafter discussed, circumstances exist that require the State to plead evidentiary matters in order to provide the defendant with adequate notice. In fact, the Texas Court of Criminal Appeals (hereinafter Court of Criminal Appeals) has held that, specifically in prosecutions for the offenses of driving while intoxicated[6] and intoxication manslaughter,[7] the State must plead matters that are evidentiary in nature. The thesis of this Article is that an indictment or information, when challenged by a motion to quash, must plead evidentiary matters *only* when such matters are descriptive of the defendant's *conduct* that constitutes an element of the offense charged.

II. Lack of Notice Is Waivable Statutory Defect

The failure of an indictment or information to give the defendant adequate notice of the offense charged constitutes a statutory defect referred to as a defect of "form."[8] If the defendant does not except or object to an inadequacy of notice by a written motion to quash[9] prior to the date on which the trial on the merits commences, the defect is waived and may not be raised by a direct or

---

at 227 (1995) (observing that "[f]ew propositions are emphasized more by the Court of Criminal Appeals than the rule that the State need not plead evidence and therefore 'need not allege facts which are essentially evidentiary in nature.'"); George E. Dix, *Texas Charging Instrument Law: Recent Developments and the Continuing Need for Reform*, 35 Baylor L. Rev. 689, 763 (1983) (noting that "as a general rule, the indictment need not plead the evidence on which the state will rely"); 22 Tex. Jur. 3D *Criminal Law* § 2348, at 614 (1982) (stating that "although every fact that is necessary to be proved should be stated in the accusatory pleading, matters of proof need not be averred").

6. *See infra* notes 78–85, 89–99 and accompanying text.

7. *See infra* notes 159–63 and accompanying text.

8. *See* Olurebi v. State, 870 S.W.2d 58, 61 (Tex. Crim. App. 1994) (en banc) (indicating that "[a]n exception to the form of an indictment exists if the indictment fails to provide adequate facts to give the defendant notice of the offense he is charged with."); *see also* Robert R. Barton, *Since 1985, Can an Indictment or Information Be "Fundamentally" Defective for Failing to Charge an Offense?*, 25 St. Mary's L.J. 217, 222 (1993) (noting that the failure of an indictment or information to allege the elements of the offense with sufficient certainty, specificity, and particularity to give the defendant adequate or effective notice of the offense charged is flawed as a defect of form); Steven Edward Rogers, Comment, *The Indictment Process*, 33 Baylor L. Rev. 1001, 1009 (1981) (commenting that a defect in an instrument's form results when the instrument fails to provide the defendant with notice of the offense charged).

9. *See* Tex. Code Crim. Proc. Ann. art. 27.10 (Vernon 1989) (requiring that "all motions to set aside an indictment or information and all special pleas and exceptions shall be in writing"); Nichols v. State, 653 S.W.2d 768, 769 (Tex. Crim. App. [Panel Op.] 1981)

collateral attack on the judgment of conviction.[10] However, if an indictment or information charges the defendant with the commission of an offense, it is constitutionally sufficient to invoke the trial court's jurisdiction and support a judgment of conviction.[11]

If the defendant does not object prior to trial to a lack of notice, the defendant is deemed to have found the notice adequate.[12] Furthermore, the Texas Code of Criminal Procedure (hereinafter Code of Criminal Procedure) provides that the denial of the defendant's objection to a defect of form is not reversible error if the defect "does not prejudice the substantial rights of the defendant."[13]

(insisting that only the grounds of attack which are included in a written motion to quash may be considered).

10. *See* TEX. CODE CRIM. PROC. ANN. art. 1.14(b) (Vernon 1977 & Supp. 1997). Article 1.14(b) states in pertinent part:

> If the defendant does not object to a defect, error, or irregularity of form or substance in an indictment or information before the date on which the trial on the merits commences, he waives and forfeits the right to object to the defect, error, or irregularity and he may not raise the objection on appeal or in any other post conviction proceeding.

Id.; *see also Ex parte* Gibson, 800 S.W.2d 548, 551 (Tex. Crim. App. 1990) (en banc) (concluding that the failure of the indictment to allege the year the offense was committed, whether constituting a defect of form or substance, was waived in the absence of pretrial objection and could not be raised for the first time in a post-conviction proceeding).

11. *See* TEX. CONST. art. V, § 12(b) (providing that "the presentment of an indictment or information to a court invests the court with jurisdiction of the cause"); Robert R. Barton, *Since 1985, Can an Indictment or Information Be "Fundamentally" Defective for Failing to Charge an Offense?*, 25 ST. MARY'S L.J. 217, 225–26 (1993) (instructing that "to invoke the trial court's jurisdiction, the charging instrument must be an indictment or information. To constitute an indictment or information, the instrument must 'charg[e]' a person with the commission of an offense."); *see also Olurebi*, 870 S.W.2d at 62 n.5 (observing that whether an indictment or information is fundamentally defective is "an entirely different issue" from whether it is flawed by a defect of form); *cf.* Cook v. State, 902 S.W.2d 471, 480 (Tex. Crim. App. 1995) (en banc) (finding that the charging instrument which failed to name a defendant did not charge a "person" with the commission of an offense; therefore, it was not an indictment that invoked the trial court's jurisdiction).

12. *See supra* notes 9–10 and accompanying text.

13. TEX. CODE CRIM. PROC. ANN. art. 21.19 (Vernon 1989); *see* Olurebi v. State, 870 S.W.2d 58, 61–62 (Tex. Crim. App. 1994) (en banc) (stating that if an indictment or information fails to provide sufficient notice, "the next step is to decide whether, in the context of the case, this had an impact on the defendant's ability to prepare a defense, and finally, how great an impact").

III. Alleging Act or Omission

A. *In General*

An indictment or information is required for the prosecution of an offense in the State of Texas.[14] The Texas Penal Code (hereinafter Penal Code) provides that only statutorily defined "conduct" constitutes an offense.[15] "Conduct" is defined, in part, as "an act or omission."[16] "Act" means a voluntary or an involuntary bodily movement, including speech.[17] "Omission" is defined as a "failure to act."[18]

The Code of Criminal Procedure defines an indictment as "the written statement of a grand jury accusing a person therein named of some *act or omission* which, by law, is declared to be an offense."[19] An information is defined by the Code of Criminal Procedure as "a written statement filed and presented on behalf of the State by the district or county attorney, charging the defendant with an *offense* which may by law be so prosecuted."[20] Consequently, because "offense" means prohibited or forbidden conduct, and "conduct" means an act or omission, an indictment and an information must charge the defendant with an unlawful act or omission to support a prosecution.

In harmonizing the application of the two basic rules that (1) the defendant must be given adequate notice, and (2) the State need not plead evidentiary matters, the Court of Criminal Appeals has enunciated the principle that if the defendant's alleged unlawful act or omission may have been committed by more than one manner

---

14. *See* Tex. Code Crim. Proc. Ann. art. 1.05 (Vernon 1979) (mandating that a felony offense must be prosecuted upon an indictment returned by the grand jury); Mayberry v. State, 168 Tex. Crim. 537, 538, 330 S.W.2d 203, 204 (1959) (stating that the prosecution of a misdemeanor offense initiated in a county court must be upon an information).

15. *See* Tex. Pen. Code Ann. § 1.03(a) (Vernon 1994) (declaring that *conduct* is not an offense unless it is so designated by statute, municipal ordinance, or rule authorized by statute) (emphasis added).

16. *Id.* § 1.07(a)(10) (Vernon 1994).

17. *See id.* § 1.07(a)(1).

18. *Id.* § 1.07(a)(34); *see* Tex. Pen. Code Ann. § 6.01(c) (Vernon 1994) (providing that "[a] person who omits to perform an act does not commit an offense unless a law as defined by Section 1.07 provides that the omission is an offense or otherwise provides that he has a duty to perform the act.").

19. Tex. Code Crim. Proc. Ann. art. 21.01 (Vernon 1989) (emphasis added).

20. *Id.* art. 21.20 (emphasis added).

or method, whether factually[21] or by statutory definition,[22] the State must plead the manner or method that it will seek to prove to establish the defendant's unlawful conduct. The corollary of this principle is that if an element of the alleged offense does not include an act or omission of the defendant, the State does not need to plead the evidence that it will rely on to prove the allegation.[23] The rationale of the principle and its corollary is that when an allegation is of an act or omission of the defendant, and alternative methods or means exist by which the act or omission can be committed, the defendant needs notice of the particular method or means the State is relying upon in order for the defendant to be

---

21. *See, e.g.*, Castillo v. State, 689 S.W.2d 443, 449 (Tex. Crim. App. 1985) (en banc) (holding that indictment charging arson that failed to allege manner in which defendant "started" fire failed to give adequate notice); Cruise v. State, 587 S.W.2d 403, 405 (Tex. Crim. App. [Panel Op.] 1979) (holding that an indictment charging aggravated robbery that failed to allege the manner by which the defendant "caused" bodily injury to the victim failed to give adequate notice); Haecker v. State, 571 S.W.2d 920, 921 (Tex. Crim. App. [Panel Op.] 1978) (holding that information charging that defendant did "torture" an animal failed to give adequate notice because the definition of "torture" was not completely descriptive of the defendant's act).

22. *See, e.g.*, Reynolds v. State, 723 S.W.2d 685, 686 (Tex. Crim. App. 1986) (en banc) (finding that an indictment which charged kidnapping by restraining the victim that did not allege which alternative statutory method of "restrain" defendant allegedly committed failed to give the defendant adequate notice); Gibbons v. State, 652 S.W.2d 413, 415 (Tex. Crim. App. [Panel Op.] 1983) (opining that the indictment charging aggravated kidnapping failed to allege by which alternative statutory method the defendant allegedly "abducted" the victim, thus failing to give adequate notice); Kass v. State, 642 S.W.2d 463, 469–70 (Tex. Crim. App. [Panel Op.] 1981) (concluding that an information charging prostitution that failed to plead statutorily-defined type of "sexual conduct" that the defendant allegedly offered, agreed to, engaged in, and solicited did not give adequate notice); Ferguson v. State, 622 S.W.2d 846, 851 (Tex. Crim. App. [Panel Op.] 1980) (deciding that an indictment charging the delivery of a controlled substance that did not plead statutorily-defined means of "delivery" allegedly committed by the defendant failed to give adequate notice).

23. *See, e.g.*, Moreno v. State, 721 S.W.2d 295, 300 (Tex. Crim. App. 1986) (en banc) (determining that a capital murder indictment charging defendant with murder of officer engaged in the lawful discharge of official duties was not required to include alleged acts of officer that constituted his action in discharge of those duties); Nethery v. State, 692 S.W.2d 686, 695 (Tex. Crim. App. 1985) (en banc) (deciding that a capital murder indictment charging defendant with the murder of a peace officer was not required to include the statutory definition of "peace officer" because the allegation did not pertain to an act or omission of the defendant); Thomas v. State, 621 S.W.2d 158, 161, 163 (Tex. Crim. App. [Panel Op.] 1980) (stating that an indictment charging theft is not required to plead statutory definitions of "owner" and "effective consent" because the allegations did not pertain to the defendant's conduct); *cf.* Geter v. State, 779 S.W.2d 403, 406–07 & n.4 (Tex. Crim. App. 1989) (en banc) (distinguishing *Thomas* by finding that if the owner's consent was not "effective" because of defendant's statutorily-defined conduct, such conduct must be alleged in an indictment for theft).

able to prepare a defense and plead the judgment in bar to a subsequent prosecution for the same offense.[24]

The Court of Criminal Appeals articulated and applied this principle in *Thomas v. State*.[25] In *Thomas*, the defendant was charged by indictment with the offense of theft.[26] In Texas, a person commits the offense of theft if he appropriates property without the *effective consent* of the *owner*.[27] Because the Penal Code provides alternative definitions of the terms "owner"[28] and "effective consent,"[29] the defendant filed a pre-trial motion to quash the indictment, asserting that he was entitled to notice specifying the

---

24. *See Moreno*, 721 S.W.2d at 300 (agreeing that the defendant is entitled to know which of his acts constitutes a criminal offense); *Nethery*, 692 S.W.2d at 695 (declaring that the "facts pertaining to the *defendant's* acts and conduct may be essential to giving notice—the manner and means of committing an offense may indeed be facts necessary to be alleged"); Gorman v. State, 634 S.W.2d 681, 684 (Tex. Crim. App. [Panel Op.] 1982) (emphasizing that "a defendant is entitled to notice of acts or omissions he is alleged to have committed. . . . *[L]ack of notice of acts or omissions is by definition a denial of fair notice.*"); *see also* TEX. CODE CRIM. PROC. ANN. art. 21.11 (Vernon 1989) (providing that "[a]n indictment shall be deemed sufficient which charges the commission of the offense . . . with that degree of certainty that will give the defendant notice of the particular *offense* with which he is charged") (emphasis added); TEX. PEN. CODE ANN. § 1.03(a) (Vernon 1994) (providing that only statutorily-defined "conduct" can constitute an offense); TEX. PEN. CODE ANN. § 1.07(a)(10) (Vernon 1994) (defining conduct as an "act or omission").

25. 621 S.W.2d 158 (Tex. Crim. App. [Panel Op.] 1981).

26. *See Thomas*, 621 S.W.2d at 159. In *Thomas*, the indictment charged the defendant with knowingly and intentionally exercising control over four hubcaps without the effective consent of the owner. *See id.*

27. *See* TEX. PEN. CODE ANN. § 31.03(a)-(b) (Vernon 1994) (emphasis added). The code defines the offense of theft as follows: "A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property." *Id.* §31.03(a). The code continues: "Appropriation of property is unlawful if: (1) It is without the owner's effective consent." *Id.* § 31.03(b).

28. *See* TEX. PEN. CODE ANN. § 1.07(a)(35) (Vernon 1994) (stating that an "owner" is either a person who "(A) has lawful or unlawful title to or possession of property, or a greater right to possession of the property than the accused; or (B) is a holder in due course of a negotiable instrument").

29. *See* TEX. PEN. CODE ANN. § 31.01(3) (Vernon 1994) (stating that "'[e]ffective consent includes consent by a person legally authorized to act for the owner.'"). Consent is not effective if:

> (A) induced by deception or coercion; (B) given by a person the actor knows is not legally authorized to act for the owner; (C) given by a person who by reason of youth, mental disease or defect, or intoxication is known by the actor to be unable to make reasonable property dispositions; (D) given solely to detect the commission of an offense; or (E) given by a person who by reason of advanced age is known by the actor to have a diminished capacity to make informed and rational decisions about the reasonable disposition of property.

Id.

statutory definition of "owner" on which the State would rely to prove that the complainant owned the property.[30] The defendant also argued that the indictment was defective because it failed to provide notice of which of the alternative statutory means of establishing the absence of "effective consent" of the owner the State would rely on to prove that the defendant unlawfully appropriated the property.[31] The court held that the motion to quash was properly denied because neither of the challenged allegations related to an *act or omission* of the defendant.[32] Consequently, the State was not required to plead the evidence on which it would rely to prove ownership or the owner's lack of effective consent.[33]

However, in the subsequent case of *Gorman v. State*,[34] the Court of Criminal Appeals held that the defendant's motion to quash should have been sustained for failure of the indictment to plead the particular statutory method by which the defendant allegedly "appropriated" the property.[35] The court held the denial of the motion to quash reversible error because to "appropriate" is an *act* of the defendant,[36] and the existence of alternative statutory methods by which the act could be committed entitled the defendant to notice of the particular method on which the State would rely.[37]

---

30. *See* Thomas v. State, 621 S.W.2d 158, 159 (Tex. Crim. App. [Panel Op.] 1981).

31. *See id.* at 160.

32. *See id.* at 161.

33. *See id.* at 163–64. The *Thomas* court stated that it could "perceive of no situation where the type of owner will either assist or affect the defense." *Id.* at 163. Continuing, the court held that whether the owner has title or possession will in no way benefit a defendant and, in any case, does not go to giving the defendant "*notice of his alleged act.*" *Id.* The court concluded that the term owner "does not go to an act or omission of the defendant." *Id.* at 164. *But see id.* at 168 (Clinton, J., concurring in part and dissenting in part) (writing that the defendant is constitutionally entitled to notice in the indictment as to the evidence on which the State will rely to establish ownership of the property). Judge Clinton states that Thomas' objection to the indictment on the ground that "it fails to allege 'the nature of the property's ownership' invokes the constitutional right of an accused 'to demand the nature and cause of the accusation against him.'" *Id.*

34. 634 S.W.2d 681 (Tex. Crim. App. [Panel Op.] 1982).

35. *See Gorman*, 634 S.W.2d at 685.

36. *See id.* at 682. Under the Texas Penal Code, a defendant "appropriates" property if he "(a) brings about a transfer or purported transfer of title to or other nonpossessory interest in property, whether to the actor or another; or (b) acquires or otherwise exercises control over property other than real property." TEX. PEN. CODE ANN. § 31.01(4) (Vernon 1994).

37. *See Gorman*, 634 S.W.2d at 682; *see also* Schmitz v. State, 952 S.W.2d 922, 925–26 (Tex. App.—Fort Worth 1997, pet. filed) (finding that the defendant received insufficient notice of the offense charged because the complaint failed to allege the particular defini-

The court reasoned that "a defendant is entitled to notice of acts or omissions he is alleged to have committed" and "lack of notice of acts or omissions is by definition a denial of fair notice."[38] Thus, the court reversed and dismissed the case.[39]

The act or omission principle of *Thomas* and *Gorman* has been applied widely by Texas courts. For example, courts have held that when challenged by a motion to quash, indictments charging the offenses of aggravated kidnapping[40] and kidnapping[41] should allege which of the alternative statutory methods were employed by the defendant to "abduct"[42] and "restrain"[43] the victim. A defendant

---

tion of "appropriate" the State would rely on to prove the defendant guilty of theft, but holding that the defendant's motion to set aside the complaint was properly denied under TEX. CODE CRIM. PROC. ANN. art. 44.181(a) (Vernon Supp. 1998), which prohibits a court conducting a trial de novo on an appeal from a justice or municipal court from dismissing the case because of a defect in the complaint, when the defendant did not attack the constitutionality of the Code provision).

38. *Gorman*, 634 S.W.2d at 684.

39. *See* Gorman v. State, 634 S.W.2d 681, 684 (Tex. Crim. App. [Panel Op.] 1982).

40. *See* TEX. PEN. CODE ANN. § 20.04(a) (Vernon 1994). A person commits the offense of aggravated kidnapping if he intentionally or knowingly abducts another person with the intent to:

> (1) hold him for ransom or reward; (2) use him as a shield or hostage; (3) facilitate the commission of a felony or the flight after the attempt or commission of a felony; (4) inflict bodily injury on him or violate or abuse him sexually; (5) terrorize him or a third person; or (6) interfere with the performance of any governmental or political function.

Id. In addition, a person commits aggravated kidnapping if a person intentionally or knowingly abducts another while using or exhibiting a deadly weapon. *See id.* § 20.04(b). Aggravated kidnapping is a first degree felony. *See id.* § 20.04(c). However, during the trial's punishment stage, if the defendant raises and proves by a preponderance of the evidence that he voluntarily released the victim in a safe place, aggravated kidnapping is a second degree felony. *See id.* § 20.04(d).

41. *See* TEX. PEN. CODE ANN. § 20.03(a) (Vernon 1994) (stating that a person commits the offense of kidnapping if he intentionally or knowingly abducts another person). Kidnapping is a third degree felony. *See id.* § 20.03(c).

42. *See* TEX. PEN. CODE ANN. § 20.01(2) (Vernon 1994) (defining abduct to mean to restrain a person with the intent to prevent his liberation); Gibbons v. State, 652 S.W.2d 413, 415 (Tex. Crim. App. [Panel Op.] 1983) (reversing the defendant's conviction of aggravated kidnapping after finding that the indictment was insufficient to provide the defendant with adequate notice as to which definition of "abduct" the State would seek to prove at trial). Gibbons was convicted of aggravated kidnapping and was sentenced to 50 years imprisonment. *See id.* at 414. Gibbons appealed, arguing that the district court erred in overruling his motion to quash the indictment for failure to specify on which statutory definition of "abduct[ion]" the State would rely to prove that he committed the offense. *See id.* at 415. The Court of Criminal Appeals held that in cases where an indictment contains a necessary allegation of an act or omission committed by the defendant which comprises "more than one statutorily defined means of its performance," but does not

charged with the offense of arson[44] is entitled to notice, if requested, of the manner or means by which he allegedly "started" the fire.[45] An information charging the offense of prostitution[46] by

---

specify which definition is relied upon by the State, the indictment is subject to a motion to quash. *Id.* (emphasis omitted). Finally, the court rejected the State's contention that such error was harmless in that discovery of the State's evidence should have made clear to the defendant which theory of abduction the State would seek to prove. *See id.* The court concluded that discovery is never a cure for such a defect. *See id.*

43. *See* TEX. PEN. CODE ANN. § 20.01(1) (Vernon 1994) (providing that restrain means to substantially interfere with a person's liberty by restricting his movements without his consent); Reynolds v. State, 723 S.W.2d 685, 686 (Tex. Crim. App. 1986) (en banc) (finding the indictment insufficient to provide the defendant with adequate notice as to which statutory definition the State would use to prove defendant "restrained" the victim). Reynolds was convicted of kidnapping and was sentenced to six years imprisonment. *See id.* at 685. Reynolds appealed, arguing that the indictment failed to provide him with sufficient notice as to "how he allegedly restrained the complainant, if at all." *Id.* at 686. The Court of Criminal Appeals agreed, declaring that a defendant is entitled to notice of the conduct—meaning acts or omissions—he is alleged to have committed. *See id.* Continuing, the court held that if the conduct is defined by alternative statutory definitions, the State must plead the particular definition which it will seek to prove at trial. *See id.* The court decided that, because "to restrain" is to commit an act, and since there are two statutory definitions of "restrain," the defendant was entitled to have notice of the specific manner in which he allegedly restrained the victim. *See id.*

44. *See* TEX. PEN. CODE ANN. § 28.02 (Vernon 1994). A person commits the offense of arson if he starts a fire or causes an explosion with the intent to destroy or damage:

> (1) any vegetation, fence or structure on open-space land; or (2) any building, habitation, or vehicle: (a) knowing that it is within the limits of an incorporated city or town; (b) knowing that it is insured against damage or destruction; (c) knowing that it is subject to a mortgage or other security interest; (d) knowing that it is located on property belonging to another; (e) knowing that it has located within it property belonging to another; or (f) when he is reckless about whether the burning or explosion will endanger the life of some individual or the safety of the property of another.

Id. § 28.02(a). Arson is a second degree felony, unless bodily injury or death is suffered by any person by reason of the commission of the offense, in which event the offense is a first degree felony. *See id.*

45. *See* Castillo v. State, 689 S.W.2d 443, 449 (Tex. Crim. App. 1985) (en banc) (declaring that the prosecution was required to prove the manner in which the defendant "started" the fire in order to carry its burden of proof). Castillo was convicted of arson and, because of a prior felony conviction, was sentenced to 20 years in prison. *See id.* at 445. Castillo appealed, arguing that the trial court erred in overruling his motion to quash the indictment for failure to specify the manner and means by which his alleged act was committed. *See id.* The Court of Criminal Appeals reiterated the rule that a motion to quash will be allowed unless the facts sought are not essential to providing the defendant with notice of the charges against him. *See id.* at 448. The court concluded that the defendant's motion to quash the indictment entitled him to specific allegations of facts sufficient to give him notice of the offense with which he was charged and to bar any subsequent prosecution for the same offense. *See id.* at 449.

46. *See* TEX. PEN. CODE ANN. § 43.02 (Vernon 1994). A person commits the offense of prostitution if he knowingly "(1) offers to engage, agrees to engage, or engages in sexual

soliciting another to engage with the defendant in sexual conduct for hire should, in the face of a motion to quash, allege which of the alternative statutory methods of committing "sexual conduct" the State will seek to prove.[47] A motion to quash an indictment charging the offense of credit card abuse[48] by alleging that the defendant unlawfully used a fictitious credit card should be sustained if the charging instrument fails to allege the manner in which the card was "fictitious," as there are two statutory means by which a credit card can be "fictitious."[49]

B. *Pleading the Offense—Specificity of the Indictment or Information*

Once the State decides which of the alternative methods or means prescribed by statute it will use to prove the defendant's unlawful conduct, the question arises as to the degree of specificity to which the indictment or information must conform when pleading the offense. In *State v. Edmond*,[50] the Court of Criminal Appeals held that an indictment alleging the particular method or means prescribed by statute need not plead the act or omission with any greater specificity than that prescribed by the statute.[51] In *Edmond*, the defendant was charged with the offense of official op-

---

conduct for a fee; or (2) solicits another in a public place to engage with him in sexual conduct for hire." *Id.* § 43.02(a). "Sexual conduct" includes deviate sexual intercourse, sexual contact, or sexual intercourse. *See id.* § 43.01(4). This offense is a Class B misdemeanor, unless the actor has been previously convicted for the same offense, in which event it is a Class A misdemeanor. *See id.* § 43.02(c).

47. *See* Kass v. State, 642 S.W.2d 463, 469–70 (Tex. Crim. App. [Panel Op.] 1981).

48. *See* TEX. PEN. CODE ANN. § 32.31(B)(2) (Vernon 1994) (stating that a person commits the offense of credit card abuse if, *inter alia*, with the intent to obtain a benefit, he uses a fictitious credit card or debit card or the pretended number or description of a fictitious card).

49. *See* Olurebi v. State, 870 S.W.2d 58, 62 (Tex. Crim. App. 1994) (en banc) (indicating that because there are two ways in which credit cards can be fictitious, the indictment must give the defendant notice as to which definition the State will seek to prove at trial). This holding seems inconsistent with the *Thomas* and *Gorman* principle unless the State relies on an act or omission of the defendant that caused the credit card to be "fictitious."

50. 933 S.W.2d 120 (Tex. Crim. App. 1996) (en banc).

51. *See Edmond*, 933 S.W.2d at 130. The court held that when a criminal statute defines the precise manner or means by which a defendant commits an offense, the information or indictment based on that statute need not allege facts beyond the statutory definition. *See id.*

pression[52] for subjecting the complainant to sexual harassment by proffering unwelcome sexual advances and requests for sexual favors.[53] The defendant filed a motion to quash the indictment, asserting its failure to allege the specific manner or means of his alleged criminal conduct by not describing or defining with particularity the unwelcome sexual advances or requests for sexual favors.[54] In affirming the trial court's decision to grant the motion, the court of appeals held that because the definitions of sexual harassment alleged in the indictment encompassed a broad spectrum of behavior and were susceptible to numerous possible meanings, the defendant was entitled to notice as to what he allegedly did or said that was deemed an unwelcome sexual advance or request for sexual favor.[55] The Court of Criminal Appeals reversed, holding that "when a statute defines the manner or means of committing an offense, an indictment based upon that statute need not allege anything beyond that definition."[56] The court further stated that by

---

52. *See* TEX. PEN. CODE ANN. § 39.03(a), (c) (Vernon 1994) (noting that a public servant commits the offense of official oppression if, *inter alia*, while acting under color of his office or employment, he intentionally subjects a person to sexual harassment).

53. *See Edmond*, 933 S.W.2d at 127–28. Specifically, the indictment alleged that the defendant intentionally subjected the complainant to sexual harassment:

> by making unwelcome sexual advances and/or making requests for sexual favors, submission to which was expressly and implicitly made a term and condition of the exercise and enjoyment by the [complainant] of a right and/or privilege, to wit: the right and/or privilege to obtain access and use of [a] motor vehicle under the care, custody and control of the [complainant].

Id.

54. *See id.* at 128. The defendant argued that, for the purpose of providing notice, it was constitutionally insufficient for the indictment to allege merely the statutory means and manner of sexual harassment. *See id.* The defendant contended that the indictment must allege the specific manner or means of his alleged criminal conduct by describing with particularity the terms "unwelcome sexual advances" or "request for sexual favors." *Id.* The State countered that, given the common meanings and definitions of these words, the indictment was sufficient to provide the defendant with notice of the charges against him. *See id.* The State's contention was that, so long as the statute defined alternative manners and means of committing an offense, the indictment did not have to further describe or define the alternative statutory definitions. *See id.* The State argued that by alleging one of the several statutory definitions on which it would rely, the defendant was provided sufficient notice. *See id.*

55. *See* State v. Edmond, 903 S.W.2d 856, 861–62 (Tex. App.—Fort Worth 1995), *rev'd*, 933 S.W.2d 120 (Tex. Crim. App. 1996) (en banc).

56. State v. Edmond, 933 S.W.2d 120, 130 (Tex. Crim. App. 1996) (en banc). The court declared that the proper resolution of the case originated with the holding in *Thomas*. *See id.* at 129. The court restated this holding, noting the general rule that a motion to quash an indictment will be allowed if the facts sought by the defendant are

pleading the specific statutory definitions of "sexual harassment" relied upon, the State satisfied the requirement of giving the defendant adequate notice.[57] The court concluded that to require the indictment to allege what the defendant did or said would improperly impose upon the State the burden of pleading facts which are essentially evidentiary in nature.[58] In other words, the State would be required to plead its evidence, which is contrary to the rules for the charging of an offense in an indictment or information.

Similarly, the Court of Criminal Appeals, citing *Thomas*, held in *Phelps v. State*[59] that an indictment charging the offense of possession of a controlled substance need not allege the specific statutory definition of the term "possess."[60] The court reasoned that be-

---

constitutionally essential to giving notice. *See id.* Moreover, the court stated that when a specific term is defined by statute, the term need not be further alleged in the charging instrument. *See id.*

57. *See id.* at 129–30. The court pointed out that the State "utilized the statutory definition of 'sexual harassment,' electing among the alternative statutory manner or means." *Id.* at 130. Thus, the court concluded that "[t]he State was required to do no more." *Id. But see id.* (Baird, J., concurring in part and dissenting in part) (disagreeing with the majority's opinion that an indictment is sufficient to provide the defendant with notice because it tracks the statutory definition of sexual harassment, including "unwelcome sexual advances" and "requests for sexual favors"). Judge Baird opined that both the federal and Texas Constitutions guarantee an accused's right to notice of the charges brought against him. *See id.* (citing the Sixth Amendment to the United States Constitution guaranteeing a defendant the right to be informed of the nature of the charges brought by the government, and Article I, Section 10 of the Texas Constitution, guaranteeing the accused the right to demand the nature of charge filed against him by the State). Judge Baird observes that, in Texas, a defendant is not required to anticipate any or all facts the State might seek to establish at trial. *See id.* Because an indictment is required to provide the defendant with adequate notice, the judge continued, a motion to quash the indictment should be granted by the courts when the instrument's language regarding the defendant's alleged conduct can be considered "so vague or indefinite as to deny the defendant effective notice of the acts he allegedly committed." *Id.* at 132. Judge Baird concludes that the allegations that the defendant committed "unwelcome sexual advances" and made "requests for sexual favors" are not completely descriptive of the offense, and therefore the statutory definitions are constitutionally insufficient to provide the defendant with notice of the charge against him. *See id.* at 133–34.

58. *See id.* at 130; *see also* Bynum v. State, 767 S.W.2d 769, 778 (Tex. Crim. App. 1989) (en banc) (declaring that an indictment which tracks the language of a statute is legally sufficient, and the State is not required to allege facts which are essentially evidentiary in nature).

59. 623 S.W.2d 936 (Tex. Crim. App. [Panel Op.] 1981).

60. *See Phelps*, 623 S.W.2d at 937. In *Phelps*, the defendant was convicted of possession of more than four ounces of marijuana and was sentenced to ten years in prison. *See id.* The defendant appealed, arguing that the trial court erred in denying her motion to quash the indictment, which alleged that the defendant knowingly "possess[ed]" mari-

cause the term "possession" is statutorily defined as the "actual care, custody, control or management,"[61] it describes a relationship to property, and does not pertain to an act or omission of the defendant.[62] Although the holding of *Phelps* seems correct, its rationale is questionable. If possession does not constitute an act or omission, it cannot constitute conduct. Based on this reasoning, possession is not an offense.[63] Yet, "possession" can constitute unlawful conduct even though it does not involve an act or omission as defined by the Penal Code.[64] In *State v. Carter*,[65] the Court of Criminal Appeals held that an allegation of the defendant's "conduct" must be sufficiently definite to give the defendant effective

---

juana. *See id.* The defendant complained that the indictment was insufficient and failed to provide notice as to the particular type of possession on which the State would rely to prove its case. *See id.*

61. TEX. HEALTH & SAFETY CODE ANN. § 481.002(38) (Vernon 1992).

62. *See Phelps*, 623 S.W.2d at 937. The Court of Criminal Appeals held that because the term "possession" more accurately reflects a relationship to property than some act by the defendant, the term "does not go to an act or omission of the defendant," and so the defendant is not entitled to a particular definition of the term "possession." *Id. But see* TEX. PEN. CODE ANN. § 6.01(b) (Vernon 1994) (indicating that possession is a voluntary *act* if the possessor knowingly receives or obtains the item or substance possessed, or has knowledge of his control of the item for an amount of time sufficient to allow him to terminate his control); *Phelps*, 623 S.W.2d at 937–38 (Teague, J., dissenting) (arguing that one "should not question the fact that the term 'possession' does go to the act of the defendant in possessing the marihuana") (emphasis omitted); Robert J. Coppock, Comment, *Indictments and Motions to Quash: The Problems of* Thomas v. State *and* Ferguson v. State, 34 BAYLOR L. REV. 459, 467–68 (1982) (positing that the possession of a controlled substance is an *act* of the possessor, not merely evidence of the relationship of a person to property).

63. *See* TEX. PEN. CODE ANN. § 1.03(a) (Vernon 1994) (providing that only statutorily defined "conduct" constitutes an offense).

64. *See* Byrd v. State, 835 S.W.2d 223, 225 (Tex. App.—Waco 1992, no pet.) (announcing that *possession* is a form of conduct (citing TEX. PEN. CODE ANN. § 6.01(a) (Vernon 1994)). In *Byrd*, the defendant was convicted of possession of cocaine and was sentenced to eight years in prison. *See id.* at 224. Byrd appealed, arguing that the state was required to prove that he had engaged in forbidden *conduct*—which is to say an act or omission—and cited two cases which held that "possession" is neither an act nor an omission. *See id.* at 225. Therefore, Byrd claimed that the state failed to allege in the indictment that he had engaged in forbidden conduct, and thus failed to state an offense against state laws. *See id.* The court of appeals affirmed Byrd's conviction, stating that Byrd overlooked Section 6.01(a) of the Penal Code, which provides that a person "commits an offense only if he engages in *conduct*, including an act, an omission, *or possession*." *Id.* The court held that although possession is not an act or omission, it is nonetheless "conduct," as statutorily defined. *See id.* Therefore, the court concluded, possession may indeed be the basis for an offense in Texas. *See id.*

65. 810 S.W.2d 197 (Tex. Crim. App. 1991) (en banc).

notice of the "behavior" he allegedly committed.[66] *Carter's* holding seems to dictate that an allegation of "possession" should contain the portion or portions of the statutory definition of the term that the State will seek to prove. Nonetheless, the holding of *Phelps* is correct even if possession constitutes conduct because the statutory definition of "possession"—care, custody, control, or management—does not contain distinctly alternative or diverse means or methods of committing such conduct.[67] Therefore, alleging that the defendant possessed a substance by exercising care, custody, control, or management of the substance would not give the defendant any greater notice than simply alleging that the defendant "possessed" the substance.[68]

The courts have similarly applied the corollary of the act or omission principle, which states that the prosecution need not plead evidentiary matters which do not relate to the defendant's conduct.[69] Because the act or omission principle requires the State to plead evidentiary matters only when there are alternative definitions or multiple modes of a defendant's *conduct*, the State is not required to plead evidentiary matters when alleging elements not related to a defendant's conduct.[70] Thus, if a defendant is charged with the offense of capital murder of a peace officer,[71] the defendant is not entitled to notice of the particular statutory definition of "peace officer" on which the State will rely to prove that the decedent was a peace officer because the definition does not relate to the defendant's conduct.[72] Likewise, the State need not allege in

66. *See Carter*, 810 S.W.2d at 199 (ruling that a defendant is entitled to notice of the acts or omission he is alleged to have committed).

67. *See* Robles v. State, 651 S.W.2d 868, 869–70 (Tex. App.— Houston [1st Dist.] 1983) (holding that where several acts of the defendant are not significantly different from one another and do not constitute different and distinct ways of proving the defendant's conduct, additional notice is not required because these matters are essentially evidentiary in nature), *aff'd*, 664 S.W.2d 91 (Tex. Crim. App. 1984) (en banc).

68. *See Robles*, 651 S.W.2d at 870 (stating that a motion to quash an indictment should not be granted when doing so would not give the defendant any additional or useful information).

69. *See supra* notes 23–24 and accompanying text.

70. *See supra* notes 23–24 and accompanying text.

71. *See* TEX. CODE CRIM. PROC. ANN. art. 2.12 (Vernon 1989) (defining "peace officers").

72. *See* Nethery v. State, 692 S.W.2d 686, 695 (Tex. Crim. App. 1985) (en banc) (rejecting the defendant's contention that the indictment was deficient for failing to define a "peace officer"). The Court of Criminal Appeals held that the term "peace officer" most

the indictment the particular evidence it will utilize in attempting to prove that the deceased officer was acting in the "lawful discharge of his duties" when killed.[73]

C. *Driving While Intoxicated and Involuntary Manslaughter*

1. Driving While Intoxicated

Courts have held that the act or omission principle applies in cases where the defendant has been charged with driving while intoxicated or intoxication manslaughter.[74] Under Section 49.04(a) of the Penal Code, a person commits the offense of driving while intoxicated if that individual "is intoxicated while operating a motor vehicle in a public place."[75] Texas courts have held that, as used here, the term "intoxicated" refers to a person's *conduct*.[76] Furthermore, under alternative statutory definitions in the Penal Code, a person is "intoxicated" if he (a) does not have the normal use of physical or mental faculties by reason of the introduction of alcohol, drugs or a controlled substance; or (b) has a blood-alcohol concentration of 0.10 or more.[77] Because the courts have held that "intoxication" constitutes one's *conduct*, and that multiple manners

---

likely need not be defined if only facts relating to the defendant's conduct are essential to giving the defendant notice; thus, it may be necessary to allege the manner in which the defendant is thought to have committed the conduct. *See id.* The court held that facts which are not necessary to providing the defendant with notice, but are only essentially evidentiary in nature, need not be alleged in the indictment because a charging instrument "need not plead the evidence relied upon by the State." *Id.* The court concluded that the indictment did not need to define "peace officer" because that term did not pertain to the conduct—an act or omission—of the defendant. *See id.*

73. *See* Moreno v. State, 721 S.W.2d 295, 300 (Tex. Crim. App. 1986) (en banc) (stating that an indictment need only provide the defendant with adequate notice of the acts he is charged with committing). The court denied the defendant's argument that he was entitled to notice in the indictment as to how the State would prove the deceased officer was acting in the line of duty, finding that no error is committed if the information requested in the motion to quash is merely evidentiary in nature and is not required for purposes of providing notice and barring future prosecutions. *See id.*

74. *See infra* notes 78–99, 159–70 and accompanying text.

75. TEX. PEN. CODE ANN. § 49.04(a) (Vernon 1994).

76. *See* Garcia v. State, 747 S.W.2d 349, 381 (Tex. Crim. App. 1988) (en banc) (labeling intoxication as "prohibited *conduct*") (emphasis added); *see also Carter*, 810 S.W.2d at 197–200 (holding that a defendant is entitled to notice of the allegedly wrongful conduct in which he has engaged, and reversing conviction, declaring that the state failed to specify in the indictment which definition of intoxication and which type of intoxicants the state would seek to prove at trial).

77. *See* TEX. PEN. CODE ANN. § 49.01(2)(A)–(B) (Vernon 1994).

or methods exist by which the defendant can be intoxicated, the act or omission principle must be applied to provide the defendant with notice in cases in which the State prosecutes the defendant for either driving while intoxicated (DWI) or intoxication manslaughter.

In *State v. Carter*,[78] the Court of Criminal Appeals applied the act or omission principle to an information charging the offense of driving while intoxicated.[79] The court held that, when challenged by a motion to quash, an information must allege the definition or definitions of "intoxicated" and the kind or kinds of "intoxicants" the State will seek to prove at trial.[80] In *Carter*, the information alleged that the defendant, "while intoxicated," drove and operated a motor vehicle in a public place.[81] The defendant filed a timely motion to quash on the ground that the information failed to provide adequate notice of the offense, claiming that the indictment alleged neither the particular statutory definition of "intoxicated" on which the State would rely at trial nor the specific type of substance that allegedly caused the intoxication.[82]

The trial court sustained the defendant's motion to quash, which was subsequently reversed on appeal. However, the Court of Criminal Appeals agreed with the trial court, asserting that Article 1, Section 10 of the Texas Constitution entitles a defendant to notice of the *acts or omissions* that individual is charged with committing.[83] The court reasoned that a defendant is constitutionally entitled to know the specific type of behavior in which he allegedly engaged so that he can properly prepare a defense to the allega-

78. 810 S.W.2d 197 (Tex. Crim. App. 1991) (en banc).

79. *See Carter*, 810 S.W.2d at 198–99.

80. *See id.* at 200.

81. *See id.* at 198.

82. *See id.*

83. *See* State v. Carter, 810 S.W.2d 197, 199 (Tex. Crim. App. 1991) (en banc) (emphasis added). Specifically, the Texas Constitution states that "[i]n all criminal prosecutions the accused . . . shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof." TEX. CONST. art. I, § 10. The court reiterated that this constitutional provision mandates that the charging instrument convey adequate notice from which the defendant may prepare a defense. *See Carter*, 810 S.W.2d at 199. The court then looked to a prior decision in which it held that a defendant is constitutionally "entitled to notice of the *acts or omissions* he is alleged to have committed." *Id.* (citing Daniels v. State, 754 S.W.2d 214, 217 (Tex. Crim. App. 1988) (en banc)).

tion.[84] Based on these assertions, the court held that the defendant's motion to quash should have been sustained because the failure of the information to allege which definition of "intoxicated" the State would seek to prove at trial rendered the instrument constitutionally insufficient.[85]

Although the pronouncements of law in *Carter* are correct statements of the act or omission principle, questions exist as to whether the court applied the principle correctly. The resolution of this issue depends on the determination of whether *being* intoxicated is an act or omission, and thereby constitutes conduct or behavior. In *Carter*, it appears that the court assumed that intoxication is conduct or behavior from the lack of any analysis or explanation of this issue.[86]

---

84. *See Carter*, 810 S.W.2d at 199. The court reviewed its holding in *Thomas*, and held that even though the wrongful conduct with which the defendant was charged was statutorily defined, if such definition allowed for multiple manners or means to commit the conduct, then upon timely request, the state was required to allege the specific manner or means it sought to establish. *See id.* The reason for this exception was that a defendant is constitutionally entitled to notice as to the particular behavior in which he was accused of engaging so that he could properly prepare a defense. *See id.* The court further reasoned that under this constitutional guarantee of sufficient notice, a defendant would not be forced to simply guess which type of conduct the State would seek to prove at trial. *See id.* However, the court continued, the State may "specifically allege, in the conjunctive or disjunctive, *any* or *all* of the statutorily-defined types of conduct regarding an offense." *Id.* The court concluded that in such cases, a defendant is still provided "clear" notice as to what the state will seek to prove at trial. *See id.*

85. *See id.* at 200. The court determined that the defendant was entitled to know which definition of "intoxicated" the State would rely on so that he could properly prepare his defense. *See id.*

86. *But see id.* (McCormick, P.J., dissenting) (arguing that "intoxication" is a type of *condition*, not *conduct*). Judge McCormick began by reviewing the rule that an information or indictment that tracks the penal statute's language is legally sufficient to provide the defendant with notice of the charges against him. *See id.* Judge McCormick then noted that when the legislature establishes offenses and expressly defines the elements and terms of the offenses, the definitions of the elements and terms are "essentially evidentiary" and need not be alleged in the charging instrument. *See id.* (emphasis omitted). Judge McCormick then noted an exception to this rule when an element of the offense proscribes *conduct*—meaning an act or omission—that is capable of being committed in multiple ways, in which case the element or definition must be specifically charged. *See id.* at 201. The judge surmised that the definition of "intoxicated" fell within the stated exception to the rule. *See id.* Judge McCormick explained that Article 6701*l*-1 of the Texas Revised Civil Statutes, which "simply proscribes the act of 'driving while intoxicated,'" does not prohibit the actual act of ingesting drugs, alcohol or other controlled substances; rather, the statute only forbids "the *act* of driving while being in an intoxicated *condition*." *Id.* Thus, Judge McCormick concluded, the statutory definition of "intoxicated" offered no more than an evi-

The decision in *Carter* evolved from *Garcia v. State*[87] and *Solis v. State*,[88] two cases which address the issue of whether intoxication is conduct, and therefore, an act or omission. In *Garcia*, the defendant was convicted of driving while intoxicated.[89] The information alleged that Garcia drove a motor vehicle in a public place while intoxicated—"[w]hen the defendant did not have the normal use of his mental and physical faculties."[90] Although the information alleged the particular statutory definition of intoxication on which the State relied, it failed to allege the substance that caused the intoxication.[91] The defendant filed a motion to quash the information, arguing that because the instrument did not plead the intoxicating substance, the State did not provide adequate notice as constitutionally required.[92] The Fourth Court of Appeals agreed with the defendant, and subsequently reversed and dismissed the conviction.[93] In an en banc decision, the Court of Criminal Appeals affirmed, holding that an instrument charging a defendant with an offense involving intoxication must allege the particular intoxicant that caused the intoxication.[94] The court based its decision on *Ferguson v. State*,[95] which held that because "delivery" of a con-

---

dentiary means by which the State could prove that the defendant was in an intoxicated state. *See id.*

87. 747 S.W.2d 379 (Tex. Crim. App. 1988) (en banc).

88. 787 S.W.2d 388 (Tex. Crim. App. 1988) (en banc).

89. *See Garcia*, 747 S.W.2d at 380 (finding Garcia guilty of driving while intoxicated and sentencing him to 12 days in jail and a $500.00 fine).

90. *Id.* The statute defining the offense of driving while intoxicated then in effect provided that a defendant commits an offense if he is "intoxicated while driving or operating a motor vehicle in a public place." *Id.*

91. *See id.*

92. *See id.*

93. *See* Garcia v. State, 720 S.W.2d 655, 656 (Tex. App.—San Antonio 1986) (reversing Garcia's conviction after the State failed to provide adequate notice in the information of the charges against the defendant), *aff'd*, 747 S.W.2d 379 (Tex. Crim. App. 1988) (en banc).

94. *See* Garcia v. State, 747 S.W.2d 379, 381 (Tex. Crim. App. 1988) (en banc) (ruling that the charging instrument must allege the intoxicant "singularly, or in disjunctive combination").

95. 622 S.W.2d 846 (Tex. Crim. App. 1981). In *Ferguson*, the defendant was charged by indictment with the offense of delivery of a controlled substance. *See Ferguson*, 622 S.W.2d at 849. Ferguson was convicted of delivery of heroin and was sentenced to 45 imprisonment in the Texas Department of Corrections. *See id.* at 848. Because there were alternative statutory definitions of the manner or means by which a delivery could be committed, the court held that, when challenged by a motion to quash, the indictment should have alleged the particular manner or means of delivery that the State would seek to

trolled substance could be effected in more than one manner or method, the indictment was required to allege the actual type of delivery the State would seek to establish at trial.[96] Based on this holding, the *Garcia* court found the definition of "intoxication" to be analogous to *Ferguson's* definition of "delivery" in that the proscribed conduct could be accomplished in more than one way.[97] The court further reasoned that in both cases the means of accomplishing the prohibited conduct depends on the defendant's *act or omission*.[98] Therefore, the court concluded, when challenged by a motion to quash, the indictment or information must allege the intoxicant or intoxicants that caused the defendant's intoxication.[99]

In *Solis*, however, the Court of Criminal Appeals held that an indictment or information charging the offense of driving while intoxicated need not allege the statutory definition of "intoxication" that the State will seek to prove.[100] The information charged that Solis drove a motor vehicle in a public place while "intoxicated, to-wit: by reason of the introduction of alcohol into [his] body."[101] Unlike the information in *Garcia*, the information in *Solis* alleged

---

prove. *See id.* at 851. The court reasoned that because the State failed to note the definition of delivery it would seek to prove at trial, the defendant was left to guess or assume that the State would attempt to prove any or all of the types of conduct. *See id.* at 852 (Roberts, J., concurring) (writing that the defendant charged with delivering a controlled substance has the right to notice of whether the State is alleging an actual or constructive transfer, or offer to sell). The court further reasoned that "[t]he 'delivery' is the *act* by the [defendant] which constitutes the criminal conduct." *Id.* at 850 (emphasis added). The court stated that in the instant case, delivery was at "the very heart of the offense," and that the type of delivery the State would seek to prove at trial was critical to Ferguson's defense. *Id.* From this premise, the court concluded that the indictment did not give the defendant adequate notice and would not prevent subsequent prosecutions for the same offense. *See id.* at 851.

96. *See Garcia*, 747 S.W.2d at 380–81.

97. *See id.* at 381 (comparing the definition of "delivery" to "intoxication," and finding an "inescapable similarity is present: in each the prohibited conduct can be accomplished in several different ways").

98. *See id.*

99. *See id.* The court stated that the type of intoxicant allegedly used constituted an element of the charged offense "critically necessary" to the State's proof. *See id.* Thus, the court concluded that, in prosecuting the offense of driving while intoxicated, the State must allege the intoxicant which caused the defendant's alleged intoxication. *See id.*

100. *See* Solis v. State, 787 S.W.2d 388, 391 (Tex. Crim. App. 1988) (en banc).

101. *Id.* at 389. The defendant was convicted of driving while intoxicated and was assessed two year's probation and a $300 fine. *See id.* at 388–89. The trial judge overruled the defendant's motion to quash the indictment, asserting insufficient notice, and the court of appeals reversed. *See id.* at 389.

the intoxicant relied upon, but did not allege the definition of "intoxication" on which the State relied.[102] Following *Thomas* and *Gorman*, the court in *Solis* held that an indictment or information must allege the statutory definition upon which the State relies "only when the alternative definitions create different ways in which a defendant's *conduct* could constitute an element of an offense."[103] If, however, the alternative statutory definitions merely address different avenues of proof and not the defendant's *conduct*, the particular definition relied upon need not be pleaded.[104]

As mentioned, the information charging the offense of driving while intoxicated in *Carter* did not allege either the intoxicating substance or the definition of "intoxication" relied upon by the State.[105] Thus, Carter argued in the Court of Criminal Appeals that he was constitutionally entitled to notice of which statutory definition of "intoxicated" and what type of intoxicant the State would seek to prove.[106] The State argued that these are matters of evidence that need not be pleaded.[107]

After stating the principle of *Thomas* and *Gorman*, the *Carter* court followed *Garcia*, silently overruling *Solis*.[108] In affirming the trial court's granting of a motion to quash, the court held that the information failed to give the defendant adequate notice because it failed to allege the specific definition of "intoxicated," as well as the particular type of intoxicant the State sought to prove at trial.[109]

The court pointed out that, in Texas, there are actually two separate types of DWI offenses: (1) a loss of faculties offense, and (2) a "*per se*" offense.[110] The "loss of faculties" offense may be estab-

---

102. *See id.*

103. *Id.* at 391.

104. *See id.* The court noted that as a corollary to the rule that the State must specify which of multiple statutory definitions it will rely on at trial, the State will not be required to specifically plead the alternative definition in the indictment or information if the alternative statutory definitions fail to address an act or omission of the defendant. *See id.*

105. *See* State v. Carter, 810 S.W.2d 197, 198 (Tex. Crim. App. 1991) (en banc).

106. *See id.* at 199.

107. *See id.*

108. *See id.* at 198–200 (maintaining that a charging instrument must allege the specific definition of "intoxication" the State will seek to prove, and the type of intoxicant the defendant allegedly used, while overruling all previous rulings to the contrary).

109. *See id.* at 200.

110. *See* State v. Carter, 810 S.W.2d 197, 200 (Tex. Crim. App. 1991) (en banc).

lished upon proof that the defendant drove or operated a motor vehicle in a public place without the normal use of his physical or mental faculties because of the introduction into his body of alcohol, a controlled substance, a drug or any combination thereof.[111] The court stated the "*per se*" offense may be established by proving that the defendant either drove or operated a motor vehicle in a public place while having an alcohol concentration of 0.10 or more in his blood, breath, or urine.[112] From this premise, the court concluded that because of the fundamentally different natures of the two offenses and the different "behaviors" necessary to commit them, the indictment or information, when challenged by a motion to quash, must allege the particular definition of "intoxicated" and the specific type of intoxicant used by the defendant which the State will seek to prove at trial.[113]

The soundness of the decisions in *Garcia*, *Solis* and *Carter* depends on the resolution of two questions. First, is *being* intoxicated an "act or omission"—conduct or behavior—that can be committed in different ways, or is it a "condition" that can be proved to exist by different evidence? Because there are alternative definitions of "intoxicated," if being intoxicated is an act or omission, the courts should apply the act or omission principle and require the State to provide the defendant with adequate notice by pleading the particular definition relied upon. If being intoxicated is not a type of conduct, the State should not have to plead what would amount essentially to evidentiary matters. Second, are there indeed two distinct offenses of driving while intoxicated, as the *Carter* court concluded that can be committed in different ways, or is there really only one offense that can be proved by different evidence?

a. Conduct or Condition

The general rule in interpreting a Penal Code term is that the Penal Code must be construed according to the Texas Code Construction Act.[114] The Code Construction Act requires words and phrases to be read in context and construed "according to the rules

111. *See id.*
112. *See id.* at 198, 200.
113. *See id.*
114. *See* TEX. PEN. CODE ANN. § 1.05(b) (Vernon 1994).

of grammar and common usage."[115] The Act also provides that words and phrases that have acquired technical or particular meanings by legislative definition or otherwise, shall be construed accordingly.[116]

Although the term "intoxication" is defined in the Penal Code, those definitions raise, rather than answer, the question of whether *being* intoxicated is conduct or a condition. The common definition classifies a person as "intoxicated" if that individual is in a "*state* of intoxication."[117] Similarly, the common definition defines "intoxication" as a "*state* of inebriation or drunkenness,"[118] or the "*condition* of being drunk."[119] Furthermore, "condition" means "a *state* of being."[120] From this simple lexicological analysis, it appears obvious that "intoxicated" does not regard one's *conduct*, but is instead a description of one's *condition*. The dissent in *Carter* reached the same conclusion by observing that the offense of driving while intoxicated "outlaws the act of driving while being in an intoxicated *condition*."[121] The majority in *Carter* did not address this conclusion, and this issue was not raised in *Garcia*.

The decision in *Garcia*—that the substance that allegedly caused the defendant's intoxication must be pleaded—is flawed by the court's equating the definition of "intoxication" with the *Ferguson* court's definition of "delivery."[122] "Delivery" is defined statutorily as "the *act* of delivering."[123] "Intoxication," on the other hand, is defined statutorily as either "not *having*" normal mental or physical utility,[124] or "*having*" a proscribed minimum alcohol concentration.[125] Based on these statutory constructions, the court was correct in *Ferguson* in holding that "delivery" constitutes an act of the defendant.[126] However, the *Garcia* court's analogy between

115. TEX. GOV'T CODE ANN. § 311.011 (Vernon 1988).
116. *See id.*
117. BALLENTINE'S LAW DICTIONARY 659 (3d ed. 1969) (emphasis added).
118. *Id.* at 660 (emphasis added).
119. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 634 (1990) (emphasis added).
120. *Id.* at 274 (emphasis added).
121. State v. Carter, 810 S.W.2d 197, 201 (Tex. Crim. App. 1991) (en banc) (McCormick, P.J., dissenting).
122. *See* Garcia v. State, 747 S.W.2d 379, 381 (Tex. Crim. App. 1989) (en banc).
123. TEX. HEALTH & SAFETY CODE ANN. § 481.002(8) (Vernon 1992).
124. TEX. PEN. CODE ANN. § 49.01(2)(A) (Vernon 1994).
125. *See id.* § 49.01(2)(B).
126. *See* Ferguson v. State, 622 S.W.2d 846, 850 (Tex. Crim. App. 1981).

the definition of delivery in *Ferguson* and the definition of intoxication is misplaced because "not having" normal mental or physical utility or "having" a proscribed minimum alcohol concentration is not defined as an act, as delivery is. Consequently, the decision in *Garcia* that "intoxication" constitutes an act of the defendant is incorrect.

The offense of driving while intoxicated[127] does not proscribe the act of *becoming* intoxicated while driving.[128] If it did, the process by which the person *became* intoxicated would logically require some conduct by the person. If *becoming* intoxicated could be accomplished by alternative conduct—that is to say, different methods or means—the act or omission principle of *Thomas* and *Gorman* would require that the State give the defendant notice of the particular method or means relied upon for conviction.[129] Yet, the tacit reasoning of *Garcia* and *Carter* stems from the assertion that when a person is in the condition of *being* intoxicated, it implies that the person engaged in conduct, such as the act of consuming or ingesting the intoxicant, that caused the person to *become* intoxicated. The gravamen of the offense, however, is *being* intoxicated, not *becoming* intoxicated.[130] Thus, under the act or omission principle, it is the *condition*, rather than the *conduct*, that is prohibited. Consequently, the State should not be required to plead the evidence on which it will rely to prove the intoxicated condition even though the statute in question provides the nature of the evidence that is sufficient to prove the condition.

The statute involved in *Garcia* and *Carter* defined "intoxicated" to mean either "(A) not having the normal use of mental or physical faculties by reason of the *introduction* . . . [of a substance] into the body; or (B) having an alcohol concentration [in the blood,

---

127. *See supra* note 75 and accompanying text.

128. *See* Parr v. State, 575 S.W.2d 522, 526 (Tex. Crim. App. [Panel Op.] 1978) (clarifying that "it is not the act of consuming the intoxicating liquor which is prohibited, but only when a person also operates a motor vehicle on a public road while under its influence"); 41 GEORGE E. DIX & ROBERT O. DAWSON, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 20.109, at 230 (1995) (stating that "[u]nder the Penal Code provision defining and prohibiting driving while intoxicated, the conduct required is 'driving or operating a motor vehicle'. This must occur in a public place and the accused must have been intoxicated at the time.").

129. *See supra* notes 22–39 and accompanying text.

130. *See Parr*, 575 S.W.2d at 526 (holding that it is an offense for a person to be intoxicated while engaged in the conduct of driving a motor vehicle).

breath, or urine] of 0.10 or more."[131] Part (A) of the definition, referred to in *Carter* as "loss of faculties," requires that the condition of intoxication result from the "introduction" of a substance or combination of substances into the body.[132] Although to "introduce" a substance into one's body implies an act by someone,[133] the definition does not require that the defendant engage in the act. The "introduction" may be performed or accomplished by another person without any act or omission of the defendant.[134] A controlled substance, drug or dangerous drug may be "introduced" by means of intravenous injection administered by a third person, including a physician. This method of introduction of a controlled substance would not constitute an act by the *defendant.* It would constitute the defendant's conduct by *omission*[135] only if the failure to act were an offense or the defendant had a statutory duty to act.[136]

If the "loss of faculties" definition of "intoxication" required that the condition exist by reason of the *ingestion* of an intoxicating substance, a plausible argument might be made that the definition presupposes an act of ingesting, or "taking in," by the defendant.[137] The person affected by the substance and the person who ingested the substance would have to be the same person—the defendant.

---

131. *See* State v. Carter, 810 S.W.2d 197, 198 (Tex. Crim. App. 1991) (en banc) (emphasis added); *accord* Garcia v. State, 747 S.W.2d 379, 380 n.3 (Tex. Crim. App. 1988) (en banc).

132. *See Carter*, 810 S.W.2d at 200.

133. *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 635 (1990) (defining "introduce" as "place, insert").

134. *Cf.* 41 GEORGE E. DIX & ROBERT O. DAWSON, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 20.109, at 230 (1995). The authors state: "While the State must prove that the accused was intoxicated, it is not required to prove how the accused was placed in that condition and specifically it need not prove he achieved that condition by his own conduct." *Id.*

135. *See* TEX. PEN. CODE ANN. § 1.07(a)(34) (Vernon 1994) (defining "omission" as the "failure to act").

136. *See* TEX. PEN. CODE ANN. § 6.01(c) (Vernon 1994) (indicating that "a person who omits to perform an act does not commit an offense unless a law as defined by Section 1.07 provides that the omission is an offense or otherwise provides that he has a duty to perform the act"); *see also* TEX. PEN. CODE ANN. § 1.07(a)(30) (Vernon 1994) (defining the "law" as "the constitution or a statute of this state or of the United States, a written opinion of a court of record, a municipal ordinance, an order of a county commissioners court, or a rule authorized by and lawfully adopted under a statute").

137. *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 621 (1990) (defining "ingest" as "to take in for or as if for digestion").

However, the "loss of faculties" definition requires that the condition exist by reason of the "*introduction*" of an intoxicating substance.[138] It requires only that the substance has been "put" or "inserted" in the defendant.[139] A rational assumption or inference cannot be made that the defendant engaged in the act of "introduction" because, as observed earlier, the "introduction" can be the act of a third person. Consequently, the defendant's condition of being intoxicated can exist without any act or omission, conduct or behavior of the defendant.

Part (B) of the definition of intoxication, referred to in *Carter* as "*per se*" intoxication,[140] requires only that the defendant "have" a minimum alcohol concentration.[141] This definition refers to a mere condition of the defendant's breath, blood, or urine.[142] Although the existence of the condition implicitly requires the act of consuming alcohol, neither the act of consumption nor the act of becoming intoxicated is prohibited conduct. Only the condition of *being* intoxicated while engaging in the act of driving is forbidden.[143] Consequently, the decision in *Garcia* is flawed by the court's analogizing the definition of "intoxication" to *Ferguson's* definition of "delivery." The *Carter* court's reliance on *Garcia* perpetuates the flaw.

b. Number of Offenses

In *Carter*, the majority held that "there are really two types of DWI offenses": (1) a "'loss of faculties'" offense, and (2) a "*per se*" offense.[144] Because of "the fundamentally different natures" of

138. *See* State v. Carter, 810 S.W.2d 197, 200 (Tex. Crim. App. 1991) (en banc); *see also* TEX. PEN. CODE ANN. § 49.01 (Vernon 1994) (noting that intoxication means "not having the normal use of mental or physical faculties by reason of the *introduction* of alcohol . . . into the body") (emphasis added).

139. *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 635 (1990) (defining "introduction" as "a putting in, insertion").

140. *See Carter*, 810 S.W.2d at 200.

141. *See* TEX. PEN. CODE ANN. § 49.01(2)(B) (Vernon 1994) (stating that a person is intoxicated if he has an alcohol concentration of 0.10 or more).

142. *See id.* § 49.01(1) (A)–(C).

143. *Cf.* Trent v. State, 925 S.W.2d 130, 132 (Tex. App.—Waco 1996, no pet.) (noting that "DWI requires . . . *being* intoxicated [while] operating a motor vehicle") (emphasis added); Porter v. State, 921 S.W.2d 553, 556 (Tex. App.—Waco 1996, no pet.) (acknowledging that the defendant was "previously convicted of *being* intoxicated while operating a motor vehicle in public place") (emphasis added).

144. *See* State v. Carter, 810 S.W.2d 197, 200 (Tex. Crim. App. 1991) (en banc).

the two offenses and the different "behaviors" necessary to commit them, the indictment or information must allege the "definition(s) of 'intoxicated' on which the State is relying."[145]

In two recent cases, the defendants sought to make rational and logical applications of the court's "two-offense" reasoning in *Carter*. In *Harris v. State*,[146] the information charging the defendant with the offense of driving while intoxicated alleged that the defendant operated a motor vehicle in a public place while he was intoxicated, "to-wit: by reason of the introduction of *alcohol* into the defendant's body."[147] The defendant moved to set aside the information by arguing that, under *Carter*, there were in effect at the time two "offenses"—a "loss of faculties" offense and a "per se" offense "—that have fundamentally different natures."[148] The defendant argued that the information failed to specify which of these two offenses the defendant was accused of committing.[149] In response, the State moved to amend the information to charge the defendant with the "loss of faculties" offense and the "per se" offense.[150] Relying on the reasoning of *Carter*, the defendant objected to the proposed amendment "because the amended information charged an additional or different offense in violation of Article 28.10(c) of the Code of Criminal Procedure."[151] In holding that the amendment was not subject to the defendant's objection, the court of appeals held that "[d]espite some of the language

145. *Id.*

146. 866 S.W.2d 316 (Tex. App.—San Antonio 1993, pet. ref'd).

147. *Harris*, 866 S.W.2d at 318. Harris was convicted by a jury of driving while intoxicated. *See id.* The enhancement paragraph in the indictment alleged that as a direct result of this offense, a third party suffered serious bodily injuries. *See id.* The trial court concurred and sentenced Harris to one year in the county jail and fined him $2,000. *See id.*

148. *See id.* at 324.

149. *See id.*

150. *See id.*; *see also* TEX. CODE CRIM. PROC. ANN. art. 28.09 (Vernon 1989) (providing that "if the exception to an indictment or information is sustained, the information or indictment may be amended if permitted by Article 28.10 of this code, and the cause may proceed upon the amended indictment or information"); TEX. CODE CRIM. PROC. ANN. art. 28.10(a) (Vernon 1989) (providing that "[a]fter notice to the defendant, a matter of form or substance in an indictment or information may be amended at any time before the date the trial on the merits commences.").

151. Harris v. State, 866 S.W.2d 316, 324 (Tex. App.—San Antonio 1993, pet. ref'd); *see also* TEX. CODE CRIM. PROC. ANN. art. 28.10(c) (Vernon 1989) (providing that "[a]n indictment or information may not be amended over the defendant's objection as to form or substance if the amended indictment or information charges the defendant with an additional or different offense. . . .").

in *Carter*, the amendment here simply dealt with the different means or modes of committing the *same offense*—driving while intoxicated."[152]

In *Kilgo v. State*,[153] the information charging the defendant with the offense of driving while intoxicated alleged in one paragraph:

> [Defendant] did unlawfully then and there drive and operate a motor vehicle in a public place in Dallas County, Texas, to wit: a street and highway, while intoxicated, in that the defendant did not have the normal use of his mental and physical faculties by reason of the introduction of alcohol into defendant's body, and defendant had an alcohol concentration of at least 0.10 . . . .[154]

Relying on the reasoning of *Carter* that there are two offenses, the defendant moved to quash the information on the ground that it violated the provision of the Code of Criminal Procedure that no paragraph of a count in an indictment or information "may charge more than one offense."[155]

Following *Harris*, the court of appeals in *Kilgo* held that although there are several statutory "ways by which the offense can be proven, only one act is prohibited—driving while intoxicated."[156] Consequently, the single paragraph of the information charged only one offense.[157] Contrary to the reasoning of *Carter*, the holdings of *Harris* and *Kilgo* are correct in that there are not two driving while intoxicated offenses but only one such offense. This offense, as stated in *Kilgo*, may be "proven" in different ways (*i.e.*, by different types of evidence).[158]

2. Involuntary Manslaughter

Similar to DWI offenses, Texas courts have incorrectly applied the act or omission principle to cases in which the defendant is charged with intoxication manslaughter. In *Saathoff v. State*,[159] the

---

152. *Harris*, 866 S.W.2d at 324 (emphasis added).

153. 880 S.W.2d 828 (Tex. App.—Dallas 1994, pet. ref'd).

154. *Kilgo*, 880 S.W.2d at 829.

155. *Id.*; *see* TEX. CODE CRIM. PROC. ANN. art. 21.24(b) (Vernon 1989) (explaining that "[a] count may contain as many separate paragraphs charging the same offense as necessary, but no paragraph may charge more than one offense.").

156. *Kilgo*, 880 S.W.2d at 830.

157. *See id.* at 829–30.

158. *See* Kilgo v. State, 880 S.W.2d 828, 829–30 (Tex. App.—Dallas 1994, pet ref'd).

159. 891 S.W.2d 264 (Tex. Crim. App. 1994) (en banc).

Court of Criminal Appeals held that, when challenged by a motion to quash, an indictment charging the offense of involuntary manslaughter by reason of intoxication[160] must allege the statutory definition or definitions of intoxication the State will seek to prove.[161] The court found that its decision in *Carter* was controlling. The court explained that in *Carter* it was determined that "intoxication for DWI is part of the *prohibited conduct* the State must prove and allege if requested."[162] Thus, the court reasoned that because intoxication is an element of involuntary manslaughter, it is "part of the *prohibited conduct* the State must prove. . . ."[163]

The State argued in *Saathoff* that "intoxication" is a state or condition, not an act or omission; therefore, the State is not required to allege the definition of the condition in the indictment.[164] The court's first response to the State's argument was that the issue was "addressed" in *Carter*.[165] However, as noted previously, the majority in *Carter* did not respond to the dissent's rationale that intoxication is a "condition,"[166] but simply asserted without explanation that intoxication is an "act or omission," "conduct," or "behavior."[167] The *Saathoff* court's second response to the State's argument was that "[t]he State interprets act or omission too narrowly in the context of what constitutes sufficient notice to a defendant,"[168] and cited *Drumm v. State*,[169] *Garcia*, and *Geter v.*

160. *See Saathoff*, 891 S.W.2d at 264 n.1 (noting that Section 19.05(a)(2) of the Texas Penal Code provides that "[a] person commits an offense if he . . . (2) by accident or mistake when operating a motor vehicle, airplane, helicopter, or boat while intoxicated and, by reason of such intoxication, causes the death of an individual."); *see also* TEX. PEN. CODE ANN. § 49.08(a) (Vernon 1994) (defining the offense of intoxication manslaughter by stating that "[a] person commits an offense if the person: (1) operates a motor vehicle in a public place, an aircraft, or a watercraft; and (2) is intoxicated and by reason of that intoxication causes the death of another by accident or mistake.").

161. *See Saathoff*, 891 S.W.2d at 266–67.

162. *Id.* at 266 (emphasis added).

163. *Id.* (emphasis added).

164. *See* Saathoff v. State, 891 S.W.2d 264, 266 (Tex. Crim. App. 1994) (en banc) (presenting the State's argument that it need not plead evidentiary matters).

165. *See id.* The court stated that this was not the first time a Texas court would address this issue. *See id.*

166. *See* State v. Carter, 810 S.W.2d 197, 201 (Tex. Crim. App. 1991) (en banc) (McCormick, P.J., dissenting).

167. *See id.* at 199.

168. *Saathoff*, 891 S.W.2d at 266.

169. 560 S.W.2d 944 (Tex. Crim. App. 1977) (en banc).

State[170] in support of its assertion that *being* intoxicated is prohibited *conduct.*

a. *Drumm v. State*[171]

In *Drumm*, the defendant was prosecuted for the offense of driving while his license was suspended.[172] In relevant part, the information alleged that the suspension of the defendant's license had been "ordered and effected by the Texas Department of Public Safety under the authority and provisions of Art[icle] 6687b, Sec[tion] 24, Vernon's Annotated Texas Civil Statutes."[173] The defendant filed a motion to quash the information for its failure to "give sufficient notice to the defendant of the date or nature of the driver's license suspension upon which the state relies for conviction,"[174] and its failure to specify "any subsection under the section alleged."[175] The trial court overruled the motion.[176]

Five subsections of Section 24(a) of Article 6687b provided for the automatic suspension of a person's license upon the person's final conviction of any one of five specified offenses: negligent homicide, driving while intoxicated, a felony offense under the motor vehicle laws, failure to stop and render aid, and aggravated assault.[177] Although the information alleged that the suspension occurred under Section 24, it did not specify for which subsection the defendant was convicted that resulted in the automatic suspension.[178] The court held that because "[t]here may exist several such grounds for suspension, and there may exist various defenses to some or all of those grounds,"[179] the defendant was entitled to notice of the particular ground upon which the State would rely.[180]

Although *Drumm* was decided prior to the enunciation of the act or omission principle of *Thomas* and *Gorman*, its holding is consistent with that principle. To be entitled to obtain a conviction

170. 779 S.W.2d 403 (Tex. Crim. App. 1989) (en banc).
171. 560 S.W.2d 944 (Tex. Crim. App. 1977) (en banc).
172. *See Drumm*, 560 S.W.2d at 945.
173. *Id.*
174. *Id.* at 944.
175. *Id.*
176. *See* Drumm v. State, 560 S.W.2d 944, 944 (Tex. Crim. App. 1977) (en banc).
177. *See id.* at 945–46.
178. *See id.*
179. *Id.* at 947.
180. *See id.*

for the offense of "driving while license suspended," the State is required to prove that the defendant engaged in an act or omission,[181] and that such act or omission resulted in a final conviction.[182] Under *Thomas* and *Gorman*, the defendant was entitled to notice of the particular act or omission that the State would seek to prove.[183] Consequently, *Drumm* is inapposite authority for the holding in *Saathoff* that the condition of being intoxicated constitutes prohibited conduct.

b. *Garcia v. State*[184]

Relying on *Garcia*, the *Saathoff* court held that, when challenged by a motion to quash, an indictment or information charging the offense of involuntary manslaughter must plead the intoxicant or intoxicants that allegedly caused the defendant's intoxication.[185] As noted previously, the rationale of *Garcia* is that the statutory definition of "intoxication" is analogous to the definition of "delivery" involved in *Ferguson*.[186] Although *Garcia* is apposite authority for the decision in *Saathoff*, the holding in *Garcia* is incorrect because it is based upon the flawed reasoning that the alternative definitions of "intoxicated" involve "an act or omission of the [defendant]."[187] While, as correctly held in *Ferguson*, the definition of "delivery" is dependent on an act or omission of the defendant,[188] the definition of being "intoxicated" is not dependent on an act or omission of the defendant. Instead, the definition of "intoxicated" merely describes a condition and specifies the evidence that is sufficient to prove its existence.[189]

---

181. *See* Drumm v. State, 560 S.W.2d 944, 945–46 (Tex. Crim. App. 1977) (en banc). Some examples of an act or omission include that the defendant negligently operated a motor vehicle and caused a death, drove a motor vehicle while intoxicated, committed a felony offense under the motor vehicle laws, failed to stop and render aid, or committed an aggravated assault by means of a motor vehicle.

182. *See id.* at 946.

183. *See id.* at 946–47.

184. 747 S.W.2d 379 (Tex. Crim. App. 1988) (en banc).

185. *See Garcia*, 747 S.W.2d at 381.

186. *See supra* note 95 and accompanying text.

187. *Garcia*, 747 S.W.2d at 381.

188. *See* Ferguson v. State, 622 S.W.2d 846, 850 (Tex. Crim. App. 1981).

189. *See supra* notes 117–21, 129–30 and accompanying text.

c. *Geter v. State*[190]

In *Geter*, the third case the *Saathoff* court relied on, the court held that, in a prosecution for theft in which the State relies on an act or omission of the defendant to establish that the owner's consent was not "effective," the indictment or information must allege the statutory provision relied on by the State that caused the consent to be ineffective.[191] A defendant who *obtains* consent to the appropriation of the owner's property by "deception or coercion," from "a person the [defendant] knows is not legally authorized to act for the owner" or from "a person who by reason of youth, mental disease or defect, or intoxication is known by the [defendant] to be unable to make reasonable decisions"[192] engages in conduct—an act or omission. Accordingly, the defendant is entitled to notice of the particular act or omission that the State will seek to prove. In *Geter*, the court distinguished *Thomas* on the ground that, in *Thomas*, the State did not rely on any act or omission of the defendant to establish lack of "effective" consent.[193] Thus, the *Saathoff* court's reliance on *Geter* is misplaced because the State need not rely on any act or omission of the defendant to prove that the defendant was in the condition of being "intoxicated."

In asserting that *Carter* is dispositive, the *Saathoff* court reasoned that "[i]ntoxication as an *element* of involuntary manslaughter is, in the same manner as for DWI, part of the prohibited conduct the State must prove. . . ."[194] It is correct that "intoxication" is an element of driving while intoxicated[195] and involuntary manslaughter,[196] and the State must prove that ele-

190. 779 S.W.2d 403 (Tex. Crim. App. 1989) (en banc).

191. *See Geter*, 779 S.W.2d at 407. The court held that where there are multiple statutory definitions regarding an offense, the state must allege in the charging instrument the one which the State will seek to prove at trial. *See id.*

192. *Id.* at 405; *see also* TEX. PEN. CODE ANN. § 31.01(3) (Vernon 1994) (defining "effective consent").

193. *See Geter*, 779 S.W.2d at 407 n.4; *supra* notes 27–33 and accompanying text.

194. Saathoff v. State, 891 S.W.2d 264, 266 (Tex. Crim. App. 1994) (en banc).

195. *See* Snider v. State, 145 Tex. Crim. 59, 60, 165 S.W.2d 904, 905 (1942) (observing that the first element of driving while intoxicated is intoxication); Turner v. State, 877 S.W.2d 513, 515 (Tex. App.—Fort Worth 1994, no pet.) (stating that the corpus delicti of the offense includes intoxication of the driver).

196. *See* McWhirter v. State, 147 Tex. Crim. 268, 271, 180 S.W.2d 364, 365 (1944) (stating that the fact of intoxication is an essential element of the offense of involuntary manslaughter); Gabryelski v. State, 885 S.W.2d 203, 204 (Tex. App.—San Antonio 1994, no pet.) (declaring that a defendant's intoxication is an element of involuntary manslaughter).

ment.[197] However, it is not correct that the State must give the defendant notice of the evidentiary basis on which the State will rely to prove every element of an offense.[198] An indictment or information must plead evidentiary matters only when an element of the offense consists of an *act* of the defendant, and multiple factual or statutory means or methods exist by which the *act* can be committed.[199] In a prosecution for theft, the State must plead and prove that the defendant's appropriation of the property was from the "owner" and "was without the owner's effective consent."[200] These items are elements of the offense,[201] and the absence of the "owner's effective consent" causes the defendant's act of appropriation to constitute prohibited conduct.[202] Therefore, the State must plead these elements.

However, if the elements of the offense are not dependent upon some act or omission of the defendant, the State is not required to give the defendant notice of the evidence it will rely on to prove either of those elements. For example, in *Nethery v. State*,[203] the court held that an indictment charging the offense of capital murder of a peace officer[204] need not plead the evidence on which the State will rely to prove that the deceased was a "peace officer,"

---

197. *See Saathoff*, 891 S.W.2d at 266.

198. *See supra* note 5 and accompanying text.

199. *See supra* notes 21–24 and accompanying text; *see also* Cruise v. State, 587 S.W.2d 403, 405 (Tex. Crim. App. [Panel Op.] 1979) (holding that, in a prosecution for robbery by causing bodily injury, the defendant is entitled to notice of the manner and the means (act) by which he caused bodily injury to the complainant); Haecker v. State, 571 S.W.2d 920, 923 (Tex. Crim. App. [Panel Op.] 1978) (holding that if the statute defining the proscribed act is not completely descriptive of the offense, the charging instrument must use more precise language).

200. TEX. PEN. CODE ANN. § 31.03(b) (Vernon 1994).

201. *See Ex parte* Cannon, 546 S.W.2d 266, 272–73 (Tex. Crim. App. 1976) (recognizing the elements of theft as: "(1) a person (2) with intent to deprive the owner of property (3) obtains the property (4) without the owner's effective consent").

202. *See* Auzenne v. State, 547 S.W.2d 596, 596 (Tex. Crim. App. 1977) (mandating that "without the owner's consent" is an essential element of theft that must be alleged); Skillern v. State, 890 S.W.2d 849, 871, 876 (Tex. App.—Austin 1994, pet. ref'd) (stating that "[a]ppropriation of property is unlawful if it is without the owner's effective consent[,]" and "proof of the owner's lack of consent as alleged is required before a conviction for theft will be sustained.").

203. 692 S.W.2d 686 (Tex. Crim. App. 1985) (en banc).

204. *See* TEX. PEN. CODE ANN. § 19.03 (Vernon 1994) (providing that "(a) A person commits an offense if he commits murder as defined under Section 19.02(b)(1) and: (1) the person murders a peace officer . . . who is acting in the lawful discharge of an official duty and who the person knows is a peace officer. . . .").

who was acting "in lawful discharge of official duty" because those elements of the offense[205] do not involve any act or omission of the defendant.[206] By analogy, the element of being "intoxicated" in the offenses of driving while intoxicated and involuntary manslaughter does not necessarily depend upon an act or omission of the defendant; therefore, the State should not be required to plead the evidence on which it will rely to prove that element.

As discussed previously, the prohibited conduct is the act of driving while in the condition of *being* intoxicated.[207] The act of *becoming* intoxicated while driving is not the gravamen of the offense.[208] Furthermore, the "loss of faculties" definition of "intoxication" requires that the condition of being intoxicated exist by reason of the "introduction" of a substance into the body.[209] The "introduction" of the substance, as noted earlier, can be the act of a third person.[210] As a result, the defendant's condition of being intoxicated can exist without any conduct of the defendant. Consequently, *Drumm* and *Geter* are inapposite authority for *Saathoff*,

---

205. *See* Farris v. State, 819 S.W.2d 490, 496 (Tex. Crim. App. 1990) (en banc) (observing that Section 19.03(a)(1) of the Texas Penal Code defines capital murder to include elements of murder set out in Section 19.02(a)(1), and elements that accused "'murders a peace officer who is acting *in the lawful discharge of an official duty* and who the [accused] knows is a peace officer'"); *see also* TEX. PEN. CODE ANN. § 19.03(a)(1) (Vernon 1994). In Texas, a person commits the offense of capital murder if he intentionally or knowingly causes one's death and:

> (1) the victim is a peace officer or firefighter who is acting in the lawful discharge of his official duty and the defendant knows the victim is either a peace officer or firefighter; (2) the defendant intentionally commits murder in the course of attempting to commit or committing burglary, robbery, kidnapping, aggravated sexual assault, arson or obstruction or retaliation; (3) the defendant commits murder for remuneration or employs another person to commit murder for remuneration; (4) the defendant commits the murder during an escape or attempted escape from a penal institution; (5) the defendant, while incarcerated in a penal facility, murders an employee of the facility; (6) the defendant murders more than one person, either (a) during the same criminal transaction; or (b) during different transactions, but the murders are committed pursuant to the same scheme or course of conduct; or (7) the defendant murders a child under the age of six years.

Id.

206. *See Nethery*, 692 S.W.2d at 695.

207. *See supra* note 143 and accompanying text; *see also* 41 GEORGE E. DIX & ROBERT O. DAWSON, TEXAS PRACTICE AND PROCEDURE § 20.109, at 230 (1995) (discussing that under the Texas Penal Code, it is an offense for one who is intoxicated to drive a motor vehicle).

208. *See supra* notes 127–30.

209. *See supra* note 77, 111, 131–32, 138–39 and accompanying text.

210. *See supra* note 115–34 and accompanying text.

and *Garcia* is flawed authority for the holding of *Saathoff* that the condition of being intoxicated is prohibited conduct.[211]

IV. CONCLUSION

The general rule that an indictment or information need not plead evidentiary matters is based upon sound legal and practical considerations. First, the function of an indictment and an information is to charge an offense, "not the particular facts which constitute the offense."[212] Second, requiring that an indictment or information plead evidentiary matters "would make the indictment [or information] as long as the evidence."[213]

There are only two constitutional and statutory exceptions to the rule that evidentiary matters need not be pleaded. First, the defendant must be given adequate notice to be able to prepare a defense. Constitutionally, the defendant is entitled to notice of the nature and cause of the "accusation,"[214] *i.e.*, the *offense* with which the defendant is charged.[215] Second, the defendant is entitled statutorily to adequate notice to be able to plead the judgment in bar to a subsequent prosecution for the same *offense*. If the notice sought by a motion to quash is not essential to either exception, it is evidentiary in nature and need not be pleaded.[216]

Consequently, an indictment or information must plead descriptive evidentiary matters only when an element of the offense con-

---

211. *See* Saathoff v. State, 891 S.W.2d 264, 266–67 (Tex. Crim. App. 1994) (en banc).

212. Smith v. State, 35 Tex. 739, 740 (1871).

213. State v. West, 10 Tex. 553, 554 (1853); *see also* TEX. CODE CRIM. PROC. ANN. art. 21.11 (Vernon 1989) (providing that "[a]n indictment shall be deemed sufficient which charges the commission of the offense in ordinary and *concise* language in such a manner as to enable a person of common understanding to know what is meant. . . .") (emphasis added).

214. *See supra* note 3 and accompanying text.

215. *See, e.g.*, Blake v. State, 147 Tex. Crim. 333, 336, 180 S.W.2d 351, 352–53 (1944) (instructing that the state must specify the offense charged); Garber v. State, 145 Tex. Crim. 44, 45, 165 S.W.2d 741, 741–42 (1942) (stating that the defendant must be accused of an offense); BALLENTINE'S LAW DICTIONARY 14 (3d ed. 1969) (defining "accusation" as "[a] declaration or statement that another person is guilty of some *offense*.") (emphasis added); BLACK'S LAW DICTIONARY 38 (4th ed. 1968) (defining "accusation" as "[a] formal charge against a person, to the effect that he is guilty of a punishable *offense*.") (emphasis added).

216. *See* Koonce v. State, 654 S.W.2d 705, 708 (Tex. App.—Houston [14th Dist.] 1983, pet. ref'd) (determining that an allegation that the defendant caused the deceased's death by shooting him with a "gun" gave the defendant adequate notice, and that an additional description of the gun was evidentiary in nature).

sists of conduct of the defendant (*i.e.*, an *act or omission*), and there are alternative factual or statutory means of methods by which the conduct can be committed. This rule is sound in principle and logic[217] because it is the defendant's *conduct* that constitutes the "offense" and the "accusation" to which the defendant is entitled to adequate notice for the purposes of preparing a defense and asserting a plea in bar.[218]

Although the Court of Criminal Appeals articulates this rule with consistency, it has created a conundrum in its application by holding that an indictment or information charging the offenses of driving while intoxicated and intoxication manslaughter, if challenged by a motion to quash, must allege the definition or definitions of "intoxicated" and the kind or kinds of "intoxicant" the State will seek to prove at trial.

These holdings are misapplications of the exceptions to the rule that an indictment or information need not plead evidentiary matters because they are based on the erroneous characterization of *being* "intoxicated" as conduct. *Being* "intoxicated" is a *condition*, not conduct. Consequently, the definition of "intoxicated" and the kind of "intoxicant" the State will seek to prove at trial is evidentiary in nature and need not be pleaded.

---

217. *Cf.* 41 GEORGE E. DIX & ROBERT O. DAWSON, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 20.109, at 229 (1995) (asserting that "[w]hy the requirements of specificity should apply with exceptional vigor to conduct elements is not addressed in the cases. An accused is no less unconvictable because the State's evidence fails to establish a required circumstance rather than that the accused did not engage in the conduct constituting the offense."). In determining the sufficiency of a pleading, the relevant inquiry is whether the allegations give the defendant adequate notice, not whether the State's evidence is sufficient to support a conviction.

218. *See supra* notes 3–4, 24.