St. Mary's Law Journal

Volume 35 | Number 3 Article 3

1-1-2004

Punishment Evidence: Grunsfeld Ten Years Later.

Edward L. Wilkinson

PUNISHMENT EVIDENCE: *GRUNSFELD* TEN YEARS LATER

EDWARD L. WILKINSON*

I. Scope of This Article 604
II. Introduction 605
III. Enhancement Evidence 606
A. Evidence of the Existence of a Prior Conviction .. 607
1. Official Records 607
2. "Pen Packets" 609
3. Admissions, Stipulations, and Pleas of True ... 610
B. Evidence That the Defendant Is the Same Person Convicted of the Prior Offense 611
C. Finality 614
1. Official Records 615
2. Eyewitness Testimony 617
3. The Defendant's Testimony 617
D. Notice 618
IV. Evidence Under Article 37.07 619
A. Evidence of the Prior Criminal Record of the Defendant 620
1. The Evolution of Article 37.07, § 3(a) 620
2. "Prior Criminal Record" Under *Grunsfeld* ... 622
3. "Prior Criminal Record" Under the Present Article 37.07, § 3(a) 624
4. Notice of Intent to Introduce a "Prior Criminal Record" Under Article 37.07 627
5. Charge Instruction As to Burden of Proof for Criminal Records 635
B. Evidence of a Defendant's Reputation 635

* Assistant Criminal District Attorney, Appellate Division, Tarrant County Criminal District Attorney, Fort Worth, Texas. A.B., Georgetown University; M.A., The University of North Carolina at Chapel Hill; J.D., The University of Texas School of Law.

C. Testimony of a Witness's Opinion of the Defendant's Character 644
D. Circumstances of the Offense and Offender 649
1. Mitigating Evidence 651
2. Evidence of the Circumstances of the Offender 654
3. Victim Impact and Victim Character Evidence 657
E. Evidence of Extraneous Offenses and Bad Acts .. 665
F. Evidence of Juvenile Adjudications of Delinquency 671
G. "Any Matter the Court Deems Relevant to Sentencing" 672
H. Other Evidentiary Provisions Under Article 37.07 674
I. The Limits of Admissible Evidence Under Article 37.07 676
J. PSI and Article 37.07 677
K. Victim Impact Statements and Punishment 680
V. Special Issues 681
A. Sudden Passion and Adequate Cause 682
B. Release in a Safe Place 682
C. Weapon Free Zone 683
D. Drug Free Zone 683
VI. Conclusion 684

I. Scope of This Article

This Article deals with the admissibility of evidence during the punishment phase of a non-capital trial in Texas. It includes a discussion of the applicable portions of Article 37.07 of the Texas Code of Criminal Procedure, as well as an examination of other codes and rules that affect the admissibility of evidence during the punishment stage. It does not address issues of double jeopardy, habeas corpus, or sufficiency of the evidence.

Because of the broad scope of the subject and the overwhelming number of cases that have addressed some aspect of the topic, only

published opinions have been relied upon in citation and discussion.[1]

II. INTRODUCTION

In 1989, the Texas Legislature amended Article 37.07, Section 3(a) of the Texas Code of Criminal Procedure in an effort to widen the scope of evidence admissible during the punishment phase of a non-capital trial.[2] The Court of Criminal Appeals, in the lead case of *Grunsfeld v. State*[3] and subsequent opinions, interpreted the statute so narrowly as to render the change meaningless.[4]

In response, in 1993, the legislature amended the statute a second time.[5] This subsequent alteration of the statute was far more

---

1. *See* TEX. R. APP. P. 47.7 (stating that "[o]pinions not designated for publication by the court of appeals under these or prior rules have no precedential value"). A few cited decisions in this Article are only available at this time in slip opinion form, and have not yet been designated for publication.

2. Act of May 28, 1989, 71st Leg., R.S., ch. 785, § 4.04, 1989 Tex. Gen. Laws 3492 (amended 1993) (current version at TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a) (Vernon Supp. 2003)); *see also* Grunsfeld v. State, 813 S.W.2d 158, 166 (Tex. App.—Dallas 1991) (citing that the only relevant change in the amendment was the addition of the emphasized language), *aff'd*, 843 S.W.2d 521 (Tex. Crim. App. 1992) (en banc); Gallardo v. State, 809 S.W.2d 540, 541-42 (Tex. App.—San Antonio 1991) (noting that the legislative change was intended to expand admissibility of evidence), *vacated*, 849 S.W.2d 825 (Tex. Crim. App. 1993) (en banc); Huggins v. State, 795 S.W.2d 909, 911 (Tex. App.—Beaumont 1990, pet. ref'd) (recognizing that evidence may be offered as to any issue the court finds to be relevant to sentencing); McMillan v. State, 799 S.W.2d 311, 313 (Tex. App.—Houston [14th Dist] 1990) (noting the same), *vacated*, 844 S.W.2d 749 (Tex. Crim. App. 1993) (en banc).

3. 843 S.W.2d 521 (Tex. Crim. App. 1992) (en banc).

4. *See* Grunsfeld v. State, 843 S.W.2d 521, 523-26 (Tex. Crim. App. 1992) (en banc) (arguing that the State's construction renders a large part of the statute useless); *see also* Hubbard v. State, 892 S.W.2d 909, 911 (Tex. Crim. App. 1995) (en banc) (stating that the case should be remanded for reconsideration in light of the court's decision in *Grunsfeld*); Gallardo v. State, 849 S.W.2d 825, 825 (Tex. Crim App. 1993) (en banc) (per curiam) (vacating the lower court's judgment for consideration following the court's decision in *Grunsfeld*); Slott v. State, 843 S.W.2d 571, 571 (Tex. Crim. App. 1992) (en banc) (per curiam) (remanding the case to the court of appeals for consideration in light of *Grunsfeld*).

5. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a) (Vernon Supp. 2003); *see also* Act of May 29, 1993, 73d Leg., R.S., ch. 900, § 5.09(a), 1993 Tex. Gen Laws 3760 (indicating that the change in the law is applicable only prospectively); Act of May 29, 1993, 73d Leg., R.S., ch. 900, § 8.02, 1993 Tex. Gen. Laws 3764 (noting the change takes effect on September 1, 1993); Minor v. State, 91 S.W.3d 824, 830 (Tex. App.—Fort Worth 2002, pet. ref'd) (indicating that Article 37.07, § 3(a) "was amended in 1993 to permit the admission of evidence of unadjudicated extraneous offenses at punishment hearings"); Brown v. State, 6 S.W.3d 571, 583 (Tex. App.—Tyler 1999, pet ref'd) (noting that the amendment applies to offenses committed on or before September 1, 1993); Barrett v. State, 932 S.W.2d 590, 591

sweeping than the first, as it not only provided for a more expansive range of evidence to be introduced, but deleted a critical definition of what type of evidence was admissible under the statute, added a burden of proof for certain types of evidence, and included a provision for notice to the defense of the State's intent to introduce particular kinds of evidence.[6]

The courts of Texas have struggled with the implications of these significant changes over the last ten years. Though the "shake out" process is far from over, there have been enough opinions from the Court of Criminal Appeals and the intermediate courts to develop some understanding of the ramifications of the changes and the direction in which they may lead. This Article will examine the current state of admissible punishment evidence, examining, where necessary, the impact of legislative changes following *Grunsfeld*.

Evidence admissible during sentencing may generally be divided into three types: enhancement evidence; evidence admissible under Article 37.07, Section 3; and evidence relevant to certain special issues that may affect the punishment range applicable to an offense. For the purposes of this paper, evidence admissible under Article 37.07 includes, but is not limited to, prior adjudicated offenses; opinion and reputation testimony; evidence of extraneous offenses and bad acts; victim impact evidence; mitigating evidence; "any matter the court deems relevant to sentencing," and special provisions for the submission of pre-sentence investigation reports and victim impact statements. Obviously, specific evidence or testimony may fall into more than one of these broad categories or sub-categories.

III. ENHANCEMENT EVIDENCE

If the State has properly pleaded that a defendant has been convicted of previous criminal offenses, it may then—indeed, must, if it desires to increase the punishment range for the offense—adduce evidence: (1) of the existence of the alleged prior conviction

---

n.1 (Tex. App.—Tyler 1995, writ ref'd) (signaling that a legislative change permits the admission of unadjudicated offenses during the punishment phase of a trial); *Ex parte* Smith, 884 S.W.2d 551, 551 n.2 (Tex. App.—Austin 1994, no writ) (per curiam) (noting that the amendment was made in response to *Grunsfeld*).

6. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a) (Vernon Supp. 2003); Act of May 28, 1989, 71st Leg., R.S., ch. 785, § 4.04, 1989 Tex. Gen. Laws 3492 (amended 1993).

for an offense; (2) that the defendant on trial is the same person convicted of the prior offense; and (3) that the prior conviction is final.[7]

In addition to attacking the elements of the State's burden of proof, a defendant may attack the validity of a prior conviction on the grounds that the conviction is void by filing a writ of habeas corpus,[8] moving to quash the enhancement,[9] or objecting to the introduction of the conviction on the grounds that it is void.[10] Similarly, though a juvenile felony adjudication may be used for enhancement purposes, a felony adjudication based upon conduct committed prior to January 1, 1996 may not be used for enhancement.[11] Failure to object to an infirm prior conviction generally waives error in admitting it.[12] Collateral attacks are outside the scope of this Article.

A. *Evidence of the Existence of a Prior Conviction*

The State may adduce evidence of a prior conviction in three ways: (1) through official records; (2) through "pen packets"; and (3) through admissions, stipulations, or "pleas of true."

1. Official Records

In proving the existence of a prior conviction, the State may offer the original or a certified copy of the judgment and sentence from the record of the court in which the conviction was obtained.[13] If the prosecution offers an original or uncertified copy of

---

7. TEX. PEN. CODE ANN. § 12.42 (Vernon 2003).

8. *Ex parte* Stover, 946 S.W.2d 343, 344 (Tex. Crim. App. 1997) (en banc).

9. Robinson v. State, 739 S.W.2d 795, 799 (Tex. Crim. App. 1987) (en banc) (per curiam).

10. *Ex parte* Martin, 747 S.W.2d 789, 790 (Tex. Crim. App. 1988) (en banc).

11. *See* TEX. FAM. CODE ANN. § 51.13(d) (Vernon Supp. 2003) (reaffirming that children engaged in crimes on or after January 1, 1996 are subject to enhancement); Sims v. State, 84 S.W.3d 768, 780 (Tex. App.—Dallas 2002, pet. ref'd) (noting that because the appellant had a statutory right to have his primary offense not enhanced, the court had to determine harm and the standard of nonconstitutional errors).

12. *Ex parte* Dietzman, 851 S.W.2d 304, 305 (Tex. Crim. App. 1993); Hill v. State, 633 S.W.2d 520, 525 (Tex. Crim. App. 1982).

13. *See* Elliott v. State, 858 S.W.2d 478, 488 (Tex. Crim. App. 1993) (en banc) (stating, "A certified copy of the judgment and sentence standing alone were insufficient to prove the prior offense, prior to the enactment of Tex. H.B. 635, 70th Leg. (1987) and Tex. S.B. 60, 71st Leg. (1989)").

the judgment and sentence, the clerk of the convicting court must testify in order to authenticate the record.[14]

If the State offers a copy of the judgment and sentence that comply with paragraphs (1), (2), (3), or (4) of Texas Rule of Evidence 902, concerning self-authentication of documents, the custodian need not testify in order to authenticate the document and render it admissible.[15] The use of a rubber stamp to produce a facsimile of a signature required under Rule 902 does not affect the authenticity of the signature or the admissibility of the document.[16]

Simply because the record does not comply with Rule 902, however, does not mean that it is inadmissible absent testimony by the custodian of the record. Under Rule 901(a), the "requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."[17] Documents need not be authenticated under both Rules 901 and 902 to be admissible.[18] Out-of-state judgments that do not precisely conform to the requirements of a judgment under the Texas Code of Criminal Procedure will nevertheless be deemed sufficient if they contain the elements of a judgment and the elements of a court's sentence

---

14. TEX. R. EVID. 901(b)(1) (stating that a witness with knowledge may testify that matters are indeed what they are claimed to be); *cf. Elliot*, 858 S.W.2d at 488 (indicating that the custodian of records for the police department properly authenticated the defendant's "jail card").

15. *See* TEX. R. EVID. 901(b)(7) (recognizing that public records or reports are examples of authentication); TEX. R. EVID. 901(b)(10) (providing for "[a]ny method of authentication or identification provided by statute or by other rule prescribed pursuant to statutory authority"); TEX. R. EVID. 902(4) (reiterating that public records and certified copies of public records are examples of authentication); Farrar v. State, 865 S.W.2d 607, 608-09 (Tex. App.—Fort Worth 1993, no pet.) (stating that authentication was proper under paragraph (4)); Sanders v. State, 787 S.W.2d 435, 438 (Tex. App.—Houston [1st Dist.] 1990, pet. ref'd) (indicating that authentication was proper under paragraphs (1), (2), or (3)).

16. Paulus v. State, 633 S.W.2d 827, 849-50 (Tex. Crim. App. [Panel Op.] 1982); Kemp v. State, 861 S.W.2d 44, 47 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd).

17. TEX. R. EVID. 901(a); *see also* TEX. R. EVID. 901(b)(7) (stating that "[e]vidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept" conforms with requirements of Rule 901(a)).

18. Reed v. State, 811 S.W.2d 582, 586 (Tex. Crim. App. 1991) (en banc).

and pronouncement of sentence set out in Articles 42.01, 42.02, and 42.03 of the Code of Criminal Procedure.[19]

2. "Pen Packets"

"Pen packets" or "pen papers" constitute the penitentiary file of an inmate and contain the record of an inmate's prior convictions.[20] The records are used by prison officials in admitting and detaining prisoners at state correctional facilities.[21] Since pen packets also document an inmate's prior convictions, they are admissible, if properly authenticated, to prove the fact of a defendant's prior conviction.[22] Because of their importance to establishing the proper custody of inmates, the probability of the existence of false or fraudulent documentation is relatively low, and thus, pen packets are admissible under Texas Rules of Evidence 901(a) and 902(4) where they have been certified by the record clerk of the Texas Department of Criminal Justice, Institutional Division.[23] Conformance with Rules 901(a) and 902(4) are not the only methods for authenticating pen packets. Besides the obvious method of authenticating the documents through a sponsoring witness, pen packets may be authenticated by certification by the "designated officer" of the Texas Department of Criminal Justice as provided by Article 42.09, Section 8(b) of the Code of Criminal Procedure.[24]

---

19. TEX. CODE CRIM. PROC. ANN. arts. 42.01-.03 (Vernon Supp. 2003); *see also* Hill v. State, 666 S.W.2d 130, 135 (Tex. App.—Houston [14th Dist.] 1983, no writ) (recognizing that the appellant's sentence was imposed and executed by the Louisiana Department of Corrections, and that the judgment included the elements delineated in Articles 42.02 and 42.03).

20. Barber v. State, 757 S.W.2d 83, 87 (Tex. App.—Houston [14th Dist.] 1988, writ ref'd).

21. *See Reed*, 811 S.W.2d at 587 (noting that the Texas Department of Criminal Justice relies on these records for admitting prisoners and holding them in custody).

22. Cuddy v. State, 107 S.W.3d 92, 96 (Tex. App.—Texarkana 2003, no pet. h.); *Barber*, 757 S.W.2d at 87.

23. *See Reed*, 811 S.W.2d at 587 (reaffirming that the existence of fraudulent documentation is relatively low); Hawkins v. State, 89 S.W.3d 674, 679 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd) (noting that public officials have no incentive to falsify documentation during the course of their duties).

24. *See* TEX. CODE CRIM. PROC. ANN. art. 42.09, § 8(b) (Vernon Supp. 2004) (stating that "[a] document certified under this subsection is self-authenticated for the purposes of Rules 901 and 902, Texas Rules of Criminal Evidence"); TEX. R. EVID. 901(10) (providing that a document meets the requirement of authentication if it conforms to "any method of

Article 42.09(b) does not exclusively control the authentication of pen packets, and other methods of authentication may be used to render the necessary documents admissible.[25] A document need not be authenticated under all possible means in order to be admissible; one method of authentication will be sufficient.[26] Article 42.09 formerly required that the alternative certification provided for in the statute be performed by the "director" of the Department of Criminal Justice, which was obviously impractical.[27] The legislature amended the statute in 1995.[28] Pen packets from other states are admissible as self-authenticating if they conform with Rule 902(1), that is, if they bear "a seal purporting to be that of the United States, or of any state, district, Commonwealth, territory, or insular possession thereof . . . and a signature purporting to be an attestation or execution."[29]

3. Admissions, Stipulations, and Pleas of True

While admissions, stipulations, and "pleas of true" are similar in nature, they represent separate methods of establishing the existence of prior convictions. The type of method may sometimes determine what additional evidence, if any, the State must offer to prove an enhancement.

A defendant's admission during testimony in the guilt-innocence phase of trial that he has previously been convicted of a prior offense is sufficient to establish the existence of a prior offense, and the State need not prove the fact again during punishment.[30] While an admission may be sufficient to establish the existence of a

---

authentication or identification provided by statute or by other rule prescribed pursuant to statutory authority").

25. *See* Barker v. State, 931 S.W.2d 344, 348-49 (Tex. App.—Fort Worth 1996, writ ref'd) (noting that Article 42.09(b) "is one automatic vehicle for admission that the legislature enacted to provide a sure-fire method of admission, but not an exclusive one").

26. *See Hawkins*, 89 S.W.3d at 679 (stating that a "document deemed reliable by an avenue of authentication . . . should not be excluded . . . merely because it has not been authenticated through all possible avenues of authentication").

27. *See id.* (recognizing that Section 8(b) does not contain exclusivity language, and to hold that it is the exclusive method for authenticating documents would produce an absurd result); *Barker*, 931 S.W.2d at 348 (finding it absurd to interpret Section 8(b) as the exclusive method of admission).

28. *Barker*, 931 S.W.2d at 348 n.1.

29. TEX. R. EVID. 902(1); *see also* Jones v. State, 810 S.W.2d 824, 828-29 (Tex. App.—Houston [14th Dist.] 1991, no writ) (quoting Rule 902(1)).

30. Bush v. State, 642 S.W.2d 787, 789-90 (Tex. Crim. App. 1983) (en banc).

conviction, it will not necessarily establish that the conviction is final.[31]

A defendant may enter a plea of true to the enhancement paragraphs when he is arraigned prior to the start of the punishment phase.[32] A plea of true constitutes sufficient evidence to support an enhancement allegation and make punishment at the enhanced level mandatory.[33] The plea must be reflected with evidence in the record affirmatively.[34] Indeed, at least one court has concluded that the "better practice" is for a court to orally read the enhancement and findings into the record where appropriate.[35]

A stipulation, as opposed to a plea of true, constitutes an agreement as to what the evidence will show or as to what the witnesses would testify.[36] Even though a stipulation may not explicitly declare that the defendant acknowledges that the evidence stipulated is true, a stipulation as to punishment evidence is sufficient to support an enhancement.[37] The stipulation must appear affirmatively in the record.[38]

B. *Evidence That the Defendant Is the Same Person Convicted of the Prior Offense*

Proof of the existence of a prior conviction and proof sufficiently linking a defendant to that conviction are distinct issues that the

---

31. *See Ex parte* Klasing, 738 S.W.2d 648, 650 (Tex. Crim. App. 1987) (en banc) (finding that the State, in order to rely on an indictment alleging a second prior felony conviction "to prove the sequence of convictions for enhancement purposes," must instruct members of the jury regarding the statute of limitations or instruct them as to whether they may presume that the second conviction occurred within the limitation period); *see also Bush*, 642 S.W.2d at 790 (concluding that the defendant's admissions as to prior convictions during testimony was sufficient, as read into the record, to sustain the prior convictions allegations).

32. *See* Hathorne v. State, 459 S.W.2d 826, 830 (Tex. Crim. App. 1970) (observing that the appropriate plea at the penalty stage is "true" or "not true").

33. Wilson v. State, 671 S.W.2d 524, 526 (Tex. Crim. App. 1984) (en banc); Thomas v. State, 849 S.W.2d 405, 406 (Tex. App.—Fort Worth 1993, no writ).

34. *Wilson*, 671 S.W.2d at 526.

35. *See* Garner v. State, 858 S.W.2d 656, 660 (Tex. App.—Fort Worth 1993, pet. ref'd) (indicating a preference for the court to orally read the enhancement into the record).

36. *See* Stone v. State, 919 S.W.2d 424, 425-26 (Tex. Crim. App. 1996) (differentiating between a stipulation and plea of true).

37. *See id.* at 426 (defining stipulation); Garza v. State, 548 S.W.2d 55, 56-57 (Tex. Crim. App. 1977) (defining stipulation).

38. *See* Howard v. State, 429 S.W.2d 155, 156 (Tex. Crim. App. 1968) (noting that a stipulation must appear in the record).

State must prove.[39] The former is a question of sufficiency of the evidence, while the latter is a procedural issue of conditional relevancy.[40]

While the relevance—and hence, admissibility—of a prior conviction are conditional upon a finding that the defendant on trial is the same person as the one previously convicted, it is not essential that the supporting evidence of identification precede the admission of the prior conviction.[41] That is, the objection that proof of a prior conviction is inadmissible because it has not been linked to the defendant is sustainable only if it is apparent that the State will not offer any additional evidence.[42]

If, after all proof on the question of identity has been received, the evidence does not in the aggregate support a rational finding that the defendant is the same person as the one previously convicted, the trial court should grant the defendant's motion to strike and withdraw the evidence from the jury's consideration.[43] Failure

---

39. *See* Beck v. State, 719 S.W.2d 205, 210 (Tex. Crim. App. 1986) (en banc) (stating that it is the State's burden to connect a defendant to a prior conviction); Smith v. State, 998 S.W.2d 683, 687 (Tex. App.—Corpus Christi 1999, pet. ref'd) (noting that the burden is on the State to connect a defendant to a prior conviction).

40. *See Smith*, 998 S.W.2d at 687 (noting that there is a sufficiency of the evidence requirement to prove a prior conviction); Zimmer v. State, 989 S.W.2d 48, 51 (Tex. App.—San Antonio 1999, pet. ref'd) (indicating that a record of a prior conviction must be proved to be the same defendant); Howard v. State, 896 S.W.2d 401, 406 (Tex. App.—Amarillo 1995, pet. ref'd) (mandating that the relevancy of a prior conviction must be proved with sufficient evidence); Rosales v. State, 867 S.W.2d 70, 72 (Tex. App.—El Paso 1993, no pet.) (indicating that the existence of a prior conviction is a matter of evidence, whereas linking a defendant to a prior conviction is procedural).

41. *See Beck*, 719 S.W.2d at 210 (supporting the premise that the order of the submission of evidence and the admission of a prior conviction does not matter); Arroyo v. State, 64 S.W.3d 81, 85 (Tex. App.—San Antonio 2001) (citing Zimmer v. State, 989 S.W.2d 48, 51 (Tex. App.—San Antonio 1998, pet. ref'd)), *rev'd on other grounds*, 117 S.W.3d 795 (2003); *Smith*, 998 S.W.2d at 687 (noting that the burden is on the state to connect the defendant to the crime).

42. *See* TEX. R. EVID. 104(b) (stipulating that "[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon . . . the introduction of evidence sufficient to support a finding of the fulfillment of the condition").

43. *See* Aleman v. State, 49 S.W.3d 92, 95-96 (Tex. App.—Beaumont 2001, no pet.) (stressing that when a lower court allows evidence of a prior conviction that was not sufficiently linked to the defendant, then the trial court is in error); *Smith*, 998 S.W.2d at 687 (indicating that evidence must be sufficient, and providing the standard to determining sufficiency); *Rosales*, 867 S.W.2d at 73 (noting that a motion to strike the admission of a prior conviction is proper if evidence is insufficient); *see also* Fuller v. State, 829 S.W.2d 191, 197 (Tex. Crim. App. 1992) (en banc) (citing the requirements of sufficient evidence).

to object and, if necessary, to move to strike, waives the error in admitting the evidence.[44]

Though the most common method of proving identity is through expert testimony comparing the defendant's fingerprints to those in the pen packet on the judgment, a defendant's identity may be proved by any number of means.[45] When documents, other than pen packets or judgments, are used to prove the defendant's prior convictions, they must contain sufficient reliable information on their face to link the defendant to the prior convictions.[46]

---

44. *See Howard*, 896 S.W.2d at 406 (recognizing that the appellant's failure to object resulted in waiver); *see also* Hill v. State, 633 S.W.2d 520, 525 (Tex. Crim. App. [Panel Op.] 1982) (indicating a waiver for failure to object).

45. *See* TEX. CODE CRIM. PROC. ANN. art. 38.33 (Vernon Supp 2003) (requiring a judgment to contain the defendant's fingerprint); *Beck*, 719 S.W.2d at 210 (mandating that a judgment must contain the defendant's fingerprint); *Zimmer*, 989 S.W.2d at 50 (stipulating that a judgment must contain the defendant's fingerprint); *see also* Human v. State, 749 S.W.2d 832, 839 (Tex. Crim. App. 1988) (en banc) (noting the fingerprint comparison of the defendant and a fingerprint on a jail card, which contained cause numbers of prior convictions); Littles v. State, 726 S.W.2d 26, 32 (Tex. Crim. App. 1987) (en banc) (indicating that a combination of expert testimony concerning fingerprint comparison and photographic comparison by the jury is proper); Gollin v. State, 554 S.W.2d 683, 686-87 (Tex. Crim. App. 1977) (noting testimony that the photograph and physical description in the pen packet was the defendant); Garza v. State, 548 S.W.2d 55, 56 (Tex. Crim. App. 1977) (indicating stipulation of the identify of the defendant); Ward v. State, 505 S.W.2d 832, 837 (Tex. Crim. App. 1974) (discussing the testimony of a witness who personally knows the defendant and the fact of his prior conviction); Jackson v. State, 496 S.W.2d 93, 94 (Tex. Crim. App. 1973) (discussing the defendant's plea of "true"); Dorsett v. State, 396 S.W.2d 115, 116 (Tex. Crim. App. 1965) (discussing a D.W.I. judgment and the driver's license record containing a description of the defendant and reference to a prior D.W.I. conviction); Garcia v. State, 135 Tex. Crim. 667, 669, 122 S.W.2d 631, 632 (1938) (discussing the testimony of a witness who had been present at the defendant's prior conviction); Varnes v. State, 63 S.W.3d 824, 833 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (discussing fingerprint comparison of the judgment and a fingerprint sample); *Zimmer*, 989 S.W.2d at 51 (indicating that a fingerprint comparison between booking slips and a prior judgment is insufficient because there is nothing to tie the booking slip reference to the judgment); Branch v. State, 937 S.W.2d 577, 584 (Tex. App.—Tyler 1995, no pet.) (noting that a fingerprint comparison of the defendant's driving record containing a list of prior convictions is sufficient to link the defendant to judgments); Bautista v. State, 642 S.W.2d 233, 237 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd, untimely filed) (determining that testimony of the defendant's parole officer coupled with certified copies of prior judgments was sufficient to link the prior convictions). *But see* Carlock v. State, 99 S.W.3d 288, 294-95 (Tex. App.—Texarkana 2003, no pet.) (indicating that testimony of a parole officer and uncertified judgments is insufficient to prove prior convictions).

46. *See* Timberlake v. State, 711 S.W.2d 50, 51 (Tex. Crim. App. 1986) (en banc) (indicating that the sheriff's testimony regarding a prior bench warrant to transport the defendant was insufficient to link the defendant's identity to the judgment where the warrant did not link the defendant to the judgment); *Zimmer*, 989 S.W.2d at 52 (finding that a booking

Handwriting samples may be introduced to link the defendant to prior convictions by comparing his signature to that on documents supporting the prior conviction.[47] Where no expert testimony has been introduced, however, and no other evidence links the defendant to the prior conviction, this evidence has been held insufficient to support the enhancement.[48]

C. *Finality*

"A conviction from which an appeal has been taken is not considered final" for purposes of enhancement "until the appellate court affirms the conviction and issues its mandate."[49] An appealed prior conviction that is alleged in an indictment for enhancement purposes is deemed final on the date the appellate court issues its mandate affirming the conviction.[50] A probated sentence is not considered final for purposes of enhancement[51] until after it has been revoked and any appeal of the revocation has been disposed.[52]

It is the State's burden to "make a *prima facie* showing that any prior conviction alleged for enhancement, or for punishing an ac-

---

slip did not establish that the defendant was the individual subsequently convicted in the given cause number); Sanders v. State, 787 S.W.2d 435, 439-40 (Tex. App.—Houston [1st Dist.] 1990, writ ref'd) (indicating that cause numbers on the defendant's jail card did not all match the cause numbers on the judgments entered into evidence as prior convictions). *But see* Taylor v. State, 947 S.W.2d 698, 707 (Tex. App.—Fort Worth 1997, pet. ref'd) (noting that the failure to adduce live testimony that cause numbers on the jail card and judgments matched did not render predicates for admission of judgments inadequate, where the numbers were identical); Henderson v. State, 786 S.W.2d 62, 63 (Tex. App.—Waco 1990, no writ) (finding a jail card sufficient despite irregularities between the cause number listed on the card and the cause number of a prior conviction).

47. *See* Smith v. State, 489 S.W.2d 920, 921 (Tex. Crim. App. 1973) (indicating that handwriting samples are sufficient).

48. *See id.* at 922 (indicating that unsworn statements made to the jury were insufficient evidence); *Rosales*, 867 S.W.2d at 73-74 (indicating that a comparison of signatures, with no further evidence, was insufficient evidence).

49. Jordan v. State, 36 S.W.3d 871, 875 (Tex. Crim. App. 2001) (quoting Johnson v. State, 784 S.W.2d 413, 414 (Tex. Crim. App. 1990)).

50. Beal v. State, 91 S.W.3d 794, 796 (Tex. Crim. App. 2002).

51. *See* Vaughan v. State, 634 S.W.2d 310, 313 (Tex. Crim. App. [Panel Op.] 1982) (noting that a prior probated conviction is admissible even if the probation is successfully completed if offered for the jury's consideration during punishment, instead of for enhancement purposes); Moon v. State, 509 S.W.2d 849, 851 (Tex. Crim. App. 1974) (permitting the admission of a prior conviction that had been set aside).

52. *See Jordan*, 36 S.W.3d at 875 (reasoning that a conviction cannot be final until all appeals have been resolved).

cused as a repeat offender, became final before the commission of the primary offense"; once the State makes such a showing, the burden shifts to the defendant to prove otherwise.[53] After the State has established that the defendant has been previously convicted, appellate courts will presume from a silent record that the conviction was final.[54] The mere possibility that a defendant *could* have appealed his conviction is insufficient to overcome the presumption.[55] Once the presumption is overcome, however, the State must proceed with affirmative evidence of the finality of the conviction.[56]

The finality of a conviction may be proved three ways: through official records, eyewitness testimony, or the defendant's testimony.

1. Official Records

The judgment and sentence contained in pen packets or in the court's file will often not establish that the conviction is final, since the documents may reflect a pending appeal.[57] When the sentence notes that a defendant has given notice of appeal, the State must prove finality by introducing a certified copy of the appellate mandate or some similar proof of disposition.[58]

---

53. Diremiggio v. State, 637 S.W.2d 926, 928 (Tex. Crim. App. [Panel Op.] 1982).

54. *See* Jones v. State, 77 S.W.3d 819, 824 (Tex. Crim. App. 2002) (allowing the defendant to present evidence to combat the State's offer that the prior conviction was final); Johnson v. State, 784 S.W.2d 413, 414 (Tex. Crim. App. 1990) (en banc) (affirming that the court, "when faced with a silent record," will presume a conviction is final).

55. *See Jones*, 77 S.W.3d at 824 (declaring that a right to appeal is not equivalent to a pending appeal).

56. *See id.* at 823 (identifying the standard by which the State must prove that a conviction has been affirmed).

57. *See* Jones v. State, 711 S.W.2d 634, 636 (Tex. Crim. App. 1986) (en banc) (pointing out that the court document from a prior conviction that the State offered included a clean and recorded notice of appeal by the defendant).

58. *See Johnson*, 784 S.W.2d at 414 (noting that the "evidence cannot be 'circumstantially sufficient' when there has been *no* evidence of finality and other evidence establishes that the case has been appealed"); *Jones*, 711 S.W.2d at 636 (reiterating that settled law requires the appellate court to affirm the conviction and the mandate becomes final); *see also* Carter v. State, 510 S.W.2d 323, 324-25 (Tex. Crim. App. 1974) (allowing that proof of mandate is sufficient absent the defendant's showing that he had filed a petition for writ of certiorari); Williams v. State, 899 S.W.2d 13, 15 (Tex. App.—San Antonio 1995, no pet.) (affirming that an order from the Court of Criminal Appeals was a judgment sufficient to establish finality, where a mandate was not introduced).

Where a defendant has been sentenced to probation, the State must introduce an order revoking the probation or otherwise prove that the probation has been revoked in order to establish the finality of the conviction.[59] A conviction which has been previously shock probated[60] is not "final" for purposes of enhancement, unless the State proves that the defendant's subsequent shock probation was revoked.[61]

Foreign judgments that suggest on their face that they may not be final—for example, a sentence of confinement and a partial suspension of the sentence—must be proved to be final under the applicable foreign law.[62] Where the applicable foreign law has not been established, the courts will presume Texas law applies.[63]

Where the State must establish the date of the prior offense, as well as the finality of conviction—particularly in cases where the State has attempted to enhance as a habitual offender—the judgment may be used to prove the date of the offense if it is noted there.[64]

---

59. Elder v. State, 677 S.W.2d 538, 539 (Tex. Crim. App. 1984) (en banc); *see also Ex parte* Murchison, 560 S.W.2d 654, 656 (Tex. Crim. App. 1978) (en banc) (holding that in the absence of an order revoking probation, the State has no evidence that a prior conviction was final).

60. "Shock probation" may be granted to a defendant who is sentenced to imprisonment if, within 180 days of the defendant beginning to serve the sentence, the sentencing judge determines that "the defendant would not benefit from further imprisonment," the defendant is eligible for community supervision under Texas Code of Criminal Procedure Article 42.12, and has never before been sentenced to imprisonment for a felony. TEX. CODE CRIM. PROC. ANN. art. 42.12 § 6(a) (Vernon Supp. 2004); Scott D. Deatherage & Caroline M. Legette, *Annual Survey of Texas Law: Environmental Law*, 49 S.M.U. L. REV. 991, 998 (1996). The defendant's sentence will be suspended and he will be placed under community supervision. TEX. CODE CRIM. PROC. ANN. art. 42.12 § 6(a) (Vernon Supp. 2004).

61. *Ex parte* Langley, 833 S.W.2d 141, 143 (Tex. Crim. App. 1992) (en banc).

62. *Compare* Diremiggio v. State, 637 S.W.2d 926, 928 (Tex. Crim. App. [Panel Op.] 1982) (holding that the prosecution failed to establish that the conviction was final under Virginia law), *with* Skillern v. State, 890 S.W.2d 849, 883 (Tex. App.—Austin 1994, pet. ref'd) (concluding that the State properly showed that the conviction was final under federal law, though it would not be considered final under Texas jurisprudence).

63. *See* TEX. R. EVID. 202 (providing the means by which the law of another jurisdiction may be established); *see also* Langston v. State, 776 S.W.2d 586, 587-88 (Tex. Crim. App. 1989) (en banc) (applying Texas law when foreign law was not established).

64. *See* Turner v. State, 550 S.W.2d 686, 689 (Tex. Crim. App. 1977) (using a prior judgment to determine the date of offense); Caballero v. State, 725 S.W.2d 776, 777 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd) (addressing the State's evidence of mandate by the appellate court affirming a prior conviction); Beasley v. State, 629 S.W.2d 161, 164

The State may also "indirectly" prove that the offense was committed prior to the finality of the second using the indictment and the statute of limitations.[65] When punishment is decided by the jury, the State must introduce some evidence to support its later claim that the jury utilized the statute of limitations in calculating finality.[66]

2. Eyewitness Testimony

The State may prove the date of conviction through the eyewitness testimony of someone who was present during trial.[67] Similarly, the State may prove the date of the offense, if necessary, through eyewitness testimony.[68] The prosecution may also prove the finality of a conviction through the testimony of a defendant's parole officer.[69]

3. The Defendant's Testimony

A defendant's admission that he has been previously convicted of particular offenses under specific cause numbers is sufficient to establish a prima facie case.[70] If the defendant admitted the prior conviction on cross-examination during the guilt-innocence phase, the admission need not be re-introduced during punishment to be considered by the fact-finder.[71] Testimony by the defendant that he served certain prison terms, coupled with pen packets that pro-

---

(Tex. App.—Dallas 1982, no writ) (announcing that the State carried its burden of proof by using the judgments of a prior conviction to ascertain the date of the offense).

65. *See Ex parte* Girnus, 640 S.W.2d 619, 621 (Tex. Crim. App. 1982) (en banc) (noting that pen packets showed the indictment in the second prior conviction was returned over six years after the first conviction, and the statute of limitations for the offense was three years).

66. *See Ex parte* Klasing, 738 S.W.2d 648, 650 (Tex. Crim. App. 1987) (en banc) (stating that the prosecution failed to establish that the jury used the statute of limitations in calculating finality where the charge to the jury did not contain any instruction on statute of limitations).

67. Garcia v. State, 135 Tex. Crim. 667, 669, 122 S.W.2d 631, 632 (1938).

68. *See* Parr v. State, 557 S.W.2d 99, 101 (Tex. Crim. App. 1977) (including the defendant's testimony to the date of the offense).

69. *See* Bautista v. State, 642 S.W.2d 233, 236 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd, untimely filed) (determining that the testimony of the defendant's parole officer was sufficient).

70. *See* Bush v. State, 642 S.W.2d 787, 790 (Tex. Crim. App. 1982) (en banc) (finding that the defendant's testimony was sufficient to sustain allegations of prior convictions).

71. *Ex parte* Girnus, 640 S.W.2d 619, 620-21 (Tex. Crim. App. 1982) (en banc).

vide additional evidence of the convictions, may be sufficient to establish that the second conviction was committed after the first became final.[72]

D. *Notice*

The Court of Criminal Appeals has long maintained that a defendant is entitled to notice of prior convictions to be used for enhancement.[73] While enhancements "must be pled in some form," they need not be pled in the indictment, "although it is permissible and perhaps preferable to do so."[74] It is sufficient that the enhancement be pled somewhere, such as in a motion to amend.[75] At least one court has held that in order to be properly "pled," notice must be filed with the court before trial, so that an informal letter informing the defendant of the State's intended enhancements does not constitute sufficient notice.[76]

Notice must be in writing.[77] Proper notice consists of "a description of the judgment of former conviction that will enable [the accused] to find the record and make preparation for a trial of the question whether he is the convict named" in the record.[78] Multiple enhancements need not be pled in separate paragraphs.[79] At

---

72. *See* Tomlin v. State, 722 S.W.2d 702, 705-06 (Tex. Crim. App. 1987) (en banc) (concluding that the defendant's testimony and the pen packets corroborated to the offense committed, the date of the conviction, and the punishment received). *But see* Gutierrez v. State, 555 S.W.2d 457, 459 (Tex. Crim. App. 1973) (finding that the pen packets did not contain dates upon which the offenses were committed).

73. *See* Brooks v. State, 957 S.W.2d 30, 34 (Tex. Crim. App. 1997) (en banc) (holding that the State's motion gave the requisite notice).

74. *Id.*; *see also* Riney v. State, 60 S.W.3d 386, 388 (Tex. App.—Dallas 2001, no pet.) (holding that since the record contained a pleading of the enhancement paragraphs, the appellant was provided with written notice of prior convictions, which the State intended to rely on to increase the punishment); Williams v. State, 33 S.W.3d 67, 68 (Tex. App.—Texarkana 2000, no pet.) (affirming that it is sufficient to plead the enhancement in a motion to amend the indictment).

75. *Brooks*, 957 S.W.2d at 34; *Riney*, 60 S.W.3d at 388; *Williams*, 33 S.W.3d at 68.

76. *See* Throneberry v. State, 109 S.W.3d 52, 59 (Tex. App.—Fort Worth 2003, pet. dism'd, untimely filed) (refusing to conclude that an informal letter admitted during the punishment phase constitutes a pleading in any form).

77. *See Brooks*, 957 S.W.2d at 33 (noting that everything should be stated in the indictment that is necessary to be proved).

78. Hollins v. State, 571 S.W.2d 873, 875 (Tex. Crim. App. 1978) (quoting Morman v. State, 127 Tex. Crim. 264, 266, 75 S.W.2d 886, 887 (1934) (per curiam), *overruled on other grounds by* Rooks v. State, 576 S.W.2d 615 (Tex. Crim. App. 1978)).

79. *Williams*, 33 S.W.3d at 69.

least one court has held that notice must be provided at least ten days before trial in order to be timely.[80]

IV. Evidence Under Article 37.07

Evidence of a defendant's character is relevant and admissible in the punishment stage of trial under Article 37.07 of the Code of Criminal Procedure.[81] Generally, evidence of character may be divided into seven categories: (1) the defendant's prior criminal record; (2) the defendant's general reputation; (3) an opinion regarding the defendant's character; (4) the circumstances of the offense for which the defendant is on trial; (5) evidence of an extraneous crime or bad act; (6) evidence of a juvenile adjudication of delinquency; and (7) evidence of "any matter the court deems relevant to sentencing."[82]

Changes in Article 37.07 have affected the scope of admissible character evidence. Briefly, the original version of Article 37.07, Section 3(a) was amended by the legislature in 1989 in an apparent effort to broaden the scope of admissible evidence at punishment. The Court of Criminal Appeals subsequently interpreted the amendment so narrowly, however, that the legislature's change had no practical effect on the admissibility of punishment evidence. The legislature again amended the statute, making sweeping changes in its wording, and in the process, dramatically altering the scope of evidence admissible during the punishment phase of trial.

These changes had the practical effect of making caselaw interpreting the prior versions of the statute inapplicable to many evidentiary issues arising under the new statute. Compounding the confusion is the fact that the 1993 amendment applies only to offenses committed after its effective date: September 1, 1993.

The effect of the various changes to Article 37.07 on the admissibility of different types of evidence will be discussed where appropriate.

---

80. Sears v. State, 91 S.W.3d 451, 455 (Tex. App.—Beaumont 2002, no pet.).

81. Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a) (Vernon Supp. 2003); Aliff v. State, 627 S.W.2d 166, 173 (Tex. Crim. App. 1982).

82. Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a) (Vernon Supp. 2003).

A. *Evidence of the Prior Criminal Record of the Defendant*

1. The Evolution of Article 37.07, § 3(a)

Prior to its amendment in 1989, Section 3(a) of Article 37.07 of the Code of Criminal Procedure provided in pertinent part:

> Regardless of the plea and whether the punishment be assessed by the judge or the jury, evidence may, as permitted by the . . . Rules of Evidence, be offered by the state and the defendant as to the prior criminal record of the defendant, his general reputation and his character. The term prior criminal record means a final conviction in a court of record, or a probated sentence . . . that has occurred prior to trial, or any final conviction material to the offense charged.[83]

This version was construed narrowly, and evidence of a defendant's "prior criminal record" that did not fall under the statutory definition of "prior criminal record" was generally held to be inadmissible during punishment.[84] This excluded not only prior unadjudicated acts of misconduct, but the details of adjudicated offenses as well.[85]

In 1989, the legislature amended the statute, adding the portion emphasized below:

> Regardless of the plea and whether the punishment be assessed by the judge or the jury, evidence may, as permitted by the Rules of Evidence, be offered by the state and the defendant *as to any matter the court deems relevant to sentencing, including* the prior criminal record of the defendant, his general reputation and his character. The term prior criminal record means a final conviction in a court of

---

83. Act of May 22, 1987, 70th Leg., R.S., ch. 385, § 19, 1987 Tex. Gen. Laws 1891, 1898, *amended by* Act of May 28, 1989, 71st Leg., R.S., ch. 785, § 4.04, 1989 Tex. Gen. Laws 3471, 3492 (amended 1993); *see also* Grunsfeld v. State, 813 S.W.2d 158, 166 (Tex. App.—Dallas 1991) (noting that under the former statute, unadjudicated extraneous offenses were inadmissible), *aff'd*, 843 S.W.2d 521 (Tex. Crim. App. 1992) (en banc).

84. *See* Murphy v. State, 777 S.W.2d 44, 57 (Tex. Crim. App. 1988) (en banc) (noting the general rule that neither unadjudicated bad acts nor details of adjudicated offenses are admissible in the punishment phase).

85. *See* Ramey v. State, 575 S.W.2d 535, 537 (Tex. Crim. App. [Panel Op.] 1978) (referring to the statute's ban on showing details of offenses resulting in convictions or extraneous offenses not yet final); Sherman v. State, 537 S.W.2d 262, 263-64 (Tex. Crim. App. 1976) (finding that, regardless of the action taken regarding the appellant's parole, the evidence was inadmissible).

> record, or a probated sentence that occurred prior to trial, or any final conviction material to the offense charged.[86]

Though several intermediate courts viewed the addition as manifesting the legislature's desire to render unadjudicated extraneous acts admissible during the punishment stage, the Court of Criminal Appeals nevertheless continued to interpret the statute narrowly. In *Grunsfeld v. State*, the court held that despite the addition of the expansive language, the legislature's "retention of the term 'prior criminal record' and its definitional provision" indicated "an intent to maintain limitations on the admission of extraneous offense evidence."[87] The admissibility of prior criminal records and of extraneous offenses after *Grunsfeld* thus remained unchanged.[88]

In what has been described as a "blistering reaction to the Court of Criminal Appeals' interpretation of the 'legislative intent'" of the 1989 amendment, the legislature again amended the statute in 1993.[89] The amended statute, which also constitutes its present version, states in pertinent part:

> Regardless of the plea and whether the punishment be assessed by the judge or the jury, evidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing, including but not limited to the prior criminal record of the defendant, his general reputation, his character, an opinion regarding his character, the circumstances of the offense for which he is being tried, and, notwithstanding Rules 404 and 405, Texas Rules of Evidence, any other evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally re-

---

86. Act of May 28, 1989, 71st Leg., R.S., ch. 785, § 4.04, 1989 Tex. Gen. Laws 3471, 3492 (amended 1993); *see also Grunsfeld*, 813 S.W.2d at 166 (examining the change in the statute as merely additional emphasized language).

87. Grunsfeld v. State, 843 S.W.2d 521, 524-25 (Tex. Crim. App. 1992) (en banc); *see also id.* at 527 n.2 (Clinton, J., concurring) (listing the courts of appeals that had interpreted change broadly).

88. *Id.* at 526.

89. Martin v. State, 860 S.W.2d 735, 737 n.3 (Tex. App.—Beaumont 1993, no pet.); *see also* Clewis v. State, 922 S.W.2d 126, 160-62 (Tex. Crim. App. 1996) (en banc) (White, J., dissenting) (describing the struggle between the Texas Legislature and the courts); Brooks v. State, 961 S.W.2d 396, 400 (Tex. App.—Houston [1st Dist.] 1997, no pet.) (taking judicial notice of the "struggle between the legislature and the Court of Criminal Appeals over enlarging the scope of evidence admissible at the punishment stage of non-capital trials").

> sponsible, regardless of whether he has previously been charged with or finally convicted of the crime or act.[90]

Significantly, in addition to adding broad language suggesting that the scope of admissible evidence has been widened,[91] the legislature also deleted the narrow statutory definition of the term "prior criminal record." The legislature specifically provided that the change in the law brought about by the amendment "applies only to an offense committed on or after the effective date of this article"—that is, on or after September 1, 1993.[92] Thus, punishment for offenses committed prior to September 1, 1993 must be tried under the 1989, or "*Grunsfeld* version," of the statute, while offenses committed after that date are subject to being tried under the current, and broader, procedure.[93]

2. "Prior Criminal Record" Under *Grunsfeld*

Under the *Grunsfeld* version of Article 37.07, a defendant's "prior criminal record" consists only of final criminal convictions or "probated or suspended sentences" that have occurred "prior to trial."[94] The status of the conviction as felony or misdemeanor does not affect its admissibility.[95] Evidence of the details of the underlying offense is not admissible as part of a defendant's prior criminal record.[96]

---

90. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a) (Vernon Supp. 2003).

91. *See Brooks*, 961 S.W.2d at 400-01 (explaining that "[w]hile the amendments may have been intended to overrule *Grunsfeld* specifically in order to make unadjudicated offenses admissible, the language of the amendments is far broader than that").

92. Act of May 29, 1993, 73d Leg., R.S., ch. 900, § 5.09(a), 1993 Tex. Gen. Laws 3586, 3763; Act of May 29, 1993, 73d Leg., R.S., ch. 200, § 5.10, 1993 Tex. Gen. Laws 3586, 3764; Brown v. State, 6 S.W.3d 571, 583 (Tex. App.—Tyler 1999, pet. ref'd); Barrett v. State, 932 S.W.2d 590, 591 n.1 (Tex. App.—Tyler 1995, pet. ref'd); *Ex parte* Smith, 884 S.W.2d 551, 552 n.2 (Tex. App.—Austin 1994, no pet.).

93. *See Barrett*, 932 S.W.2d at 591 n.1 (stating that according to *Grunsfeld*, "[p]rior to September 1, 1993, evidence of unadjudicated extraneous offenses was not admissible during the punishment phase of trials for non-capital offenses").

94. *See* Grunsfeld v. State, 843 S.W.2d 521, 525-26 (Tex. Crim. App. 1992) (en banc) (arguing that evidence of unadjudicated extraneous offenses is not admissible at the punishment phase for a non-capital offense unless the evidence is permitted within the rules of evidence and the evidence sought to be admitted satisfies the statutory definition of a prior criminal record).

95. *See* Chancy v. State, 614 S.W.2d 446, 448 (Tex. Crim. App. [Panel Op.] 1981) (declaring that under the provisions of Article 37.07, Section 3(a), a prior misdemeanor conviction is admissible as part of the defendant's "prior criminal record").

96. *Grunsfeld*, 843 S.W.2d at 525.

Convictions that are not final because they are on appeal are inadmissible.[97] Similarly, evidence of a jury verdict, without more, is insufficient to establish a prior "conviction," and hence is inadmissible during punishment,[98] as is an indictment or information standing alone.[99] Evidence of a defendant's probated or suspended sentence is admissible under the statute, but where the probation or suspension has been revoked, the State must establish that the conviction is "final" if evidence in the record suggests that the conviction or revocation has been appealed.[100] Evidence that a defendant has completed deferred adjudication and has had the charge dismissed, or that he has not yet successfully completed a deferred adjudication, may be introduced in the punishment stage of trial for a subsequent offense.[101] Curiously, if the deferred probation has been revoked, but is on appeal at the time of trial, the fact of the prior adjudication may not be admitted into evidence.[102]

Convictions that have become final before trial are admissible at punishment, regardless of whether the offense was committed prior to the offense for which the defendant is being tried.[103] Thus, where a case has been reversed and remanded, convictions ob-

---

97. *See* Johnson v. State, 583 S.W.2d 399, 403 (Tex. Crim. App. [Panel Op.] 1979) (holding that the evidential proof in this case was sufficient to show the prior conviction was final before the commission of the present offense).

98. Morgan v. State, 515 S.W.2d 278, 280 (Tex. Crim. App. 1974).

99. Lafayette v. State, 835 S.W.2d 131, 135 (Tex. App.—Texarkana 1992, no pet.); *see also* Webb v. State, 840 S.W.2d 543, 547-48 (Tex. App.—Dallas 1992, no pet.) (claiming that an indictment for a greater offense, where the defendant was subsequently convicted of the lesser offense, was admissible as part of the prior criminal record because it is more than a mere detail of the prior offense).

100. *Johnson*, 583 S.W.2d at 403; Hunter v. State, 640 S.W.2d 656, 659 (Tex. App.—El Paso 1982, writ ref'd).

101. *See* Brown v. State, 716 S.W.2d 939, 949 (Tex. Crim. App. 1986) (en banc) (inferring that a defendant who is unsuccessful in living out the conditions of deferred adjudication status would be vulnerable to a revelation of that fact at a subsequent trial); Taylor v. State, 911 S.W.2d 906, 909 (Tex. App.—Fort Worth 1995, writ ref'd) (noting that "if a defendant is placed on deferred adjudication and successfully lives out the conditions of his probation then evidence of that deferred adjudication would be admissible in a subsequent trial for another offense").

102. *Taylor*, 911 S.W.2d at 909.

103. *See* Eggins v. State, 860 S.W.2d 206, 207 (Tex. App.—Fort Worth 1993, no pet.) (stating that the term "prior criminal record" includes a final conviction occurring prior to the date of the retrial of the defendant's punishment); Sanders v. State, 832 S.W.2d 719, 722 (Tex. App.—Austin 1992, no pet.) (holding that the appellant's burglary conviction occurred prior to his retrial and constituted a final conviction that is admissible at the punishment phase).

tained after the case was tried that have become final before the re-trial are admissible during the punishment phase of the re-trial.[104] Evidence of a defendant's prior criminal record offered under the *Grunsfeld* version of Article 37.07 is not subject to the notice requirements of Texas Rule of Evidence 609(f), which applies on its face only to prior criminal records offered to impeach a witness.[105] Similarly, convictions introduced during punishment are not subject to the remoteness limitations contained in Rule 609(b).[106]

3. "Prior Criminal Record" Under the Present Article 37.07, § 3(a)

The legislature's deletion of the definition already in the statute and its failure to define "prior criminal record" in the current version of 37.07, Section 3(a), suggests that it did not intend to limit "prior criminal record" simply to "a final conviction in a court of record, or a probated or suspended sentence that has occurred prior to trial, or any final conviction material to the offense charged."[107] Evidence admissible under the prior, more restrictive statute is of course still admissible under the present version. Arguably, however, because of the legislature's deletion of the restricting definition of "prior criminal record," evidence not previously admissible as a "prior criminal record," but which logi-

104. *See Eggins*, 860 S.W.2d at 207 (claiming that the trial court did not err in admitting and considering the defendant's intervening convictions); Kingsley v. State, 834 S.W.2d 82, 84-85 (Tex. App.—Dallas 1992, pet. ref'd) (contending that all convictions that become final before the date of the new trial are prior convictions and are admissible).

105. *See* TEX. R. EVID. 609(f) (providing that "[e]vidence of a conviction is not admissible if after timely written request by the adverse party specifying the witness or witnesses, the proponent fails to give to the adverse party sufficient advance written notice of intent to use such evidence" in order to allow the opposing party the opportunity to contest); Stringer v. State, 845 S.W.2d 400, 406 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd) (arguing that because the pen packet was introduced at the punishment phase of trial solely to prove the appellant's prior criminal record, no notice was required under Rule 609(f)); Vela v. State, 771 S.W.2d 659, 662-63 (Tex. App.—Corpus Christi 1989, pet. ref'd) (holding that Rule 609(f) does not govern the admissibility of pen packets used solely to illustrate a defendant's criminal history).

106. Barnett v. State, 847 S.W.2d 678, 679-80 (Tex. App.—Texarkana 1993, no pet.); *see also* Mendoza v. State, 552 S.W.2d 444, 449 (Tex. Crim. App. 1977) (declaring that a prior conviction is not subject to a common law bar of remoteness, as it was not introduced for purposes of impeachment).

107. Act of May 28, 1989, 71st Leg., R.S., ch. 785, § 4.04, 1989 Tex. Gen. Laws 3471, 3492 (amended 1993).

cally comprises a criminal record, may now be admissible during punishment, subject to the limitations of Texas Rule of Evidence 403.[108] Under such an interpretation, convictions on appeal, guilty verdicts, and even prison disciplinary actions, would be admissible during the punishment phase of trial.[109] Though the Court of Criminal Appeals has held that prior sentences, at least, are admissible under the broader language of the statute,[110] Texas courts have yet to expand the definition of "prior criminal record" much beyond *Sunbury v. State*[111] and *Rogers v. State*.[112]

It is not enough that the State simply introduce prior criminal records into evidence during the penalty phase.[113] The State must show that the criminal record is "relevant" by establishing that the criminal record offered is the defendant's.[114] The prosecution may do this using the same evidentiary devices used to prove enhancement counts: testimony of a fingerprint expert; testimony of someone who knows the defendant and can testify to the past convictions; stipulation; judicial admission; or through photographs, signatures, or other connections between the defendant and the documents at issue.[115]

---

108. *See* Cameron v. Terrell & Garrett, Inc., 618 S.W.2d 535, 540 (Tex. 1981) (en banc) (arguing that a reviewing court must presume that every word excluded when a statute is revised was excluded for a purpose); *see also* Rogers v. State, 991 S.W.2d 263, 265 (Tex. Crim. App. 1999) (en banc) (explaining that evidence introduced at punishment is subject to exclusion under Rule 403).

109. Lavinge v. State, 64 S.W.3d 673, 676-77 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (indicating that evidence of prior convictions is admissible despite the prosecution's failure to prove that the convictions were final as "criminal records" under Article 37.07, § 3(a)).

110. *See* Sunbury v. State, 88 S.W.3d 229, 235 (Tex. Crim. App. 2002) (claiming that a defendant is entitled to introduce sentences for non-final convictions); *Rogers*, 991 S.W.2d at 266 (stating that the prosecution is entitled to introduce evidence of sentences for prior final convictions).

111. 88 S.W.3d 229 (Tex. Crim. App. 2002).

112. 991 S.W.2d 263 (Tex. Crim. App. 1999) (en banc); *see also* Watkins v. State, 572 S.W.2d 339, 341 (Tex. Crim. App. [Panel Op.] 1978) (holding that, notwithstanding that the defendant was pardoned for a prior offense, the prior conviction was admissible during punishment unless a pardon is based upon a showing of actual innocence (quoting Gurleski v. United States, 405 F.2d 253, 266 (5th Cir. 1968))).

113. *See* Aleman v. State, 49 S.W.3d 92, 95-96 (Tex. App.—Beaumont 2001, no pet.) (holding that the State must connect the accused to the criminal records offered into evidence).

114. *Id.* at 95.

115. *Id.*

Introduction of the fact of conviction does not make the underlying facts of the prior offense inadmissible.[116] Indeed, introduction of the underlying facts will render harmless any error in the improper admission of a "prior criminal record."[117] Similarly, a defendant may offer the facts of the prior conviction into evidence.[118]

While there may be some question as to whether other juvenile records constitute a prior criminal record, the current statute specifically permits the introduction of evidence "of an adjudication of delinquency based on a violation by the defendant of a penal law of the grade of" felony or a misdemeanor punishable by confinement in jail, "notwithstanding Rule 609(d)" of the Texas Rules of Evidence.[119] Misdemeanor juvenile adjudications are admissible only if the underlying conduct was committed on or after January 1, 1996.[120]

In a curious quirk in the law, a defendant whose probation has been reduced and discharged, and the charge dismissed, is "released from all penalties and disabilities resulting from the offense . . . except that . . . proof of the conviction or plea of guilty shall be made known to the judge should the defendant again be

---

116. *See* Barletta v. State, 994 S.W.2d 708, 712-13 (Tex. App.—Texarkana 1999, pet. ref'd) (deciding that the evidence about the bad acts is admissible regardless of whether the defendant has previously been charged with or finally convicted of the crime or bad act); Williams v. State, 976 S.W.2d 330, 332 (Tex. App.—Corpus Christi 1998, no pet.) (stating that the legislative history reveals that the amendment was intended to permit evidence regarding extraneous crimes or bad acts to be admitted in the punishment phase of a trial); Heney v. State, 951 S.W.2d 551, 554-55 (Tex. App.—Waco 1997, no pet.) (arguing that the fact that the defendant was actually convicted of the extraneous crime does not prevent the prosecution from proving beyond a reasonable doubt what that prior offense involved factually); Standerford v. State, 928 S.W.2d 688, 693 (Tex. App.—Fort Worth 1996, no pet.) (claiming that the trial court was within its discretion to allow testimony from the four witnesses regarding four of the defendant's previous D.W.I. arrests); *cf.* Smith v. State, 930 S.W.2d 227, 229-30 (Tex. App.—Beaumont 1996, pet. ref'd) (holding that the applicability of the prior version of Section 37.07 rendered inadmissible the facts of a prior conviction).

117. *See* Goff v. State, 931 S.W.2d 537, 553 (Tex. Crim. App. 1996) (en banc) (finding that the trial court's admission of prior convictions without the required waiver was harmless error where the State offered victims' testimony as to the underlying facts).

118. Hambrick v. State, 11 S.W.3d 241, 243 (Tex. App.—Texarkana 1999, no pet.).

119. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a) (Vernon Supp. 2003).

120. *Id.* § 3(i); *see also* Wallace v. State, No. 12-02-00200-CR, slip op. at 6, 2004 WL 306120, at *4-5 (Tex. App.—Tyler Feb. 18, 2004, no pet. h.) (finding unadjudicated extraneous juvenile offenses admissible under Article 37.07, Section 3(a)(1), notwithstanding the provision barring adjudicated offenses under Section 3(i)).

convicted of any criminal offense."[121] The statute seemingly does not permit the prior probation to be entered into evidence, though the Court of Criminal Appeals has held that it does.[122] The statute also does not address whether the trial court, once "made known" of the prior probation, may take the fact into consideration in assessing punishment or conditions of probation. Presumably it may, or the statute would be rendered meaningless.[123]

Similarly, a defendant's prior deferred adjudication may be admitted into evidence during punishment, not under Article 37.07, but rather under Article 42.12, Section 5(c)(1).[124] Both the fact of deferred adjudication and the underlying details of the offense are admissible under Articles 42.12 and 37.07, respectively.[125]

4. Notice of Intent to Introduce a "Prior Criminal Record" Under Article 37.07

Article 37.07, Section 3(g) requires that upon "timely request" by the defense, the State must provide "notice of intent to introduce evidence under this article."[126] This notice requirement applies to the introduction of criminal records.[127] By the very terms

---

121. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 20(a)-(a)(1) (Vernon Supp. 2003).

122. *See* Vaughn v. State, 634 S.W.2d 310, 313 (Tex. Crim. App. [Panel Op.] 1982) (proclaiming that the appellant's prior conviction that had been set aside after probation was admissible).

123. *See* Childress v. State, 784 S.W.2d 361, 364 (Tex. Crim. App. 1990) (en banc) (stating that in construing a statute, the court "will not presume the Legislature did a useless thing").

124. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5(c)(1) (Vernon Supp. 2003) (stating that a defendant's prior deferred adjudication is admissible into evidence); Davis v. State, 968 S.W.2d 368, 373 (Tex. Crim. App. 1998) (en banc) (reiterating that deferred adjudication can be admitted against a defendant in the penalty phase).

125. *See Davis*, 968 S.W.2d at 373 (describing that Articles 42.12 and 37.07 allow the facts of a prior deferred adjudication proceeding and whether the defendant has received deferred adjudication into the penalty phase of a trial).

126. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(g) (Vernon Supp. 2004).

127. *See* Johnson v. State, 84 S.W.2d 726, 728 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd) (restating that Article 37.07, Section 3(g) allows the introduction of criminal activity by the State, provided that sufficient notice is given to the defendant when the defendant makes a timely request for such notice); Patton v. State, 25 S.W.3d 387, 392 (Tex. App.—Austin 2000, pet. ref'd) (asserting that the State's intention to use the defendant's prior criminal conduct is restricted by Article 37.07, Section 3(g)); McQueen v. State, 984 S.W.2d 712, 715-16 (Tex. App.—Texarkana 1998, no pet.) (acknowledging that under Article 37.07, Section 3(g), the State must give notice to the defendant, upon request, of the State's intent to introduce prior crimes at trial).

of the statute, the prosecution is required to provide notice only after the defense has made a "timely" request for notice.[128]

A request for notice under Texas Rule of Evidence 404(b), which applies to evidence the State might introduce during the guilt-innocence phase, is not sufficient by itself to trigger the prosecution's obligation under Article 37.07, Section 3(g).[129] Similarly, a request incorporated into a pre-trial motion to the court does not comply with Section 3(g), and the State is not required to respond unless the court actually rules upon the motion.[130] Thus, a defendant may require the State to provide notice of its intent to introduce criminal convictions by either one of two ways: "(1) serve the State with a request for notice, or (2) file a discovery motion requesting the court to order such notice and secure a ruling thereon."[131] Though Section 3(g) does not mandate that the request be filed with the court or even that it be written, evidentiary problems may arise if it is not.[132]

The statute does not define what constitutes a "timely" request, though it actually uses the phrase twice.[133] A request filed upon the day of trial is not "timely."[134] The "timeliness" of a request

---

128. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(g) (Vernon Supp. 2004); *see also* Lloyd v. State, 97 S.W.3d 808, 810 (Tex. App.—Texarkana 2003, pet. ref'd) (commenting that "[t]he statute . . . only requires the State to give notice if the defendant timely requests it").

129. Williams v. State, 933 S.W.2d 662, 666 (Tex. App.—Eastland 1996, no writ).

130. *See* Mitchell v. State, 982 S.W.2d 425, 427 (Tex. Crim. App. 1998) (en banc) (noting that the State does not have to respond to a discovery motion until the court makes a ruling on it); *see also* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(g) (Vernon Supp. 2004) (stating that the notice requirement "applies only if the defendant makes a timely request *to the attorney representing the state* for the notice" (emphasis added)); *cf.* Espinosa v. State, 853 S.W.2d 36, 39 (Tex. Crim. App. 1993) (en banc) (holding that the defendant must obtain a ruling on a motion for discovery to trigger the notice requirements).

131. Henderson v. State, 29 S.W.3d 616, 625 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd); *see also* Webber v. State, 21 S.W.3d 726, 731 (Tex. App.—Austin 2000, pet. ref'd) (noting that the defendant did not show a proper request for discovery where the defendant's letter of request was not introduced at trial).

132. *See Webber*, 21 S.W.3d at 731 (finding that since the appellant's letter for notice was not admitted into evidence, it could not be reviewed on appeal).

133. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(g) (Vernon Supp. 2004) (detailing that the defendant must give notice before the State is required to give notice of intent to introduce evidence).

134. *See Espinosa*, 853 S.W.2d at 39 (stating that a request was untimely filed when it was filed on the day of trial).

should be left to the discretion of the trial judge under the facts and circumstances of the case.[135]

Upon receipt of a "timely request" by the defendant, the prosecution must provide notice of its intent to introduce evidence under Article 37.07 "in the same manner required by Rule 404(b)."[136] Rule 404(b), however, requires only that upon a "timely request by the accused," the State provide "reasonable notice . . . in advance of trial" of intent to introduce extraneous offense evidence.[137] Neither Rule 404(b) nor Article 37.07 define "reasonable notice."[138] Courts addressing the issue have concluded that "the reasonableness of the State's notice turns on the facts and circumstances of each individual case."[139]

Nevertheless, some parameters are clear. Merely providing an "open file" to the defense does not satisfy the State's obligation, because while it may inform the defendant of the prior convictions or extraneous offense evidence possessed by the prosecution, it does not provide specific notice to the defense of what evidence the State intends to introduce.[140] On the other hand, enhancements included in the indictment sufficiently comply with the stat-

---

135. *See* Sebalt v. State, 28 S.W.3d 819, 822 (Tex. App.—Corpus Christi 2000, no pet.) (committing that the reasonableness of the State's notice under 37.07, Section 3(g) must be left to the court's discretion in light of all the facts and circumstances); Ramirez v. State, 967 S.W.2d 919, 923 (Tex. App.—Beaumont 1998, no pet.) (noting that since the trial judge's discretion was reasonable, it did not constitute an abuse of discretion).

136. TEX CODE CRIM. PROC. ANN. art. 37.07, § 3(g) (Vernon Supp. 2004).

137. TEX. R. EVID. 404(b).

138. *See* Owens v. State, 119 S.W.3d 439, 443 (Tex. App.—Tyler 2003, no pet.) (stating that the rule provides "only minimal details regarding the manner in which notice is given"); Patton v. State, 25 S.W.3d 387, 392-93 (Tex. App.—Austin 2000, pet. ref'd) (noting that both Section 404(b) and Article 37.07 use the word "reasonable," but that neither provide a definition).

139. *Patton*, 25 S.W.3d at 392; *see also Owens*, 119 S.W.3d at 443-44 (determining that the "reasonableness of the State's notice turns on facts and circumstances of each individual case); Henderson v. State, 29 S.W.3d 616, 626 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd) (concluding that the trial court's inclusion of evidence of the defendant's prior criminal record was not an abuse of discretion); *Sebalt*, 28 S.W.3d at 822 (asserting that all facts and circumstances can be examined to determine if notice was reasonable); *Ramirez*, 967 S.W.2d at 923 (deciding that the trial court did not abuse its discretion where the defense counsel had noticed the defendant's juvenile criminal records in the State's file and notice of intent to use these records was given on the Friday before the trial).

140. *See* Buchanan v. State, 911 S.W.2d 11, 15 (Tex. Crim. App. 1995) (en banc) (emphasizing that the State cannot merely give the defendant access to its files, but instead must indicate an intent to use the evidence).

ute's notice requirements.[141] In addition, the State is not required to provide notice of offenses it does not intend to introduce in its case-in-chief, and its failure to provide notice of such evidence does not bar the State from using the evidence either in rebuttal or cross-examination.[142]

Neither Article 37.07 nor Rule 404(b) specifically require that the State's notice be in writing.[143] Indeed, the Court of Criminal Appeals has opined that the State need not even explicitly declare its intent. In *Hayden v. State*,[144] the court held that the State's production of witnesses' statements shortly after the defendant demanded notice under Rule 404(b) constituted "reasonable" notice of the State's intent to introduce the extraneous offenses outlined in the statements.[145] "Although the better practice is for the prosecutor to state explicitly the intent to introduce extraneous offense evidence," the court observed that the prosecution's delivery of the statements shortly after receiving the demand for notice "implicitly" notified the defense that the prosecution intended to introduce the extraneous offenses contained in the statements.[146]

---

141. *See* Johnson v. State, 84 S.W.3d 726, 728 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd) (concluding that sufficient notice was given when the enhancement paragraph is provided to the defendant).

142. *See* Jaubert v. State, 74 S.W.3d 1, 4 (Tex. Crim. App. 2002) (suggesting that notice is not required for use of the evidence in cross-examination and rebuttal); Franklin v. State, 986 S.W.2d 349, 357 (Tex. App.—Texarkana 1999) (finding that it was not harmful error when the judge did not require the State to turn over its jury list during cross-examination), *rev'd on other grounds*, 12 S.W.3d 473 (Tex. Crim. App. 2000); Washington v. State, 943 S.W.2d 501, 507 (Tex. App.—Fort Worth 1997, pet. ref'd) (holding that notice is required when the evidence is to be used as rebuttal evidence).

143. *See* Hayden v. State, 66 S.W.3d 269, 273 n.16 (Tex. Crim. App. 2001) (noting that Rule 404(b) does not require notice to be in writing); Chimney v. State, 6 S.W.3d 681, 699 (Tex. App.—Waco 1999, pet. ref'd) (clarifying that the notice requirement under Article 37.07 may be complied with orally); Neuman v. State, 951 S.W.2d 538, 540 (Tex. App.—Austin 1997, no pet.) (asserting that Rule 404(b) does not specify the manner of notice); Woodard v. State, 931 S.W.2d 747, 749 (Tex. App.—Waco 1996, no writ) (noting that the State provided sufficient notice where it gave copies of records and provided the defendant with oral notice that the records would be used).

144. 66 S.W.3d 269 (Tex. Crim. App. 2001).

145. *See Hayden*, 66 S.W.3d at 273 (concluding that reasonable notice was given to the defendant when the State delivered witness statements).

146. *Id.*; *see also* Ortiz v. State, 4 S.W.3d 851, 853 (Tex. App.—Eastland 1999, pet. ref'd) (agreeing that the prosecution's filing of criminal records with the district clerk provided the defense with reasonable notice of the State's intent to introduce the prior convictions).

By analogy, the prosecution's delivery of copies of a defendant's prior criminal history shortly after a request by the defense under Article 37.07 would "implicitly" notify the defense of the State's intent to use the records during punishment.[147] The prosecution should use caution in such an approach, however; as the court has warned, "[t]he longer the time lapse between the receipt of the notice and the delivery of the witness statements, the less likely" the notice will be found to have been "reasonable."[148] Moreover, as one court of appeals has implied, relying upon the timing of the delivery of certain materials to signal the State's intent to introduce them into evidence can be a two-edged sword: delivery of incomplete records may mislead a defendant into concluding that the State does not intend to introduce evidence of other unadjudicated acts, thus making any late attempt to amend the State's notice problematic.[149]

Since there is no "formalistic method for conveying notice,"[150] there are no specific requirements as to what information the State must provide concerning its intent to introduce a defendant's prior criminal record. Presumably, the prosecution should convey a sufficient "description of the judgment of former conviction that will enable [the accused] to find the record and [prepare] for a trial of the question whether he is the convict named [in the record]."[151] At least one court has determined that notice listing "the cause number, the district court number, the type of offense, the date, the length of confinement, and the place of confinement" constitutes "reasonable" notice.[152] As this appears to be more than the State is required to plead for enhancement purposes, something less is probably sufficient.[153] Obviously, providing copies of the convic-

147. *Hayden*, 66 S.W.3d at 272.

148. *Id.*

149. *See* Waltmon v. State, 76 S.W.3d 148, 158 (Tex. App.—Beaumont 2002, no pet.) (noting the problems of relying on the timing of notice).

150. *Hayden*, 66 S.W.3d at 273 n.16.

151. *See* Hollins v. State, 571 S.W.2d 873, 875 (Tex. Crim. App. 1978) (interpreting the requirements of proper notice of enhancements); Sears v. State, 91 S.W.3d 451, 454 (Tex. App.—Beaumont 2002, no pet.) (noting that notice is presumed reasonable if given at least ten days before trial).

152. McQueen v. State, 984 S.W.2d 712, 716 (Tex. App.—Texarkana 1998, no pet.).

153. *Compare Hollins*, 571 S.W.2d at 875 (commenting that the same particularity is not required when dealing with enhancements), *and Sears*, 91 S.W.3d at 454 (noting that the defendant has a right to know that the State is seeking a greater penalty), *with McQueen*, 984 S.W.2d at 716 (listing the items the State provided to the defendant). *See also*

tions, either directly to the defendant or by filing them with the court, will provide sufficient information concerning what convictions the prosecution intends to introduce.[154]

There is no set time deadline by which the State's notice may be deemed "reasonable" or "unreasonable" for purposes of the statute.[155] Rather, the reasonableness of the State's notice turns on the facts and circumstances of each case.[156] While notice as late as the Friday before trial beginning the following Monday has been held to be unreasonable,[157] under other circumstances notice while trial is underway has been held to be "reasonable."[158]

Courts that have found that the State's notice was "unreasonable" under the circumstances have generally analyzed the error as

---

Patton v. State, 25 S.W.3d 387, 391 (Tex. App.—Austin 2000, pet ref'd) (providing that in response to the defendant's Article 37.07 request, the prosecution identified prior convictions by listing cause numbers, dates, and the county of conviction).

154. *See* Ortiz v. State, 4 S.W.3d 851, 853 (Tex. App.—Eastland 1999, pet. ref'd) (noting that the pen packets filed with the court provided notice to the defendant); Woodard v. State, 931 S.W.2d 747, 749 (Tex. App.—Waco 1996, no writ) (holding that the pen packets gave the defendant reasonable notice that the State intended to introduce them as evidence).

155. *See Patton*, 25 S.W.3d at 393 (explaining that "there is no bright line as to the number of days or amount of time alone [that] constitutes reasonable notice").

156. Sebalt v. State, 28 S.W.3d 819, 822 (Tex. App.—Corpus Christi 2000, no pet.); *see also* Owens v. State, 119 S.W.3d 439, 443 (Tex. App.—Tyler 2003, no pet.) (indicating that the reasonableness of "notice turns on the facts and circumstances of each individual case"); *Patton*, 25 S.W.3d at 393 (noting the trial court's discretion to determine reasonable notice under the circumstances).

157. *See* Hernandez v. State, 914 S.W.2d 226, 234-35 (Tex. App.—Waco 1996, no writ) (interpreting Rule 404(b) notice requirements).

158. *See Owens*, 119 S.W.3d at 443-44 (holding that the trial court did not abuse its discretion in admitting evidence of extraneous offenses where the State gave notice only after the trial had begun, but that the State had just discovered the evidence, immediately informed the defense, and at trial it provided the defense with an investigator and a hearing outside the jury's presence on the testimony); Henderson v. State, 29 S.W.3d 616, 625 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd) (explaining how notice during trial was reasonable where the State belatedly discovered a prior conviction and notified the defense immediately); *Sebalt*, 28 S.W.3d at 822 (reasoning that notice of intent filed three days before trial was reasonable where the defense already had a statement that contained references to extraneous offenses); *Patton*, 25 S.W.3d at 393-94 (asserting that notice the day before trial was "reasonable" because the State belatedly discovered the prior conviction and notified the defense immediately); Ramirez v. State, 967 S.W.2d 919, 923 (Tex. App.—Beaumont 1998, no pet.) (holding that an amended notice, adding two additional prior convictions, filed three days before trial, was sufficient where the defense counsel had seen the judgments in the State's file months before).

one of the trial court's failure to bar admission of the evidence.[159] But evidence need not necessarily be barred from admission if the prosecution has failed to give the required notice. The statute does not absolutely bar punishment evidence for the failure to give notice, and logic dictates against such a drastic action in many cases.[160] "The lack of notice does not render the evidence inherently unreliable, but instead raises a question about the effect of procedural noncompliance."[161] Mechanically barring the evidence may not be the most equitable solution to the lack of notice in any given case, and does not appear to be absolutely required under the statute.

The purpose of Section 3(g) is to avoid unfair surprise and enable the defendant to prepare to answer the extraneous offense evidence.[162] Particularly where the defendant already has knowledge of the punishment evidence to be proffered against him, the failure of the State to provide notice that it would be used against him may be cured by a hearing outside the presence of the jury, or by granting a continuance so that the defense may further prepare.[163]

---

159. *See Patton*, 25 S.W.3d at 394 (analyzing the trial court's decision to admit testimony of prior convictions under an abuse of discretion standard); McQueen v. State, 984 S.W.2d 712, 716 (Tex. App.—Texarkana 1998, pet. ref'd) (analyzing the impact of an officer's testimony on the defendant's imposed sentence).

160. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(g) (Vernon Supp. 2003) (providing that evidence of prior punishment is admissible if notice is given to the defendant after timely request); *see also* 42 GEORGE E. DIX & ROBERT O. DAWSON, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 22.254 (2d ed. 2001) (explaining that "Article 37.07 does not address the consequences of the State's failure to provide the required notice or of incomplete notice").

161. Roethel v. State, 80 S.W.3d 276, 282 (Tex. App.—Austin 2002, no pet.).

162. *See* Wallace v. State, No. 12-02-00200-CR, slip op. at 4, 2004 WL 306120, at *3 (Tex. App.—Tyler Feb. 18, 2004, no pet. h.) (stating that "[t]he purpose of Article 37.07 section 3(g) is to avoid unfair surprise, that is, trial by ambush"); *Owens*, 119 S.W.3d at 444 (indicating that "[t]he purpose of the notice requirement is to avoid unfair surprise and trial by ambush"); Nance v. State, 946 S.W.2d 490, 493 (Tex. App.—Fort Worth 1997, pet. ref'd) (reasoning that the purpose of Article 37.07 is to prevent trial by ambush).

163. *See* Self v. State, 860 S.W.2d 262, 263-64 (Tex. App.—Fort Worth 1993, pet. ref'd) (holding that the trial court did not err in overruling the objection to extraneous offense evidence after the prosecution had failed to provide notice of intent to use the evidence). The court provided the defendant with a hearing outside the presence of the jury and permitted the defendant to cross-examine the prosecution witness. *Id.* at 264.

The Third District Court of Appeals at Austin has rejected such alternative solutions, however.[164] In weighing the argument, the court pointed to the fact that prior to the 1993 changes in Article 37.07, evidence of extraneous unadjudicated offenses was inadmissible during punishment.[165] In 1993, the court observed, the legislature added both the provision that unadjudicated offenses be admissible and the requirement that the State provide notice of its intent to introduce such evidence.[166] The mandatory language of Section 3(g), coupled with the history of the admissibility of unadjudicated offenses, the court posited, leads to the "logical and proper" conclusion that a violation of Section 3(g) makes the evidence inadmissible.[167] But the court overlooked the legislature's first attempt to change the statute in 1989, which did not include a notice provision,[168] and the fact that the notice requirement and the admissibility of extraneous offenses are contained in separate subsections of the statute, suggesting that they are to be read separately.

The court also reasoned that "[i]f the evidence is admissible despite the State's failure to comply with the notice requirement," Section 3(g) would be rendered a "nullity."[169] But the court itself admitted that the bad faith of a prosecutor may be taken into account in assessing the appropriate remedy for a violation.[170] Arguably, a more open interpretation of Section 3(g), which takes into consideration the good or bad faith of the prosecutor, along with the actual knowledge of the defendant, the relevance and significance of the evidence sought to be introduced, and the availa-

---

164. *See Roethel*, 80 S.W.3d at 281 (disagreeing with the State's contention that failure to provide reasonable notice does not render extraneous evidence inadmissible); *see also* Rogers v. State, 111 S.W.3d 236, 245 (Tex. App.—Texarkana 2003, no pet.) (providing that the State's failure to give notice to the defendant should have resulted in the exclusion of the witness).

165. *See Roethel*, 80 S.W.3d at 281 (reviewing the legal history of the admissibility of extraneous offenses).

166. *See id.* (noting the elements necessary for the legislature's change to be employed).

167. *See id.* (reasoning that Article 37.07, Section 3(g) is to be strictly construed against admissibility when a violation has occurred).

168. Act of May 28, 1989, 71st Leg., R.S., ch. 785, § 4.04, 1989 Tex. Gen. Laws 3492 (amended 1993) (current version at TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a) (Vernon Supp. 2003)).

169. *Roethel*, 80 S.W.3d at 281.

170. *Id.* at 282.

bility of alternative remedies, would allow a trial court to balance the value of a more informed fact-finder against the overall fairness to the defendant. In any event, error under Article 37.07, Section (3)(g) is susceptible to harmless error analysis under Texas Rule of Appellate Procedure 44.2(b).[171]

5. Charge Instruction As to Burden of Proof for Criminal Records

The lower courts appear to be split on whether the trial court must instruct the jury that the State must prove the defendant's prior criminal record "beyond a reasonable doubt." The Second District Court of Appeals at Fort Worth has concluded that offenses for which the defendant has been convicted are nevertheless "extraneous offenses" under Article 37.07, Section 3(a), and the jury must therefore be instructed that they must be proved beyond a reasonable doubt.[172] But three other courts have rejected such reasoning, and have held that the jury must be instructed only that the State bears the burden of proving extraneous crimes and bad acts, and not prior criminal records, beyond a reasonable doubt.[173]

B. *Evidence of a Defendant's Reputation*

Testimony of a defendant's reputation has been admissible to establish his character since "the earliest [origins] of common law."[174]

---

171. *See id.* at 281 (applying a harm analysis to evidence admitted under Article 37.07); Patton v. State, 25 S.W.3d 387, 394 (Tex. App.—Austin 2000, pet. ref'd) (finding error by the trial court harmless); McQueen v. State, 984 S.W.2d 712, 716 n.2 (Tex. App.—Texarkana 1998, pet. ref'd) (finding that even if notice failed to comply with requirements, the error was still harmless).

172. *See* Bluitt v. State, 70 S.W.3d 901, 903-04 (Tex. App.—Fort Worth 2002, pet. granted) (discussing requirements for the jury charge regarding extraneous offense evidence).

173. *See* Jones v. State, 111 S.W.3d 600, 609 (Tex. App.—Dallas 2003, pet. ref'd) (stating that "article 37.07, section 3(a)(1) does not require a reasonable doubt instruction for prior convictions"); Willover v. State, 84 S.W.3d 751, 753 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd) (holding that the defendant was not entitled to an instruction that prior criminal records must be proved beyond a reasonable doubt); Sanders v. State, 69 S.W.3d 690, 694 (Tex. App.—Texarkana 2002, pet. dism'd, untimely filed) (arguing that there is not a general charge that requires a jury to determine all matters beyond a reasonable doubt).

174. Hedicke v. State, 779 S.W.2d 837, 840 (Tex. Crim. App. 1989) (en banc); *see also* Hoffert v. State, 623 S.W.2d 141, 147 (Tex. Crim. App. [Panel Op.] 1981) (stating that the reputation of the defendant constitutes a relevant issue at the punishment stage, and the prosecution is entitled to adduce evidence of the defendant's reputation).

Under both the prior and current versions of Article 37.07, evidence of a defendant's reputation is admissible during punishment.[175] Testimony regarding a defendant's reputation must be based on discussions with others about the defendant, or on discussion heard about the defendant's reputation, and not simply on the witness's personal knowledge of the defendant.[176]

The reasoning underlying the rule that reputation testimony based solely on a witness's familiarity with a specific act of the defendant is not sufficient to justify its admission under the rubric of "reputation evidence" is simple: a reputation witness, by definition, must be familiar with a defendant's *reputation*.

> The trustworthiness of reputation testimony stems from the fact that a person is observed in his day to day activities by other members of his community and that these observations are discussed. Over a period of time . . . there is a synthesis of these observations and discussions which results in a conclusion as to the individual's reputation. When reputation is based solely on specific acts, this synthesis is lost, as well as its reliability.[177]

A witness must have discussed the reputation at issue with more than one person in order to qualify as a "reputation" witness.[178]

---

175. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a) (Vernon Supp. 2003); Act of May 22, 1987, 70th Leg., R.S., ch. 385, § 19, 1987 Tex. Gen. Laws 1898 (amended 1989 and 1993).

176. *See* Willis v. State, 785 S.W.2d 378, 386 (Tex. Crim. App. 1990) (en banc) (explaining that hearsay is an unavoidable component of testimony concerning reputation); Lopez v. State, 860 S.W.2d 938, 944 (Tex. App.—San Antonio 1993, no pet.) (stating that Rule 405 of the Texas Rules of Evidence requires that reputation testimony be based on discussion about the defendant or from hearing about the defendant's reputation from others). *But see* Thompson v. State, 379 S.W.2d 664, 666 (Tex. Crim. App. 1964) (explaining that the defendant, in making a bid for a suspended sentence, had a due process right to present testimony of good reputation); Skelton v. State, 655 S.W.2d 302, 304 (Tex. App.—Tyler 1983, pet. ref'd, untimely filed) (holding that the defendant had a due process right to present reputation testimony, even where the witnesses admitted that they had not discussed the defendant's reputation with others in the community).

177. Hernandez v. State, 800 S.W.2d 523, 524 (Tex. Crim. App. 1990) (en banc) (quoting Wagner v. State, 687 S.W.2d 303, 313 (Tex. Crim. App. 1984)); *see also* Adanandus v. State, 866 S.W.2d 210, 226 (Tex. Crim. App. 1993) (stating that reputation testimony must be "based upon a synthesis of observations and discussions which results in a conclusion as to the individual's reputation").

178. *See* Wagner v. State, 687 S.W.2d 303, 313 (Tex. Crim. App. [Panel Op.] 1984) (stressing that it is imperative that a reputation witness has reviewed the accuser's reputation with community members in order to establish a basis for the witness's testimony); Garza v. State, 18 S.W.3d 813, 824 (Tex. App.—Fort Worth 2000, pet. ref'd) (reasoning that because the witness had heard about the victim's untruthful nature from only one person,

Obviously, where a witness has heard the defendant's reputation discussed, such discussions have necessarily involved more than one person. Of course, on a practical basis, a reputation witness will often have knowledge of specific acts committed by the defendant, but so long as the reputation testimony is based upon a discussion or discussions of the defendant's reputation, the testimony is admissible.[179] In the same vein, reputation testimony may be based upon specific instances of conduct described to the witness by other persons in the community.[180]

"[R]eputation testimony cannot be based solely upon [discussions] of the offense for which the defendant is on trial; it must include a discussion of matters other than the [offense at issue]."[181] Once a witness has indicated that he has discussed with others the defendant's reputation for possessing a particular character trait, the burden then shifts to the defendant to show that those discussions were based only on the defendant's actions that are related to the trial; otherwise, the testimony is admissible.[182] Since a reputation witness's testimony is based upon his discussions of the defendant with others, and not his personal knowledge of the defendant, a reputation witness need not be personally familiar with the accused.[183] The fact that a reputation witness cannot recall to whom he spoke about the accused's reputation, or refuses to reveal the confidential informants with whom he discussed the defendant's reputation, does not render the testimony inadmissible nor implicate the confrontation clause.[184] Notably, although reputation evi-

---

the witness could not qualify as a reputation witness); Lopez v. State, 860 S.W.2d 938, 945 (Tex. App.—San Antonio 1993, no pet.) (rejecting a reputation witness's qualifications because of a lack of familiarity).

179. *See Adanandus*, 866 S.W.2d at 225-26 (interpreting Rule 405(a) to include discussions between police officers as sufficient to qualify as a reputation witness); Turner v. State, 805 S.W.2d 423, 429 (Tex. Crim. App. 1991) (en banc) (reviewing qualification factors for reputation witnesses).

180. Cooks v. State, 844 S.W.2d 697, 736 (Tex. Crim. App. 1992) (en banc) (asserting that "[i]t is well-settled that reputation testimony may be based upon specific instances of conduct described to the witness by other persons in the community").

181. *Willis*, 785 S.W.2d at 386.

182. Jackson v. State, 628 S.W.2d 446, 451 (Tex. Crim. App. [Panel Op.] 1982).

183. *Willis*, 785 S.W.2d at 386.

184. Butler v. State, 640 S.W.2d 612, 613 (Tex. Crim. App. 1982); Hoffert v. State, 623 S.W.2d 141, 146 (Tex. Crim. App. 1981).

dence necessarily relies on hearsay,[185] it is not subject to a hearsay objection.[186]

A police officer is not disqualified to testify regarding a defendant's reputation simply because he has investigated the defendant's crimes in the past; if the witness has discussed the defendant's reputation with members of the community, he may testify about the defendant's reputation.[187] Testimony regarding "[d]iscussions with other police officers [is] sufficient to qualify a witness" to testify as to a defendant's reputation.[188] In at least one case, a court of appeals has held that attorneys from the district attorney's office could also be qualified to testify about a defendant's reputation.[189]

A witness's testimony about a defendant's reputation need not be based only on current observation and conversations with members of the community; the remoteness of the defendant's reputation goes to the weight of the testimony, not its admissibility.[190] Similarly, a defendant's reputation as a juvenile is admissible unless it is so remote that it has no probative value in determining the

185. Rutledge v. State, 749 S.W.2d 50, 53 (Tex. Crim. App. 1988) (en banc); *see also* Beecham v. State, 580 S.W.2d 588, 590 (Tex. Crim. App. [Panel Op.] 1979, no pet.) (stressing that reputation testimony is by necessity hearsay).

186. TEX. R. EVID. 803(21) (indicating that reputation evidence is an exception to the hearsay rule); *Beecham*, 580 S.W.2d at 590 (clarifying that the admissibility of testimony of a reputation witness is at the discretion of the trial court); Tejerina v. State, 786 S.W.2d 508, 514 (Tex. App.—Corpus Christi 1990, pet. ref'd) (noting that reputation evidence is not subject to a hearsay objection).

187. *See Willis*, 785 S.W.2d at 386 (holding that a reputation witness's testimony may not be based on personal knowledge, but rather must be based on conversations with individuals regarding the defendant's reputation, including members of the defendant's community); Logan v. State, 840 S.W.2d 490, 499 (Tex. App.—Tyler 1992, pet. ref'd) (adhering to the conclusion that the trial court did not err in admitting reputation evidence in the form of the sheriff's testimony, which was based on his prior dealings with the defendant *and* conversations with other people); Davis v. State, 840 S.W.2d 480, 486 (Tex. App.—Tyler 1992, pet. ref'd) (upholding the trial court's admission of the reputation witness's testimony of officers who testified based on conversations regarding the appellant).

188. Adanandus v. State, 866 S.W.2d 210, 226 (Tex. Crim. App. 1993) (citing Turner v. State, 805 S.W.2d 423, 429 (Tex. Crim. App. 1991)); *see also* House v. State, 909 S.W.2d 214, 218 (Tex. App.—Houston [14th Dist.] 1995) (noting that the reputation witness's testimony was based on discussions with police officers, law enforcement officers from other agencies, and confidential informants), *aff'd*, 947 S.W.2d 25 (Tex. Crim. App. 1997).

189. *House*, 909 S.W.2d at 218.

190. Anderson v. State, 717 S.W.2d 622, 633 (Tex. Crim. App. 1986) (en banc); Robles v. State, 830 S.W.2d 779, 783-84 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd).

defendant's present character.[191] "The fact that [a defendant] was a juvenile when his reputation became known to [a] witness won't affect the admissibility of that testimony."[192]

At common law, discussions of a defendant's reputation did not have to occur prior to the date of the alleged offense in order to be admissible, as long as the discussions included matters other than the crime for which the accused was on trial.[193] However, under Texas Rule of Evidence 405(a), a reputation witness must have knowledge of the defendant's reputation *before* the offense was committed.[194] The theoretical justification for the rule is that an accused's reputation may have been adversely affected by the community's discussion of the crime for which he is on trial, so that the defendant's post-crime reputation may not accurately reflect his character or be sufficiently probative to justify admission.[195]

The wholesale exclusion of reputation testimony based upon discussions of a defendant's reputation after the offense makes little sense in the context of punishment evidence. The concern of whether the accused's reputation has been "tainted" by the accusation for which he is on trial carries little weight after the accusation

---

191. *Robles*, 830 S.W.2d at 784.

192. Cooks v. State, 844 S.W.2d 697, 737 (Tex. Crim. App. 1993) (en banc) (quoting *Anderson*, 717 S.W.2d at 633); *see also* Nethery v. State, 692 S.W.2d 686, 705-06 (Tex. Crim. App. 1985) (en banc) (stating that the admissibility of the defendant's reputation as a juvenile was within the trial court's discretion).

193. Mitchell v. State, 524 S.W.2d 510, 513 (Tex. Crim. App. 1975); *see also* Martin v. State, 449 S.W.2d 257, 260 (Tex. Crim. App. 1970) (upholding the admissibility of reputation testimony regarding the defendant's past record when discussed after the date of the alleged offense).

194. TEX. R. EVID. 405(a); Wilson v. State, 857 S.W.2d 90, 96 (Tex. App.—Corpus Christi 1993, pet. ref'd); *see also* Macklin v. State, 861 S.W.2d 39, 41-42 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd) (holding that the trial court did not abuse its discretion in allowing character testimony of the accused based on knowledge of the accused's reputation prior to the date of the offense).

195. United States v. Lewis, 482 F.2d 632, 641 (D.C. Cir. 1973). At least one commentator has suggested, however, that the requirement was inserted into the rule to curb the once "common" practice of calling police officers and victims of the defendant's other crimes to testify as to the defendant's reputation, though the reputation testimony was in reality based upon their discussion of specific instances of conduct. *See generally* 1 STEVEN GOODE ET AL., TEXAS PRACTICE: GUIDE TO THE TEXAS RULES OF EVIDENCE § 405.2.3 (3d ed. 2002) (discussing the purposes behind the requirements of Rule 405(a)); *see also* Hernandez v. State, 800 S.W.2d 523, 525 (Tex. Crim. App. 1990) (en banc) (discussing that testimony of a deputy constable and justice of the peace did not constitute proper reputation or opinion testimony because it was based upon discussions of the defendant's prior bad acts, undertaken in their official capacities).

has been found to be true during the guilt-innocence portion of the proceeding. Logically, if the accusation has been found beyond a reasonable doubt to have occurred, discussions of a defendant's reputation that included a discussion of the offense are more probative of the accused's reputation and character, not less. Furthermore, the extent to which the current charge against the defendant may have affected discussions and perceptions of his reputation should bear on the weight, but not the admissibility, of the evidence.[196]

Yet, even if the courts were to relax the requirement of Rule 405(a), or not apply it at all in the punishment phase, reputation evidence with little or no foundation would not become automatically relevant. First, Section 3(a)(1) of Article 37.07 still requires that punishment evidence be "relevant."[197] Testimony based solely upon discussion about the defendant's commission of the crime for which he is being tried has little relevance to the jury's determination of punishment, and thus could be barred under Section 3(a). Moreover, such evidence could also be kept from the jury under Texas Rule of Evidence 403 on the basis that it is more prejudicial than probative.[198] Further, the opposing party should be afforded an opportunity to test the qualifications of a reputation witness outside the presence of the jury.[199] The failure to hold a hearing is not error per se, however,[200] and is subject to a harm analysis.[201]

---

196. *See* 1 STEVEN GOODE ET AL., TEXAS PRACTICE: GUIDE TO THE TEXAS RULES OF EVIDENCE § 405.2.3 (3d ed. 2002) (reasoning that "it is quite believable that an opinion witness might have formed his opinion subsequent to the offense without knowing of it or, if known to her [sic], based on other adequate information").

197. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1) (Vernon Supp. 2004) (stressing that "evidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing . . . his general reputation [as well as] an opinion regarding his character").

198. *See* Salazar v. State, 90 S.W.3d 330, 337-39 (Tex. Crim. App. 2002) (explaining that victim impact evidence that is arguably relevant under Article 37.07, Section 3(a) may nevertheless be barred under Rule 403).

199. Jones v. State, 641 S.W.2d 545, 552 (Tex. Crim. App. [Panel Op.] 1982); *see also* Rodriguez v. State, 919 S.W.2d 136, 141 (Tex. App.—San Antonio 1995, no pet.) (affirming that the defense counsel should have been allowed to examine the character witnesses' qualifications before they testified); Lopez v. State, 860 S.W.2d 938, 944 (Tex. App.—San Antonio 1993, no pet.) (finding that the trial court erred in not permitting opposing counsel the opportunity to test the reputation witness's qualifications outside of voir dire).

200. *See Rodriguez*, 919 S.W.2d at 141 (announcing that the trial court's failure to allow an inquiry into a reputation witness's qualifications constitutes error, although there

Once a reputation witness has testified about the defendant's reputation for a particular character trait, the adverse party may cross-examine a reputation witness using "relevant" specific acts of conduct in order to test the extent of the witness's knowledge of the accused's reputation.[202] The "relevant" specific acts upon which the witness's knowledge may be tested consist of "specific act[s] of misconduct inconsistent with the reputation to which" the witness has testified.[203] For example, where the prosecution's witness has testified that the murder victim had a reputation for being nonviolent and nonaggressive, the defendant could not impeach the witness by asking whether he had heard of the defendant's burglary convictions, unless the defendant could show that the burglaries involved violence.[204] Such a cross-examination might have been proper if the witness had testified that the decedent was peaceable *and law-abiding.*[205]

Cross-examination regarding specific acts of misconduct inconsistent with a defendant's purported reputation is not permissible of a witness whose testimony has not been proffered by the opposing party on the issue of reputation.[206] A party may not "convert"

---

is no bill of exception which would enable the appellate court to determine whether the witness was qualified or not).

201. *See Lopez*, 860 S.W.2d at 945-46 (discussing harmless error analysis in such cases as when the trial court disallows voir dire examination of a reputation witness prior to qualification of the witness).

202. TEX. R. EVID. 405(a); Wilson v. State, 71 S.W.3d 346, 350 (Tex. Crim. App. 2001); Evans v. State, 757 S.W.2d 759, 760 (Tex. Crim. App. 1988) (en banc); *see also* Nethery v. State, 692 S.W.2d 686, 707 (Tex. Crim. App. 1985) (en banc) (illustrating that the defense could cross-examine the State's witness about the defendant's involvement in church activities after the witness had testified about the defendant's "dangerous and violent" reputation).

203. *Evans*, 757 S.W.2d at 760 (quoting Hines v. State, 515 S.W.2d 670, 676 (Tex. Crim. App. 1974)).

204. Hill v. State, 748 S.W.2d 314, 315 (Tex. App.—Houston [1st Dist.] 1988, pet. ref'd).

205. *See id.* (holding that the trial court properly excluded testimony concerning burglary, while admitting the past crime of attempted murder); *see also* Martinez v. State, 17 S.W.3d 677, 687 (Tex. Crim. App. 2000) (en banc) (emphasizing testimony that the witness "took care of [his] family members is hardly evidence of a peaceable character"); Goff v. State, 931 S.W.2d 537, 552-53 (Tex. Crim. App. 1996) (en banc) (articulating that the victim's prior conviction for injury to a child and testimony of the victim's drug addiction were not relevant to impeach the witness's statement that the victim was a "good worker").

206. *See* Wheeler v. State, 67 S.W.3d 879, 883 (Tex. Crim. App. 2002) (en banc) (maintaining that a party "may not convert a . . . fact or expert witness into a character witness through its own cross-examination" and "then ask her questions concerning prior specific

a witness into a reputation witness by examining him on the issue and then attempt to impeach him regarding his knowledge about specific acts of conduct.[207] The actual technique of impeachment consists of asking the witness if he has "heard" of the defendant's specific acts of misconduct.[208] The cross-examining party must have some basis for a good faith belief that the event inquired of actually occurred,[209] or that rumors of the behavior actually had reached the community.[210]

The grounds for the cross-examining party's belief in the factual basis of his cross-examination may be tested in a hearing outside the presence of the jury.[211] A trial court does not err in failing to provide the defendant with a separate hearing where the basis for

---

instances inconsistent with the particular character trait"); Jewell v. State, 593 S.W.2d 314, 319-20 (Tex. Crim. App. [Panel Op.] 1978) (recognizing that a party is allowed to ask the reputation witness about specific acts of misconduct so long as the act is inconsistent with the particular character trait the witness previously testified about).

207. *See Wheeler*, 67 S.W.3d at 882-83 (stating that the defendant did not offer expert testimony to establish his good character, and thus the prosecution could not cross-examine the witness regarding his bad character traits); *see also* Baize v. State, 790 S.W.2d 63, 65-66 (Tex. App.—Houston [1st Dist.] 1990, pet. ref'd) (ruling that prosecution should not have "converted" the witness's testimony that the accused had a good reputation for truth and veracity into testimony that the defendant was a "good boy" in order to cross-examine the witness about specific acts of misconduct by the defendant).

208. *See* Michelson v. United States, 335 U.S. 469, 482 (1948) (explaining that "[s]ince the whole inquiry . . . is calculated to ascertain the general talk of people about [the] defendant, rather than the witness' own knowledge of him, the form of inquiry, 'Have you heard?' has general approval, and 'Do you know?' is not allowed"); Wilson v. State, 71 S.W.3d 346, 350 (Tex. Crim. App. 2001) (noting that reputation witnesses are usually asked "have you heard" questions, while opinion witnesses are generally asked "did you know" questions); Hoffert v. State, 623 S.W.2d 141, 147-48 (Tex. Crim. App. 1981) (expressing that the State may test the witness's credibility by asking "have you heard" questions); Murphy v. State, 4 S.W.3d 926, 932-33 (Tex. App.—Waco 1999, pet. ref'd) (noting that traditionally, reputation witnesses have been cross-examined using "have you heard" questions, but Rule 405 does not specifically require such wording); Bratcher v. State, 771 S.W.2d 175, 186-87 (Tex. App.—San Antonio 1989, no pet.) (indicating that "were you aware," as opposed to "have you heard" is proper).

209. Starvaggi v. State, 593 S.W.2d 323, 328 (Tex. Crim. App. 1979) (en banc); *Murphy*, 4 S.W.3d at 931; Quiroz v. State, 764 S.W.2d 395, 399 (Tex. App.—Fort Worth 1989, pet. ref'd).

210. Billingsley v. State, 473 S.W.2d 501, 502-03 (Tex. Crim. App. 1971) (noting that the prosecutor posed "have you heard" questions about contents of several letters the defendant had written to several individuals).

211. TEX. R. EVID. 104(c); Reynolds v. State, 848 S.W.2d 785, 788 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd); *Quiroz*, 764 S.W.2d at 399.

the "have you heard" question has already been adduced.[212] "Have you heard" questions must not be framed so as to imply that the act actually has been committed.[213] Nevertheless, a question may include both the date of the alleged act of misconduct and some of the details of the alleged act, such as the participants in and the nature of the misconduct.[214] Caution must be exerted when cross-examining using "have you heard" questions because the more detail that is introduced or the more the details resemble the offense for which the defendant is being tried, the greater the chance that the question will be used by the jury as an extraneous offense rather than as a test of the witness's credibility.[215]

Error in the improper phrasing of cross-examination is subject to being cured by instruction.[216] Error is also susceptible to a harm analysis.[217] Presumably, such error will be deemed harmless where evidence of the extraneous acts is introduced.[218]

Section 3(g) of Article 37.07 states that "[o]n timely request of the defendant," the State shall provide notice of intent to introduce

---

212. *See Reynolds*, 848 S.W.2d at 788-89 (indicating that the prosecution laid the factual basis for the inquiry during the guilt-innocence phase).

213. *Wilson*, 819 S.W.2d at 664; Sisson v. State, 561 S.W.2d 197, 199 (Tex. Crim. App. [Panel Op.] 1978); Rogers v. State, 725 S.W.2d 350, 358 (Tex. App.—Houston [1st Dist] 1987, no pet.).

214. *Compare* Hoffert v. State, 623 S.W.2d 141, 148 (Tex. Crim. App. 1981) (emphasizing that a question asking whether the witnesses had heard that the defendant sold 200 pounds of marijuana to a specific individual on a specific date was proper), *with Sisson*, 561 S.W.2d at 199 (explaining that the prosecutor injected an assertion of fact by using the words "did in fact"), *and* Moffett v. State, 555 S.W.2d 437, 439 (Tex. Crim. App. 1977) (noting that the prosecution improperly cross-examined a witness by phrasing the question so as to imply that the defendant actually committed a second armed robbery), *and Rogers*, 725 S.W.2d at 351-58 (indicating that counsel repeatedly framed questions as though the defendant, on trial for sexual abuse of his girlfriend's niece, was also abusing his girlfriend's daughters).

215. *See Billingsley*, 473 S.W.2d at 502-03 (holding that "have you heard" questions were improper when the State asked the witness about specific details regarding an unproduced letter containing inflammatory statements).

216. *See* Nethery v. State, 692 S.W.2d 686, 707 (Tex. Crim. App. 1985) (en banc) (holding that the instruction to disregard cured the error in the prosecutor's phrasing of the question as to whether it was "fact").

217. *See Wilson*, 819 S.W.2d at 665 (applying a harm analysis to determine that the error in question was harmless).

218. *Cf.* Goff v. State, 931 S.W.2d 537, 553 (Tex. Crim. App. 1996) (en banc) (holding that the error in admission of allegedly void prior convictions was harmless where victims testified during punishment and the defendant's confession was admitted into evidence).

evidence "under this article."[219] A broad reading of this provision suggests that, as at least one court has held, the State is required to provide notice of its intent to introduce reputation testimony during the punishment stage.[220] At least one court has rejected such an interpretation, however.[221] Because Rule 404(b) has been held by the Court of Criminal Appeals to be "inapposite" to character evidence, the court in *Hardaway v. State*[222] held that reputation evidence is not "within the purview of the section 3(g) notice requirement because the bulk of section 3(g) is cast in terms of extraneous offense evidence."[223] If the state is required to provide notice under Section 3(g), the prosecution's failure to provide sufficient notice is susceptible to a harmless error analysis under Rule 44.2 of the Rules of Appellate Procedure.[224]

C. *Testimony of a Witness's Opinion of the Defendant's Character*

A witness was not always allowed to testify as to his opinion of the defendant's character.[225] The Court of Criminal Appeals, however, eventually held that the legislature's specific reference to the introduction of evidence of the defendant's "character" in the precursor to the present Article 37.07 manifested its intent that opinion evidence of a defendant's character be admissible during punishment.[226] Furthermore, Rule 405 of the Rules of Evidence specifically provides for the admission of opinion evidence "in all cases in which evidence of a person's character . . . is admissi-

---

219. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(g) (Vernon Supp. 2003).

220. Rodgers v. State, 111 S.W.3d 236, 245 (Tex. App.—Texarkana 2003, no pet.) (indicating that the notice provision of Section 3(g) applies to reputation evidence).

221. *See* Hardaway v. State, 939 S.W.2d 224, 226 (Tex. App.—Amarillo 1997, no pet.) (noting that the Section 3(g) notice requirement does not apply to all evidence under Article 37.07).

222. 939 S.W.2d 224 (Tex. App.—Amarillo 1997, no pet.).

223. Hardaway v. State, 939 S.W.2d 224, 226 (Tex. App.—Amarillo 1997, no pet.); *cf.* Brown v. State, 54 S.W.3d 930, 932-33 (Tex. App.—Corpus Christi 2001, pet. ref'd) (noting that the notice requirement does not apply to victim impact evidence). *But see* Chimney v. State, 6 S.W.3d 681, 697 (Tex. App.—Waco 1999, pet. ref'd) (holding that the notice requirement applies to evidence of gang membership).

224. *See Rodgers*, 111 S.W3d at 245-48 (applying a harmless error analysis to Section 3(g)).

225. *See* Hedicke v. State, 779 S.W.2d 837, 840-41 (Tex. Crim. App. 1989) (en banc) (explaining the history of character and opinion testimony).

226. *Id.* at 842.

ble. . . ."[227] Finally, and most importantly, opinion evidence has been specifically enumerated as an admissible type of punishment evidence in the current version of Article 37.07, Section 3(a).[228]

Opinion evidence differs from reputation evidence principally in two ways: (1) the qualifications of the witness are, in some ways, less stringent, and (2) opinion witnesses should be cross-examined using "did you know" rather than "have you heard" questions. In order to be qualified as an opinion witness, a witness must be acquainted with the person on whose character he will opine, though, presumably, unlike a reputation witness, he need not have discussed the person's character with anyone.[229] Rule 405 further requires that the witness "have been familiar with . . . the underlying facts or information upon which the opinion is based, prior to the day of the offense," thereby excluding opinion testimony based solely upon the facts of the offense, which a jury could infer for itself.[230]

Rule 405(a) has the effect of barring potentially probative evidence of the defendant's character on the sole basis that the witness may have become familiar with the accused after the commission of the offense.[231] Since an opinion witness may not

---

227. TEX. R. EVID. 405(a).

228. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a) (Vernon 2003) (indicating that "evidence may be offered . . . as to any matter the court deems relevant to sentencing, including . . . an opinion regarding [the defendant's] character").

229. Hernandez v. State, 800 S.W.2d 523, 525 (Tex. Crim. App. 1990) (en banc) (illustrating that witnesses who had investigated complaints against the defendant, but who apparently were not acquainted with him personally, were not qualified to offer opinion of his character); Gass v. State, 785 S.W.2d 834, 839 (Tex. App.—Beaumont 1990, no pet.) (finding that a witness who had known the defendant fifteen years, and a second witness who had known defendant since he was six, were qualified to offer an opinion as to the accused's reputation).

230. TEX R. EVID. 405(a); *see also Hernandez*, 800 S.W.2d at 525 (holding that Rule 405 requires substantial familiarity with the accused's reputation); Hollingsworth v. State, 15 S.W.3d 586, 598 (Tex. App.—Austin 2000, no pet.) (holding that the assistant district attorney properly offered opinion testimony where evidence showed that the witness had become familiar with the defendant prior to the date of the offense while investigating two cases for Child Protective Services); Calderon v. State, 950 S.W.2d 121, 131-32 (Tex. App.—El Paso 1997, no pet.) (noting that a witness who knew the defendant for seven years while she resided in a small community qualified to offer opinion testimony); Ross v. State, 763 S.W.2d 897, 904 (Tex. App.—Dallas 1988, pet. ref'd) (holding that the witness was not competent to testify as to the defendant's reputation).

231. *See* TEX. R. EVID. 405(a) (stating that a "witness must have been familiar with [the defendant's] reputation . . . prior to the day of the offense"). *But see* Thompson v. State, 379 S.W.2d 664, 665-66 (Tex. Crim. App. 1964) (indicating that the defendant has the

have been aware of the offense at the time he formed his opinion of the defendant, logically, the better practice would be to permit the testimony, allow the opponent to test the basis for the opinion through cross-examination, and leave it to the fact-finder to weigh the value of the testimony. Moreover, the absolute bar upon a defendant's proffer of a good character witness on the basis that the witness formed his opinion after the date of the offense, where the witness may have formed his opinion apart from the offense itself, may implicate due process.[232]

A witness's inability to recall when he became familiar with the defendant's character will not render the evidence inadmissible if the party offering the evidence can establish the necessary predicate some other way.[233] Opinion evidence may be based upon the witness's encounters with the accused through criminal episodes other than that at issue in the trial.[234] Under the *Grunsfeld* version of the statute, it was impermissible to elicit details of a witness's encounter with the defendant sufficient to suggest the commission of a separate offense, particularly where the offense is similar to that for which he is on trial.[235] Under the current version of the statute, evidence of an extraneous offense is admissible during

---

right to proffer evidence of good character, absent stipulation by the prosecution); Quiroz v. State, 764 S.W.2d 395, 398-99 (Tex. App.—Ft. Worth 1989, pet. ref'd) (noting that the witness became the defendant's employer three months after the offense).

232. *See* Green v. State, 700 S.W.2d 760, 761 (Tex. App.—Houston [14th Dist.] 1985) (explaining that the defendant has a constitutional right to offer good character witnesses unless the prosecution stipulates to his good reputation), *aff'd*, 727 S.W.2d 272 (Tex. Crim. App. 1987) (en banc); 1 STEVEN GOODE ET AL., TEXAS PRACTICE: GUIDE TO THE TEXAS RULES OF EVIDENCE § 405.2.3 (3d ed. 2002) (analyzing the requirements for the qualification of character witnesses).

233. *See* Macklin v. State, 861 S.W.2d 39, 41-42 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd) (suggesting that the witness could not recall when he had been robbed by the defendant, but the police report established that it was sometime before the offense on trial).

234. *See* Monroe v. State, 864 S.W.2d 140, 143-44 (Tex. App.—Texarkana 1993, pet. ref'd) (justifying the use of opinions gleaned from working with the defendant on certain duties); *Macklin*, 861 S.W.2d at 41 (allowing the testimony of a co-worker who was unsure of the alleged robbery date); Munoz v. State, 803 S.W.2d 755, 756 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd) (recognizing the propriety of five witnesses who testified to the defendant's lack of peaceful and law abiding character).

235. *See Monroe*, 864 S.W.2d at 144 (holding that during the punishment stage of trial for the offense of aggravated robbery of a convenience store, the prosecution called seven witnesses—all convenience store clerks—and made improper specific inquiries about the time, place, and employment of the witnesses when they encountered the defendant and formed an opinion as to his character).

punishment, so that it may no longer be improper to elicit details of an opinion witness's encounter with the accused.[236]

A witness is not limited to merely expressing his opinion about the defendant's general character; he may also express an opinion regarding specific, relevant character traits.[237] Opinion evidence admissible at punishment is not limited to testimony of the defendant's bad character or character traits, and the refusal to allow a defendant to adduce favorable opinion evidence that is otherwise admissible constitutes reversible error.[238]

Like reputation witnesses, opinion witnesses may be cross-examined on their awareness of relevant specific instances of conduct in order to test the scope and accuracy of the witness's familiarity with the accused.[239] The only limitations on such cross-examination, like the cross-examination of reputation witnesses, is that: (1) there must be some factual basis for the incidents inquired about, and (2) the incidents must be relevant to the character traits to which the witness has testified.[240]

The form of cross-examination of an opinion witness differs from the form of the cross-examination of a reputation witness. Since an opinion witness testifies from his knowledge of the accused, and

---

236. *Cf.* Goff v. State, 931 S.W.2d 537, 553 (Tex. Crim. App. 1996) (en banc) (determining that the purported error in admission of a void conviction was harmless where underlying facts of prior offenses were proffered at trial as well).

237. *Compare Monroe*, 864 S.W.2d at 143 (stating that the witness testified that the accused was "violent," not simply that he was not "peaceable and law-abiding"), *with* Martinez v. State, 17 S.W.3d 677, 687 (Tex. Crim. App. 2000) (en banc) (commenting that testimony that the witness took care of his family was "hardly" evidence of a peace-loving character).

238. Green v. State, 700 S.W.2d 760, 761 (Tex. App.—Houston [14th Dist.] 1985), *aff'd*, 727 S.W.2d 272 (Tex. Crim. App. 1987) (en banc).

239. *See* Wilson v. State, 71 S.W.3d 346, 350 (Tex. Crim. App. 2002) (noting that "did you know" questions may be used to test the witness's knowledge); Hedicke v. State, 779 S.W.2d 837, 842 (Tex. Crim. App. 1989) (en banc) (proclaiming that opinion witnesses may be impeached with specific instances of conduct of the person whose character is being attacked); Drone v. State, 906 S.W.2d 608, 616 (Tex. App.—Austin 1995, pet. ref'd) (allowing that "[a] witness who testifies to the defendant's good character may be cross-examined regarding relevant specific misconduct by the defendant"); Auston v. State, 892 S.W.2d 141, 144-45 (Tex. App.—Houston [14th Dist.] 1994, no pet.) (showing that the defendant's attorney opened the door for "did you know" questions that alluded to specific acts by defendant).

240. *See Drone*, 906 S.W.2d at 616 (asserting that cross-examination concerning prior convictions was relevant to discredit the witness); Reynolds v. State, 848 S.W.2d 785, 788 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd) (defining the two limitations on the right to cross-examine with specific instances of conduct).

not upon his knowledge of the community's discussions about the defendant, an opinion witness has traditionally been barred from being cross-examined on the basis of "have you heard" questions. What the witness may or may not have heard about the defendant should not, in theory, affect his personal views of the accused's character.[241] In contrast, what a reputation witness has or has not heard about the defendant may call into question the accuracy of the witness's characterization of the defendant's reputation.[242] But an opinion witness's assessment of the defendant's character is subject to testing on the basis that the witness is not very familiar with the defendant's character or that his evaluation of the defendant is based upon unusual criteria; the witness is thus subject to cross-examination regarding his knowledge of specific acts of conduct using "do you know" questions.[243]

Some commentators have argued that the distinction between the forms of cross-examination are sufficiently significant that it

---

241. *See* 1 STEVEN GOODE ET AL., TEXAS PRACTICE: GUIDE TO THE TEXAS RULES OF EVIDENCE § 405.2.4, at 277-78 (3d ed. 2002) (stating that "the opinion witness claims to testify from personal knowledge of the subject" and that "[h]er personal views of the subject's character are presumably unaffected by rumors concerning the subject's character; certainly if she has not heard such discussions"); Newell H. Blakely & Cathleen C. Herasimchuk, *Article IV: Relevancy and Its Limits*, 30 HOUS. L. REV. 281, 355-56 (1993) (discussing character witnesses). Herasimchuk writes that

> if a witness . . . does not know about these specific hair-raising acts, then the inference is that the witness does not know the other person very well and thus his testimony should be discounted. Conversely, if the witness . . . does know about these acts, then the inference is that the witness is a "Pollyanna" and would probably testify to the good character of the devil himself.

Id.

242. *See* Rutledge v. State, 749 S.W.2d 50, 53-54 (Tex. Crim. App. 1988) (en banc) (stating that the lack of familiarity with hearsay about the defendant's reputation may be used to impeach a reputation witness); Ward v. State, 591 S.W.2d 810, 817-18 (Tex. Crim. App. 1978) (en banc) (asserting that the accuracy of the reputation may affect the weight of the testimony); Murphy v. State, 4 S.W.3d 926, 932 (Tex. App.—Waco 1999, pet. ref'd) (comparing the treatment of a witness who testifies to reputation to one who testifies concerning personal opinion).

243. *See Wilson*, 71 S.W.3d at 350 (recognizing that cross-examination is used to test the reputation witness's awareness of the defendant's conduct); *Murphy*, 4 S.W.3d at 932-33 (reiterating the allowable use of cross-examination on specific instances of conduct); *Drone*, 906 S.W.2d at 616 n.6 (admitting that the witness should have been questioned about knowledge rather than rumor); *Auston*, 892 S.W.2d at 144 (allowing "did you know" questions in response to the witness's testimony of the defendant's peacefulness); *Reynolds*, 848 S.W.2d at 788 (pointing out that personal opinions of the witness are attacked with "did you know" questions).

should continue to be recognized by the courts.[244] The drafters of Federal Rule of Evidence 405, which is essentially the same as Texas Rule of Evidence 405, have opined that the difference has "slight if any practical significance."[245] Since the amendment of Rule 405 in 1990, Texas courts have not evinced much concern over arguably misphrased cross-examinations.[246]

D. *Circumstances of the Offense and Offender*

Evidence adduced at the guilt-innocence phase is "automatically" before the jury on punishment, regardless of whether it is formally re-offered by the State.[247] The fact-finder is entitled to consider at punishment all of the evidence before it from the guilt-innocence phase in determining the appropriate sentence, regardless of whether it was formally re-introduced at punishment.[248] Thus, the immediate circumstances of the offense are always before the fact-finder in the punishment phase, and are highly probative of the sentence to be assessed.[249]

---

244. *See* 1 STEVEN GOODE ET AL., TEXAS PRACTICE: GUIDE TO THE TEXAS RULES OF EVIDENCE § 405.2.4, at 277-78 (3d ed. 2002) (disagreeing that the difference between the two types of questions is insignificant). *But see* Newell H. Blakely & Cathleen C. Herasimchuk, *Article IV: Relevancy and Its Limits*, 30 HOUS. L. REV. 281, 354-55 (1993) (characterizing the insistence upon differing modes of cross-examination as an "artificial distinction").

245. FED. R. EVID. 405 advisory committee's note; *see also Murphy*, 4 S.W.3d at 933 (quoting the advisory committee). *But see* 22 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 5268, at 627 (1986) (terming the advisory committee note as "mistaken or disingenuous").

246. *Compare Murphy*, 4 S.W.3d at 933 (noting that though "imprecise language was used," it was clear that the prosecutor was testing the witness's personal knowledge, and not awareness of the defendant's reputation), *and Drone*, 906 S.W.2d at 616 n.6 (noting in passing that cross-examination should "arguably" have been phrased as "do you know" rather than "have you heard"), *with* Rutledge v. State, 749 S.W.2d 50, 53 (Tex. Crim. App. 1988) (en banc) (holding that cross-examination of an opinion witness with a "have you heard" question was reversible error).

247. *See* Trevino v. State, 100 S.W.3d 232, 235 (Tex. Crim. App. 2003) (en banc) (contending that evidence heard at trial will be considered by the jury); Wright v. State, 468 S.W.2d 422, 425 (Tex. Crim. App. 1971) (finding no error in the prosecution's failure to re-admit evidence).

248. *See Trevino*, 100 S.W.2d at 235 (exploring all evidence admitted at trial); Buchanan v. State, 911 S.W.2d 11, 13 (Tex. Crim. App. 1995) (en banc) (finding no requirement to re-introduce evidence at the punishment phase).

249. *See* Murphy v. State, 777 S.W.2d 44, 63 (Tex. Crim. App. 1988) (en banc) (determining that circumstances of the offense were "highly relevant" to sentencing).

What additional evidence may be adduced at punishment is more of an open question. The Court of Criminal Appeals has observed that "[d]eciding what punishment to assess is a normative process, not intrinsically fact bound."[250] The admissibility of evidence at the punishment phase of a non-capital felony offense is thus "a function of policy rather than a question of logical relevance,"[251] because "by and large there are no discreet [sic] factual issues at the punishment stage," and hence, "[t]here are simply no distinct 'facts . . . of consequence' that proffered evidence can be said to make more or less likely to exist."[252] "Because the material issue at punishment is so indistinct, relevancy of proffered evidence cannot be determined by deductive processes."[253] The definition of "relevant" within the Rules of Evidence is therefore "not a perfect fit in the punishment context."[254]

The Court of Criminal Appeals has concluded that "[c]alling circumstances of the offense and the offender 'relevant' is really no more than to say we deem that information appropriate for the factfinder to consider in exercise of its unfettered discretion to assess whatever punishment within the prescribed range it sees fit."[255] "Determining what is relevant then should be a question of what is helpful to the jury in determining the appropriate sentence for a particular defendant in a particular case."[256]

Because the determination of what is "relevant" during the punishment phase is as much a policy determination as that of a normative assessment of what evidence may establish the "material issue" of punishment,[257] "the circumstances of the offense itself or . . . the defendant himself" were admissible at the punishment stage of a non-capital trial as a matter of public policy even before

250. Sunbury v. State, 88 S.W.3d 229, 233 (Tex. Crim. App. 2002) (quoting *Murphy*, 777 S.W.2d at 63).

251. *Sunbury*, 88 S.W.3d at 233.

252. Miller-El v. State, 782 S.W.2d 892, 895-96 (Tex. Crim. App. 1990) (en banc) (quoting Texas Rule of Evidence 401).

253. *Sunbury*, 88 S.W.3d at 233 (quoting *Murphy*, 777 S.W.2d at 63).

254. Rogers v. State, 991 S.W.2d 263, 265 (Tex. Crim. App. 1999) (en banc); *see also* Mendiola v. State, 21 S.W.3d 282, 285 (Tex. Crim. App. 2000) (declaring that "the Rule 401 definition of 'relevant' is not a 'perfect fit' in the sentencing context").

255. Murphy v. State, 777 S.W.2d 44, 63 (Tex. Crim. App. 1988) (en banc).

256. *Rogers*, 991 S.W.2d at 265.

257. *See* Hoffert v. State, 623 S.W.2d 141, 145 (Tex. Crim. App. [Panel Op.] 1981) (stating that the circumstances surrounding the offense are material).

the legislature expanded Article 37.07.[258] Evidence of the circumstances of the offense or of the offender fall into three broad categories: mitigating evidence, evidence of the circumstances of the offender, and victim impact evidence.

1. Mitigating Evidence

Traditionally, facts admissible to mitigate punishment must have had a common relationship to the circumstances of the offense itself, or to the defendant himself, *before or at the time of* the offense; factors which arose *after* the offense and independently of the defendant were not admissible to mitigate punishment.[259] Under this rule, for example, evidence of the conditions under which the defendant had been confined before trial were not admissible in mitigation of sentence,[260] nor was evidence that the defendant "risked his safety while incarcerated" to inform authorities that drugs were being smuggled into the jail where he was held.[261] However, many courts have taken a far broader view of what the term "mitigating evidence" may encompass, and thus have created some confusion in the process.[262] Compounding the problem is the fact that the phrase "mitigating evidence" has become something of a term of art in the context of capital murder litigation.[263]

The difference between the use of the phrase "mitigating evidence" under *Stiehl v. State*[264] and under *Skipper v. South Carolina*[265] is easily reconcilable. The word "mitigating" is used in

258. *See Murphy*, 777 S.W.2d at 63 (quoting Stiehl v. State, 585 S.W.2d 716, 718 (Tex. Crim. App. 1979)). *Compare Sunbury*, 88 S.W.3d at 233 (providing that any relevant evidence may be presented by the State or the defendant in regard to sentencing), *with* Stavinoha v. State, 808 S.W.2d 76, 79 (Tex. Crim. App. 1991) (en banc) (holding that victim impact evidence is admissible during punishment).

259. Goudeau v. State, 788 S.W.2d 431, 435-36 (Tex. App.—Houston [1st Dist.] 1990, no pet.); *see also* Stiehl v. State, 585 S.W.2d 716, 718 (Tex. Crim. App. [Panel Op.] 1979) (indicating that factors which arise after the offense should not be allowed at the punishment phase).

260. *Stiehl*, 585 S.W.2d at 718.

261. *Goudeau*, 788 S.W.2d at 435.

262. *See* Skipper v. South Carolina, 476 U.S. 1, 7 (1986) (stating that evidence that the defendant was a well-behaved and disciplined prisoner while awaiting trial constituted admissible relevant mitigating evidence).

263. *See* Goss v. State, 826 S.W.2d 162, 165 (Tex. Crim. App. 1992) (en banc) (defining "mitigating evidence" as evidence that tends "to excuse or explain the criminal act, so as to make that particular defendant not deserving of death").

264. 585 S.W.2d 716 (Tex. Crim. App. [Panel Op.] 1979).

265. 476 U.S. 2 (1986).

Stiehl and its progeny only in the narrow sense of "extenuating"—that is, evidence of extenuating circumstances surrounding the offense or the offender constitutes "mitigating evidence."[266] In this context, the temporal limitation on relevant "mitigating" evidence is logical—almost by definition, "extenuating circumstances" can only be those that arose "before or at the time of" the offense.[267] In contrast, the word in *Skipper* connotes evidence of any "feature of the defendant's character that is highly relevant to" a jury's exercise of mercy or restraint.[268] This would encompass evidence which may have arisen well after the crime, but which nevertheless might give the sentencer insight into the defendant's character or circumstances.[269]

Though the applicability of *Skipper*, a death penalty case, to non-capital trials can be questioned,[270] the current scope of admissible "mitigating evidence" under Article 37.07 encompasses both *Skipper* and *Stiehl*. That is, since the admissibility of evidence at the punishment phase "is a function of policy rather than relevancy," so that "determining what is relevant . . . should be a question of what is helpful to the jury in determining the appropriate sentence in a particular case,"[271] both evidence that is "extenuating" or that may prove probative of any aspect of the defendant's character that might prompt mercy, constitute "mitigating evidence."[272] Put

---

266. *See* Stiehl v. State, 585 S.W.2d 716, 718 (Tex. Crim. App. [Panel Op.] 1979) (explaining that factors that may be admitted in mitigation are those that "have in common a relationship to the circumstances of the offense itself or to the defendant himself before or at the time of the offense"). The court disagreed with the appellant's contention that evidence of jail conditions should be introduced in mitigation, stating that "factors that can be introduced in mitigation are either statutory, . . . or are judicially created. . . ." *Id.*

267. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 746 (10th ed. 1993).

268. Skipper v. South Carolina, 476 U.S. 1, 7 n.2 (1986).

269. *Cf.* Wilson v. State, 810 S.W.2d 807, 811 (Tex. App.—Houston [1st Dist.] 1991, no pet.) (commenting that evidence of the defendant's misbehavior while in prison between the first and second trial is admissible to "throw new light upon [defendant's] 'life, health, habits, conduct, and mental and moral propensities'" (quoting North Carolina v. Pearce, 395 U.S. 711, 723 (1969))).

270. *See* Goudeau v. State, 788 S.W.2d 431, 435 (Tex. App.—Houston [1st Dist.] 1990, no pet.) (discussing the rules of admissible evidence in capital cases).

271. Mendiola v. State, 21 S.W.3d 282, 285 (Tex. Crim. App. 2000) (quoting Rogers v. State, 991 S.W.2d 263, 265 (Tex. Crim. App. 1999) (en banc)).

272. *See* Contreras v. State, 59 S.W.3d 362, 365 (Tex. App.—Dallas 2001, no pet.) (disapproving cases that have held that mitigating circumstances arising after the offense are inadmissible at punishment). *But see* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a) (Vernon Supp. 2003) (indicating that in order to be admissible at the punishment phase of

another way, if the focus of the punishment phase of the trial is, as the Court of Criminal Appeals has suggested, to assess "the personal responsibility and moral guilt" of the defendant for the crime of which he has been convicted, in order to determine the appropriate punishment,[273] then "mitigating evidence" is that evidence "which tends to reduce a defendant's moral blameworthiness."[274]

At least in one sense, however, *Stiehl* and its progeny still control. Mitigating evidence must still "have a common relationship to the circumstances of the offense itself, or to the defendant himself" in order to be admissible.[275] There must be a nexus between the proffered evidence and mitigation of the defendant's punishment before the evidence may be deemed admissible as mitigating evidence.[276] For example, testimony that the defendant's wife, the victim of his assault, had become pregnant by another man after the offense had occurred did not mitigate his blameworthiness for the assault.[277] Similarly, evidence that the victim of a sexual assault had also been assaulted by others would not have a common relationship to the offense or to the defendant himself that might mitigate the defendant's moral guilt, and thus warrant its admission into evidence.[278] Finally, testimony that the case against the defendant's co-defendant had been dismissed did not have a common relationship to the offense or the defendant, since that event arose "after the offense and independently of" the defendant.[279]

---

a trial, all that is required is that the trial judge find the evidence relevant); Montoya v. State, 65 S.W.3d 111, 115 (Tex. App.—Amarillo 2000, no pet.) (stating that dismissal of a co-defendant's case is inadmissible at punishment since it occurred after the offense).

273. Stavinoha v. State, 808 S.W.2d 76, 79 (Tex. Crim. App. 1991) (en banc).

274. Draheim v. State, 916 S.W.2d 593, 600 (Tex. App.—San Antonio 1996, pet. ref'd).

275. *Goudeau*, 788 S.W.2d at 435-36.

276. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a) (Vernon Supp. 2003) (stating that the only requirement for punishment evidence is that it be relevant); *Draheim*, 916 S.W.2d at 600 (indicating that evidence "which tends to reduce a defendant's moral blameworthiness . . . may be received as mitigating evidence").

277. *Contreras*, 59 S.W.3d at 364-65.

278. *See Draheim*, 916 S.W.2d at 600 (stating that evidence of abuse by persons other than the defendant is not relevant).

279. Montoya v. State, 65 S.W.3d 111, 115 (Tex. App.—Amarillo 2000, no pet.); *see also* Hughes v. State, 850 S.W.2d 260, 263-64 (Tex. App.—Fort Worth 1993, pet. ref'd) (expressing that evidence that the victim accused others of sexually assaulting her was relevant to the issue of the extent of the defendant's responsibility for psychological injury to the victim only if the accusations were true).

Thus, "mitigating evidence" is not synonymous with "evidence favorable to the defendant." Exonerating evidence or evidence supporting an affirmative defense, for example, is not admissible at the penalty phase as mitigating evidence if it was not offered at guilt-innocence, because it is not relevant to the jury's assessment of punishment.[280]

2. Evidence of the Circumstances of the Offender

Evidence of character is not limited to the defendant's prior criminal history, his reputation, opinion about the defendant's character, or extenuating circumstances surrounding the crime.[281] Other circumstances, "such as [a defendant's] family background, religious affiliation, education, employment history and the like, are appropriate considerations in [the] assessment of punishment."[282]

In order to be relevant and admissible, however, it is not sufficient that evidence simply relate to the defendant's character.[283] The fact-finder must have enough information to make an "informed decision" of the defendant's character based upon a "fair evaluation" of how the evidence may reflect upon the character of the accused.[284] For example, evidence of gang affiliation alone is not "enough for the jury to make an informed decision" regarding the defendant's character.[285] "It is essential for the jury to know the types of activities the gang generally engages in so that they can

280. Nixon v. State, 572 S.W.2d 699, 701 (Tex. Crim. App. [Panel Op.] 1978); Williamson v. State, 990 S.W.2d 404, 406 (Tex. App.—Dallas 1999, no pet.); Bisby v. State, 907 S.W.2d 949, 960 (Tex. App.—Fort Worth 1995, pet. ref'd). Such evidence, if admitted during guilt-innocence, however, may be considered by the jury during punishment. *See* Pena v. State, 867 S.W.2d 97, 100 (Tex. App.—Corpus Christi 1993, pet. ref'd) (noting that the fact-finder is entitled to consider at punishment all of the evidence before it from the guilt-innocence phase).

281. *See* Murphy v. State, 777 S.W.2d 44, 64 (Tex. Crim. App. 1988) (en banc) (indicating the scope of admissible evidence at the punishment phase).

282. *Id.*; Miller v. State, 442 S.W.2d 340, 348-49 (Tex. Crim. App. 1969); Coleman v. State, 442 S.W.2d 338, 340 (Tex. Crim. App. 1969).

283. Beasley v. State, 902 S.W.2d 452, 456 (Tex. Crim. App. 1995) (en banc).

284. *Id.*; *see also* Tezeno v. State, 484 S.W.2d 374, 380 (Tex. Crim. App. 1972) (noting that the defendant's apparent failure to demonstrate how "evidence concerning the sociological, economic, political, and overall conditions of his neighborhood" reflected upon his own character rendered such evidence irrelevant and inadmissible).

285. *Beasley*, 902 S.W.2d at 456.

determine if his gang membership is a positive or negative aspect of his character, and subsequently his character as a whole."[286]

Nevertheless, the introduction of evidence of a defendant's membership in a group has constitutional implications. The introduction of evidence of a defendant's membership in an organization, which proves "nothing more than [the defendant's] abstract beliefs," violates the First Amendment.[287] The prosecution must therefore prove the group's violent and illegal activities before such "bad character evidence" may be admitted.[288] In order to properly place evidence of gang membership in context, however, it is unnecessary to directly

> link the accused to the bad acts or misconduct generally engaged in by gang members, so long as the jury is 1) provided with evidence of the defendant's gang membership, 2) provided with evidence of the character and reputation of the gang, 3) not required to determine if the defendant committed the bad acts or misconduct [attributed to the gang] and 4) only asked to consider [the evidence of gang affiliation in relation to the] reputation or character of the accused.[289]

Other circumstances of the offender presumably must also be placed in sufficient context that the fact-finder may make informed decisions regarding whether the circumstances are positive or negative, so that it may further make a fair evaluation of how and to what degree the evidence reflects on the defendant's character.[290] Some evidence will be so obviously negative or positive, or the context to make the necessary conclusion so apparent, that additional evidence will be unnecessary.[291] Other evidence will require

---

286. *Id.*; Anderson v. State, 901 S.W.2d 946, 950 (Tex. Crim. App. 1995) (en banc).

287. Dawson v. Delaware, 503 U.S. 159, 167 (1992).

288. *See id.* at 167-68 (determining that introducing evidence that the defendant was a member of the Aryan Brotherhood, without more, violated the defendant's First Amendment rights); Shelton v. State, 41 S.W.3d 208, 217-18 (Tex. App.—Austin 2001, pet. ref'd) (stating that admission of evidence that the defendant was a member of the KKK, without evidence that the group committed unlawful or violent acts or had endorsed such acts, was unconstitutional).

289. *See Beasley*, 902 S.W.2d at 457 (listing the four elements necessary to admit evidence of gang membership); Aguilar v. State, 29 S.W.2d 268, 270 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (applying the elements listed in *Beasley*).

290. *See Beasley*, 902 S.W.2d at 456 (describing how other evidence is admissible if it will aid the jury in making informed decisions).

291. *See id.* at 462 (Clinton, J., concurring) (stating that evidence of the "purpose, function, and general activities" of recognized religious denominations is unnecessary be-

additional testimony in order to make it "enough" for an "informed decision."[292]

It is unclear whether the opposing party may test evidence of the circumstance of the offender and, if necessary, any contextual evidence, in a hearing outside the presence of the jury before it is admitted into evidence. Since the requisite context appears to be a procedural issue of conditional relevancy,[293] it would seem that it is not essential for the supporting evidence to precede the admission of the specific circumstance.[294] Nevertheless, given the constitutional implications involved,[295] it might be the better practice to conduct the hearing outside the jury's presence if there is a question about whether the prosecution will be able to adduce the necessary proof.[296]

If, after all proof on the issue has been received, the fact-finder cannot rationally determine whether the circumstance is positive or negative, or cannot rationally evaluate how the circumstance reflects on the accused, a motion to strike should be granted, and the evidence should be withdrawn from the jury's consideration.[297]

---

cause "in general parameters at least, those are commonly known and do not require evidentiary elaboration").

292. *Id.* at 456.

293. *Cf.* Howard v. State, 896 S.W.2d 401, 405-06 (Tex. App.—Amarillo 1995, writ ref'd) (stating that whether a prior conviction can be linked to the defendant is an issue of conditional relevancy).

294. *Cf.* TEX. R. EVID. 104(b) (stating that when relevancy depends on a condition of fact being fulfilled, the court will admit it "upon, or subject to" introduction of evidence that is sufficient to support a finding that the condition is fulfilled); Beck v. State, 719 S.W.2d 205, 210 (Tex. Crim. App. 1986) (en banc) (arguing that pen packets are not inadmissable simply because evidence linking them to the defendant had not yet been offered).

295. *See* Dawson v. Delaware, 503 U.S. 159, 165-66 (1992) (stating that First Amendment protections are implicated when testimony of membership in a particular group is used to demonstrate character); Shelton v. State, 41 S.W.3d 208, 214 (Tex. App.—Austin 2001, no pet.) (concluding that the admission of evidence providing only abstract beliefs violated the First Amendment).

296. *See* TEX. R. EVID. 104(c) (stating that "a hearing on the admissibility of a confession shall be conducted out of the hearing of the jury").

297. *Cf.* Rosales v. State, 867 S.W.2d 70, 73 (Tex. App.—El Paso 1993, no writ) (noting that if the prosecution fails to sufficiently link the prior conviction to the defendant, then the court should strike the evidence upon the defendant's motion).

Failure to object and, if necessary, to move to strike, waives the error in admitting the evidence.[298]

3. Victim Impact and Victim Character Evidence

Evidence of the impact of the crime upon the victim is actually not a separate category of admissible punishment evidence, and is not specifically enumerated as such under Article 37.07.[299] Nevertheless, such evidence is admissible during punishment as a circumstance of the offense.

In *Miller-El v. State*,[300] the Court of Criminal Appeals opined that it is "clear" that one relevant circumstance of an offense is the "degree of injury," or as the court phrased it, "the full extent of the damage done" to the victim, "even extending into the future," "so long as a factfinder may rationally attribute moral culpability to the accused for that injury."[301] The court then held that the victim's paralysis from a gun shot received in the robbery made the accused more "blameworthy," since she either "intended or should have anticipated" the victim's death, and evidence of the injury was properly admitted during punishment.[302]

The court later expanded its analysis. In *Stavinoha v. State*,[303] the prosecution adduced evidence of the "mental trauma" experienced by both the child victim of the defendant's sexual attack and the trauma suffered by the victim's mother.[304] In affirming the trial court's admission of the testimony, the Court of Criminal Appeals observed that "a jury could rationally hold [the defendant] morally accountable for the psychological trauma to both complainant and his mother, and for the consequences of that trauma."[305] Evidence of the psychological damage inflicted upon the victim and his family by the defendant's betrayal of their trust—damage which, the court asserted, the defendant, a priest, "could have easily antici-

298. *Howard*, 896 S.W.2d at 406; *see also* Hill v. State, 633 S.W.2d 520, 525 (Tex. Crim. App. [Panel Op.] 1981) (stating that a timely lodged objection can determine whether a conviction was properly obtained and admissible).

299. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a) (Vernon Supp. 2004) (providing no mention of victim impact evidence as a separate category).

300. 782 S.W.2d 892 (Tex. Crim. App. 1995) (en banc).

301. Miller-El v. State, 782 S.W.2d 892, 896-97 (Tex. Crim. App. 1995) (en banc).

302. *Id.* at 897.

303. 808 S.W.2d 76 (Tex. Crim. App. 1991) (en banc).

304. Stavinoha v. State, 808 S.W.2d 76, 77 (Tex. Crim. App. 1992) (en banc).

305. *Id.* at 79.

pated . . . had a bearing," the court insisted, on the defendant's "personal responsibility and his moral guilt," and was thus admissible at the punishment phase of the trial.[306]

With *Miller-El* and *Stavinoha*, then, the court created a two part test for the admissibility of evidence of the effect of a crime upon the victim: (1) there must be a nexus between the evidence and the defendant's personal responsibility and moral guilt, and (2) there must be an element of foreseeability in the suffering of the victim.[307]

Both the United States Supreme Court and the Texas Court of Criminal Appeals have held that the introduction of victim impact testimony does not per se offend due process principles.[308] In

306. *Id.*

307. *Id.*; *see also* McDuff v. State, 939 S.W.2d 607, 620 (Tex. Crim. App. 1997) (en banc) (arguing that testimony that the deceased's sister suffered from a fear of going out and anguish over failure to find the deceased's remains were "legitimate factor[s]" in assessing the defendant's moral capability and were "certainly foreseeable"); Richardson v. State, 83 S.W.3d 332, 361 (Tex. App.—Corpus Christi 2002, pet. ref'd) (ruling that where a husband murdered his wife, testimony concerning the effect of the murder on their children was admissible victim impact evidence); Boone v. State, 60 S.W.3d 231, 238 n.3 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd) (stating that testimony by close family members of the deceased victim had a bearing on the defendant's culpability and the effect of the crime was foreseeable); Moreno v. State, 38 S.W.3d 774, 777-78 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (ruling that testimony that the victim's uncle committed suicide as a result of the victim's murder was properly admitted because the defendant "could easily have anticipated the psychological impact of his crime on members of the deceased's extended family"); Brooks v. State, 961 S.W.2d 396, 371-401 (Tex. App.—Houston [1st Dist.] 1997, no pet.) (finding that introducing evidence that the murder victim's sister was suffering from stress and was diagnosed as being on the verge of a nervous breakdown was properly admitted during punishment); Napier v. State, 887 S.W.2d 265, 266 (Tex. App.—Beaumont 1994, no pet.) (stating that the victim's symptoms of sexual abuse were admissible during punishment, "[a]s the sentencing jury was entitled to know the probable, long-term psychological effects . . . for which the [defendant] was blameworthy"); Brown v. State, 875 S.W.2d 38, 39-40 (Tex. App.—Austin 1994, no pet.) (declaring that the symptoms of a victim of attempted assault were admissible as the jury could "rationally attribute moral culpability to the accused for that injury" and the victim's psychological trauma" was "the understandable and fully predictable result" of appellant's actions); Peoples v. State, 874 S.W.2d 804, 807 (Tex. App.—Fort Worth 1994, pet. ref'd) (seeing that the defendant "could easily have anticipated the anguish of" the victim's mother as she saw her son die, and that the evidence had "a bearing" on the defendant's personal responsibility); Murray v. State, 804 S.W.2d 279, 285-86 (Tex. App.—Fort Worth 1991, pet. ref'd) (noting that the defendant either intended or should have anticipated post-assault effects of sexual assault such as medical treatment, disruption of victim's personal career, and emotional and physical scars from attack, and "was blameworthy" as a result).

308. *See* Payne v. Tennessee, 501 U.S. 808, 827 (1991) (stating that the Eighth Amendment erects no per se bar against the admissibility of victim impact evidence); Tong v.

Payne v. Tennessee,[309] the defendant adduced testimony of his good character and his low I.Q. during the punishment phase of his trial.[310] In response, the State proffered evidence of the pain and suffering of the only surviving victim of the defendant's multiple murders—a three-year-old boy who had watched his mother and sister stabbed to death and had himself been stabbed with a butcher knife.[311] The defendant argued on appeal that the admission of the victim impact evidence violated the bar against such testimony under *Booth v. Maryland*[312] and *South Carolina v. Gathers*.[313]

The Supreme Court observed that the "primary responsibility" for defining crimes, punishment, and criminal procedure rests with each individual state, "subject to the overriding provisions of the United States Constitution."[314] It further reasoned that since "victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question," it was not per se barred by the Eighth Amendment.[315] Indeed, the court opined, victim impact evidence which is "so unduly prejudicial that it renders the trial fundamentally unfair" would violate the Fourteenth Amendment, not the Eighth.[316]

The Court added that since victim impact evidence is relevant "to show . . . *each* victim's 'uniqueness as an individual human being,'" and to remind "the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family," a state may wish to allow victim impact evidence to be admitted at trial.[317] The rule under *Booth*, the

---

State, 25 S.W.3d 707, 711 (Tex. Crim. App. 2000) (en banc) (ruling that no per se bar is erected); Mosley v. State, 983 S.W.2d 249, 261-65 (Tex. Crim. App. 1998) (en banc) (rejecting a per se bar against excluding victim impact evidence).

309. 501 U.S. 808 (1991).

310. Payne v. Tennessee, 501 U.S. 808, 814 (1991).

311. *Id.* at 812.

312. 482 U.S. 496 (1987).

313. 490 U.S. 805 (1989); *see also Payne*, 501 U.S. at 817 (rejecting the plaintiff's contention that his Eighth Amendment rights were violated).

314. *Payne*, 501 U.S. at 824.

315. *Id.* at 825.

316. *Id.*

317. *See id.* at 823, 825 (quoting Booth v. Maryland, 482 U.S. 496, 517 (1987) (White, J., dissenting)).

Court declared, "deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder."[318]

Following *Payne*, Texas courts struggled to formulate rules governing the admission of "victim impact evidence" under Article 37.07, Section 3(a).[319] The Court of Criminal Appeals has resolved much of the confusion by recognizing two distinct types of punishment evidence: "victim impact evidence" and "victim character evidence."[320] The court has concluded that the former "is designed to remind the jury that [the crime] has foreseeable consequences to the community and the victim's survivors—family members and friends who also suffer harm from" criminal conduct.[321] The latter, the court has observed, "is designed to give the jury 'a quick glimpse of the life that the petitioner chose to extinguish, to remind the jury that the person whose life was taken was a unique human being.'"[322] Both are generally admissible at trial.[323]

---

318. *Id.* at 825.

319. *See* Mosley v. State, 983 S.W.2d 249, 261-65 (Tex. Crim. App. 1998) (en banc) (explaining the various proposed methods of determining the admissibility of impact and character evidence); Ford v. State, 919 S.W.2d 107, 115-16 (Tex. Crim. App. 1996) (en banc) (noting that victim impact evidence is generally admissible, but admissibility turns on whether the evidence is relevant to the punishment phase of the trial); Smith v. State, 919 S.W.2d 96, 98 (Tex. Crim. App. 1996) (en banc) (implying that prior to *Payne v. Tennessee*, evidence of the harm resulting from a criminal offense played a limited role in the sentencing determination); McCain v. State, 995 S.W.2d 229, 246-49 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd, untimely filed) (noting that victim impact evidence is generally admissible to show the impact of the defendant's conduct on others, but is inadmissible when the evidence compares the victim's worth to other members of society); Brooks v. State, 961 S.W.2d 396, 399-401 (Tex. App.—Houston [1st Dist.] 1997, no pet.) (noting differences between the admissibility of victim impact evidence in capital and non-capital cases); Mendiola v. State, 924 S.W.2d 157, 163-64 (Tex. App.—Corpus Christi 1995, writ ref'd, untimely filed) (opining that allowing victim impact evidence to be introduced at the punishment phase of a trial is a policy-based decision not grounded in logical relevancy and checked by the Eighth Amendment); San Roman v. State, 842 S.W.2d 801, 804 (Tex. App.—El Paso 1992, writ ref'd) (explaining that impact on a victim which is made apparent subsequent to an original trial may be admissible when case is remanded as to punishment).

320. Salazar v. State, 90 S.W.3d 330, 335 (Tex. Crim. App. 2002).

321. *Id.*

322. *Id.* (quoting *Payne*, 501 U.S. at 830-31 (O'Connor, J., concurring)).

323. *Id.*; *see also Mosley*, 983 S.W.2d at 263-64 (explaining that in a capital murder trial, if the defendant waives mitigation special issues, victim impact evidence and victim character evidence are inadmissible because the evidence is rendered irrelevant). Such reasoning is not applicable to a non-capital punishment hearing. *Id.*

These two categories, however, appear to overlook the original type of victim evidence: the direct effect of the crime on the victim himself.[324] The court has compounded the problem somewhat by recently holding that testimony regarding "the medical procedures involved in the care" of a surviving victim did not comprise either "victim impact evidence" or "victim character evidence."[325] It is unclear whether the court was intentionally creating three categories of "victim effect" evidence—"direct victim effect," "victim impact," and "victim character" evidence—or whether the court was indirectly acknowledging that the admission of "direct victim effect" evidence will rarely be problematic.

In another case decided during the same term, the court implied that the latter explanation may be correct. In *Fryer v. State*,[326] the Court of Criminal Appeals held that evidence that the victim had expressed the desire that the defendant not receive probation for the offense did not violate the Eight Amendment's prohibition against family members expressing opinions and characterizations of the crime.[327] The court opined that the victim, "being more knowledgeable about the offense [than family members who did not observe the crime,] could be in a better position to speak [to] the issue" of punishment than others.[328]

In a still more recent case, however, the court has indicated that evidence of the physical harm a defendant inflicts upon his victim does not constitute "victim impact evidence" at all. In *Garcia v.*

---

324. *See* Miller-El v. State, 782 S.W.2d 892, 895 (Tex. Crim. App. 2002) (en banc) (holding that the surviving victim's testimony is admissible); *see also* DeLarue v. State, 102 S.W.3d 388, 403 (Tex. App.—Houston [14th Dist.] 2003, pet ref'd) (commenting that victim impact evidence "includes evidence regarding the physical, psychological or economic effect of crime on the victims themselves or their families").

325. Mathis v. State, 67 S.W.3d 918, 928 (Tex. Crim. App. 2002).

326. 68 S.W.3d 628 (Tex. Crim. App. 2002).

327. *See* Fryer v. State, 68 S.W.3d 628, 630 (Tex. Crim. App. 2002) (noting that the victim was in a better position that the non-observing third parties to speak of the issue of punishment, and was thus not within the scope of *Booth v. Maryland*, 482 U.S. 496 (1987)); *see also* Payne v. Tennessee, 501 U.S. 808, 830 n.2 (1991) (overturning *Booth* on the issue of the admissibility of victim impact testimony, but expressly declining to consider the issue of admissibility of family members' characterizations and opinions of the crime); Booth v. Maryland, 482 U.S. 496, 508-09 (1987) (holding that the introduction of evidence of the trauma the victim's family suffered and their opinions about the crime and suitable punishment violated the Eighth Amendment); *cf.* Simpson v. State, 119 S.W.3d 262, 272 (Tex. Crim. App. 2003) (disapproving of admission of testimony of victim's family member that the family wanted the death penalty but, ultimately, holding the error harmless).

328. *Fryer*, 68 S.W.3d at 630.

State,[329] the defendant objected during the punishment stage of trial to the State's introduction of the medical records of a person injured in the defendant's shoot-out with police.[330] On appeal, he asserted that the documents "were 'irrelevant victim impact' evidence" that should not have been admitted.[331] The Court of Criminal Appeals overruled the point of error on the grounds that because the record "did not reveal anything about [the person's] good character or how third persons were affected by the death of the victim named in the indictment" they could not be "characterized" as victim impact evidence.[332] The court concluded that though the records "might have been irrelevant or inadmissible for other reasons, they were not irrelevant or inadmissible because they were victim impact evidence."[333]

In any event, rather than set rigid guidelines for what may or may not be admissible under the rubric of "victim impact" or "victim character" evidence, the Court of Criminal Appeals has announced that "[t]rial judges should exercise their sound discretion in permitting *some*" victim impact and victim character evidence.[334] The trial court must use the "normal evidentiary rules that courts apply in any Rule 403 admissibility determination" in assessing whether to admit victim impact or victim character evidence.[335] The lack of a "bright-line rule . . . requires heightened judicial supervision and careful selection of such evidence to maximize probative value and minimize the risk of unfair prejudice."[336]

---

329. No. 74,294, slip op. at 5, 2004 WL 97632, at *5 (Tex. Crim. App. Jan. 21, 2004).

330. *See* Garcia v. State, No. 74,294, slip op. at 5, 2004 WL 97632, at *5 (Tex. Crim. App. Jan. 21, 2004).

331. *Id.*

332. *Id.*

333. *Id.*

334. Salazar v. State, 90 S.W.3d 330, 336 (Tex. Crim. App. 2002) (quoting Mosley v. State, 983 S.W.2d 249, 262 (Tex. Crim. App. 1998) (en banc)).

335. *See id.* (stating the factors which must be considered in determining whether victim impact or victim character evidence is admissible). *Salazar* gives four criteria courts use for determining whether to admit evidence under rule 403: "(1) how probative is the evidence; (2) the potential of the evidence to impress the jury in some irrational, but nevertheless indelible way; (3) the time the proponent needs to develop the evidence; and (4) the proponent's need for the evidence." *Id.*

336. *Id.; see also* Brooks v. State, 961 S.W.2d 396, 400 (Tex. App.—Houston [1st Dist.] 1997, no pet.) (stating that a judge "shall consider" statements by victims prior to sentencing, but prior to sentencing, must provide the statement to the defendant who may introduce testimony attempting to discredit a factual inaccuracy); *cf.* TEX. CODE CRIM. PROC. ANN. art. 56.03(b) (Vernon Supp. 2003) (explaining the form to which a victim's impact

Therefore "[c]ourts must guard against the potential prejudice of 'sheer volume,' barely relevant evidence, and overly emotional evidence."[337]

Two questions arise from reviewing the cases developing victim impact evidence. First, may a defendant be permitted to adduce evidence of a victim's bad character in response to the State's victim impact evidence? Texas courts have thus far rejected all attempts to introduce such "reciprocal victim impact evidence."[338] Theoretically a defendant might be permitted to offer evidence in rebuttal to the prosecution's offer of victim character evidence, but only if the evidence is relevant to a specific character trait adduced by the State. Evidence of a victim's prior conviction for injury to a child, for example, should not be admitted to rebut evidence that the victim was a good worker.[339] Obviously, the further evidence drifts from the focal issue of the punishment hearing—the appropriate punishment for the defendant—the more likely it will be

---

statement must adhere and the information included within). Despite the Court of Criminal Appeals' conclusion that there is not a bright line rule, the *Brooks* court suggested that the legislature has already explicitly determined what victim impact evidence is "relevant" by setting out what information may be included in a victim impact statement and providing that a judge may consider the statement before determining the defendant's sentence. *Brooks*, 961 S.W.2d at 400.

337. *Salazar*, 90 S.W.3d at 336; *see also* Solomon v. State, 49 S.W.3d 356, 365-66 (Tex. Crim. App. 2001) (admitting photographs of victim and family as properly admitted under Rule 403); Reese v. State, 33 S.W.3d 238, 240-43 (Tex. Crim. App. 2000) (holding that the trial court abused its discretion and committed error under Rule 403 by admitting a photograph of the murdered mother and her unborn baby); Richardson v. State, 83 S.W.3d 332, 361 (Tex. App.—Corpus Christi 2002, pet. ref'd) (holding that testimony about the possible effect on children who witnessed their mother's murder to be admissible); Boone v. State, 60 S.W.3d 231, 239-40 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd) (admitting that testimony from close family members about the effect of crime upon their lives was not an abuse of the trial court's discretion).

338. *See* Goff v. State, 931 S.W.2d 537, 554-56 (Tex. Crim. App. 1996) (en banc) (holding that the trial court properly barred evidence of the victim's homosexuality); Clark v. State, 881 S.W.2d 682, 698-99 (Tex. Crim. App. 1994) (en banc) (rejecting the "logic" of permitting the defendant to adduce evidence of the victim's immoral behavior in rebuttal to victim impact evidence); Richards v. State, 932 S.W.2d 213, 215-16 (Tex. App.—El Paso 1996, writ ref'd) (upholding the trial court's refusal to admit "'negative victim impact' evidence" of the victim's bad reputation in rebuttal to testimony of the victim's widow concerning her loss and that of her family).

339. *See Goff*, 931 S.W.2d at 552-53 (noting that there is no connection between the prior conviction of an injury to a child and testimony that the victim was a good worker).

deemed "irrelevant," so that the opportunity to rebut the State's evidence of good character probably will be rare indeed.[340]

Second, who qualifies as a "victim" for the purposes of posing victim impact evidence? Obviously, if the victim survives, he may testify.[341] At the other end of the spectrum, a person who is not close to the victim, such as the prosecutor of the case or the police officers who investigated the crime, may not testify as to the effect of the crime on them.[342] In a similar vein, victim impact or character evidence of an extraneous offense may not be introduced during punishment.[343]

The State is not required to give the defense notice of its intent to present victim impact or victim character evidence.[344] Additionally, once a victim has testified about the impact of the offense, the witness's victim impact statement, prepared under Article 56.03 of the Code of Criminal Procedure, may be inspected by the defense and used during cross-examination.[345]

---

340. *See* Booth v. Maryland, 482 U.S. 496, 506-07 (1987) (warning of the danger that the admission of reciprocal-victim impact evidence in rebuttal "could well [detract] the sentencing jury from its constitutionally required task" of deciding punishment); *Goff*, 931 S.W.2d at 555-56 (holding that evidence of the victim's homosexuality is not relevant to the defendant's "background, character, or the circumstances of the crime").

341. *See* Ford v. State, 919 S.W.2d 107, 112-14 (Tex. Crim. App. 1996) (en banc) (allowing the victim to testify about her shooting and the subsequent effects of being shot); Miller-El v. State, 782 S.W.2d 892, 897 (Tex. Crim. App. 1990) (en banc) (allowing the victim to testify about the murder attempt made upon him). Similarly, close family members or friends may also offer evidence. *See* Solomon v. State, 49 S.W.3d 356, 365 (Tex. Crim. App. 2001) (allowing the victim's brother to testify); Ladd v. State, 3 S.W.3d 547, 571 (Tex. Crim. App. 1999) (allowing the victim's mother and sister to testify); Jones v. State, 963 S.W.2d 177, 182 (Tex. App.—Fort Worth 1998, pet. ref'd) (allowing the victim's pastor to testify).

342. *See* Janecka v. State, 937 S.W.2d 456, 473 (Tex. Crim. App. 1996) (en banc) (stating that a former prosecutor's testimony was not relevant to the punishment).

343. *See* Cantu v. State, 939 S.W.2d 627, 637 (Tex. Crim. App. 1997) (en banc) (holding that evidence of the deceased's character is inadmissible unless placed in issue by the defendant); Barletta v. State, 994 S.W.2d 708, 714 (Tex. App.—Texarkana 1999, pet. ref'd) (stating that under *Cantu*, testimony of the deceased's "personal characteristics and interests" was irrelevant to punishment); Boston v. State, 965 S.W.2d 546, 551 (Tex. App.—Houston [14th Dist.] 1997, pet. ref'd) (stating that "victim impact evidence arising from a defendant's extraneous offenses is irrelevant and inadmissible during the punishment phase of [the] trial").

344. *See Ladd*, 3 S.W.3d at 571 (holding that the State is not required to designate victim impact witnesses before trial); Brown v. State, 54 S.W.3d 930, 933 (Tex. App.—Corpus Christi 2001, pet. ref'd) (concluding that the State does not have to provide notice to introduce victim impact evidence).

345. Enos v. State, 889 S.W.2d 303, 305 (Tex. Crim. App. 1994).

E. *Evidence of Extraneous Offenses and Bad Acts*

The rule prior to the 1993 amendment to Article 37.07 was clear: evidence of unadjudicated extraneous offenses was inadmissible during the punishment phase of trial.[346] There was one narrow exception: evidence of an unadjudicated extraneous offense was admissible in rebuttal after a defendant "opened the door" to the issue by adducing evidence of his suitability for probation or by failing to object when the State offered such evidence.[347] A defendant did not open the door simply by adducing evidence of his eligibility for probation, however.[348] Rather, he had to first offer evidence relating to his ability to obey the law and abide by any conditions of probation before his "suitability for probation" would have been placed in issue.[349] Nor did a defendant open the door by proffering evidence in response to improper evidence the State had introduced over his objection.[350]

In the wake of the Court of Criminal Appeals' narrow interpretation of the legislature's 1989 amendment to Article 37.07,[351] the State attempted to justify the admission of unadjudicated extraneous offenses admitted under the lower courts' more expansive, and

---

346. *See* Grunsfeld v. State, 843 S.W.2d 521, 526 (Tex. Crim. App. 1992) (en banc) (holding that "evidence of extraneous unadjudicated offenses was improperly admitted").

347. *See* Murphy v. State, 777 S.W.2d 44, 67 (Tex. Crim. App. 1989) (en banc) (holding that a defendant may open the door by foregoing an objection or tendering evidence); Cedillo v. State, 901 S.W.2d 624, 626 (Tex. App.—San Antonio 1995, no writ) (providing examples of opening the door to the issue of suitability).

348. *See* McMillian v. State, 865 S.W.2d 459, 460 (Tex. Crim. App. 1993) (en banc) (per curiam) (holding that the defendant did not open the door by applying for probation); *Murphy*, 777 S.W.2d at 68 (disapproving decisions that have held that admissible evidence of circumstances may be rebutted by evidence of specific acts if there is an application for probation).

349. *See Murphy*, 777 S.W.2d at 67 (providing examples of when the door is opened); *Cedillo*, 901 S.W.2d at 626 (including as evidence of suitability the "defendant's ability to obey the law and abide by any conditions of probation"); Anderson v. State, 896 S.W.2d 578, 579 (Tex. App.—Fort Worth 1995, writ ref'd) (holding that a witness's testimony that the defendant "was 'a good candidate' for probation" opened the door to rebuttal evidence).

350. *See* Drew v. State, 777 S.W.2d 74, 76 (Tex. Crim. App. 1989) (en banc) (finding that the defendant's rebuttal evidence to evidence to which he objected did not constitute an agreement to the admission of specific conduct); *Cedillo*, 901 S.W.2d at 626 (holding that the defendant's evidence of suitability to rebut contested evidence did not open the door).

351. *See Grunsfeld*, 843 S.W.2d at 524-25 (concluding that the retention of "prior criminal record evinced the intent" to maintain limitations on the admission of extraneous offenses).

subsequently deemed erroneous, reading of the statute under a variety of different theories. These efforts almost uniformly failed.[352]

The legislature again amended the statute in 1993.[353] This latter amendment specifically provided for the admission of evidence of extraneous unadjudicated offenses and bad acts.[354] The present statute provides that

> evidence may be offered . . . as to any matter the court deems relevant to sentencing, including . . . evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he [may] be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act.[355]

This broad statutory authorization for the admission of evidence of extraneous offenses or bad acts is not unconstitutional.[356]

---

352. *See* Flores v. State, 884 S.W.2d 784, 786-87 (Tex. Crim. App. 1994) (en banc) (per curiam) (concluding that evidence admissible in rebuttal during the guilt-innocence phase was not automatically admissible during the punishment phase); *McMillian*, 865 S.W.2d at 460 (noting the fact that an unadjudicated offense committed after the primary offense is irrelevant to admissibility at punishment); Hoffman v. State, 874 S.W.2d 138, 140 (Tex. App.—Houston [14th Dist.] 1994, writ ref'd) (rejecting the State's argument that evidence admissible in rebuttal to the issue raised in the guilt-innocence phase is thereby admissible during the punishment phase as well); Johnson v. State, 871 S.W.2d 820, 823 (Tex. App.—Houston [14th Dist.] 1994, writ ref'd) (holding that "evidence of extraneous unadjudicated offenses is inadmissible for *any* purpose"); White v. State, 866 S.W.2d 78, 81-82 (Tex. App.—Beaumont 1993, no writ) (concluding that an extraneous offense is not admissible as background evidence).

353. *See* Martin v. State, 860 S.W.2d 735, 737 n.3 (Tex. App.—Beaumont 1993, no writ) (noting the legislative change).

354. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a) (Vernon Supp. 2004); *see also* Minor v. State, 91 S.W.2d 824, 830 (Tex. App.—Fort Worth 2002, pet. filed) (noting that the statute was amended to allow evidence of unadjudicated extraneous offenses); Waltmon v. State, 76 S.W.3d 148, 153 (Tex. App.—Beaumont 2002, no pet.) (discussing the amendment); Patton v. State, 25 S.W.3d 387, 392-93 (Tex. App.—Austin 2000, pet. ref'd) (stating the resulting change from the amendment); Washington v. State, 943 S.W.2d 501, 503-04 (Tex. App.—Fort Worth 1997, no pet.) (discussing the legislative change).

355. TEX. CODE CRIM. PROC. ANN. art. 37.07. § 3(a) (Vernon Supp. 2004).

356. *See Ex parte* Broxton, 888 S.W.2d 23, 28 (Tex. Crim. App. 1994) (en banc) (holding that the provision does not violate double jeopardy); *Minor*, 91 S.W.3d at 830 (recognizing that the provision does not violate either due process or equal protection); Parker v. State, 51 S.W.3d 719, 726 (Tex. App.—Texarkana 2001, no pet.) (noting that the provision does not violate the separation of powers doctrine, due process, or due course of law); Enlow v. State, 46 S.W.3d 340, 347 (Tex. App.—Texarkana 2001, pet. ref'd) (concluding that the provision does not violate the separation of powers doctrine); *Ex parte* Smith, 884 S.W.2d 551, 554-55 (Tex. App.—Austin 1994, no pet.) (rejecting arguments that the provision violated double jeopardy); Jackson v. State, 861 S.W.2d 259, 261 (Tex. App.—Dallas 1993, no pet.) (determining that the provision does not violate the separation of powers

Article 37.07, Section 3(a) permits the State to introduce evidence of unadjudicated offenses during the punishment stage of trial.[357] Because the statute specifically states that evidence of an "extraneous crime" *or* evidence of a "bad act" is admissible during punishment, an act that is "bad," but that does not constitute an offense for which the defendant may be held criminally responsible, is nevertheless admissible during punishment.[358] In adducing testimony of a "bad act," the State need not prove culpability in the context of a criminal offense.[359]

On its face, the statute appears unlimited in its scope as to the type of offense or bad act of which details may be adduced during punishment.[360] Thus, the State may introduce both the fact of a deferred adjudication and the underlying facts of the offense.[361] Similarly, the facts of underlying juvenile offenses may also be introduced under Article 37.07.[362]

Proof beyond a reasonable doubt is a condition precedent to the admission of extraneous offense evidence.[363] The Court of Criminal Appeals has held that the trial court must make this initial determination.[364] This threshold determination is not a finding by the

---

doctrine); Carter v. State, 813 S.W.2d 746, 747-48 (Tex. App.—Houston [1st Dist.] 1991, no pet.) (finding no violation of the Ex Post Facto Clause).

357. *See Minor*, 91 S.W.3d at 830 (regarding the evidence as admissible); *Waltmon*, 76 S.W.3d at 153 (discussing what the statute allows after the 1993 amendment); *Patton*, 25 S.W.3d at 392-93 (determining that such evidence is now admitted); *Washington*, 943 S.W.2d at 503-04 (stating that the amendment allows such evidence).

358. *See* Cox v. State, 931 S.W.2d 349, 357 (Tex. App.—Fort Worth 1996, pet. dism'd, improvidently granted) (holding that evidence of an act that is bad, but not one for which there is criminal liability, is admissible).

359. *Id.*

360. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a) (Vernon Supp. 2003) (stating that the evidence of a bad act is allowed "regardless of whether he has previously been charged with or finally convicted of the crime or act").

361. Davis v. State, 968 S.W.2d 368, 373 (Tex. Crim. App. 1998) (en banc).

362. *See* Strasser v. State, 81 S.W.3d 468, 469-70 (Tex. App.—Eastland 2002, no pet.) (upholding the rule that evidence of prior juvenile unadjudicated offenses is allowed); McMillan v. State, 926 S.W.2d 809, 813 (Tex. App.—Eastland 1996, pet. ref'd) (holding that evidence of prior unadjudicated juvenile offenses is admissible).

363. *See* TEX. CODE CRIME PROC. ANN. art. 37.07, § 3(a) (Vernon Supp. 2004) (requiring that the evidence of an extraneous bad act or crime must be "shown beyond a reasonable doubt"); Mitchell v. State, 931 S.W.2d 950, 954 (Tex. Crim. App. 1996) (en banc) (holding that the act, to be admissible, must be proved beyond a reasonable doubt).

364. *See Mitchell*, 931 S.W.2d at 954 (stating that "[t]his Court agrees . . . that the trial judge has the responsibility of determining the threshold admissibility of extraneous offenses in the punishment phase"); Harrell v. State, 884 S.W.2d 154, 160 (Tex. Crim. App.

court that the State has proved an extraneous offense or bad act beyond a reasonable doubt; "the jury as 'the exclusive judge of the facts' is . . . to determine whether or not the State has proved the extraneous offenses beyond a reasonable doubt."[365] Once the jury has concluded that the extraneous offense or bad act has been proved beyond a reasonable doubt, it may use the extraneous bad acts evidence however it chooses in assessing punishment.[366]

Section 3(a) does not require that the trial court conduct a hearing before making the necessary preliminary determination.[367] Several courts have upheld trial court procedures for making the preliminary determination that comprised less than a full-blown hearing.[368] Of course, the trial court may choose to conduct a hearing outside the jury's presence.[369]

1994) (en banc) (stating that "in deciding whether to admit extraneous offense evidence in the guilt/innocence phase of the trial, the trial court must, under rule 104(b), make an initial determination at the proffer of the evidence, that a jury could reasonably find beyond a reasonable doubt that the defendant committed the extraneous offense"); Mann v. State, 13 S.W.3d 89, 94 (Tex. App.—Austin 2000) (reiterating that "the court must make an initial determination at the proffer of the evidence that a jury could reasonably find beyond a reasonable doubt that the defendant committed the extraneous offense"), *aff'd*, 58 S.W.3d 132 (Tex. Crim. App. 2001); Wilson v. State, 15 S.W.3d 544, 548 (Tex. App.—Dallas 1999, pet. ref'd) (declaring that "[t]he trial court determines the admissibility of the unadjudicated extraneous offense evidence, and the factfinder . . . determines whether the unadjudicated extraneous offense was proven beyond a reasonable doubt").

365. *See Mitchell*, 931 S.W.2d at 954 (quoting Article 36.13 of the Texas Code of Criminal Procedure); *see also* Arzaga v. State, 86 S.W.3d 767, 781 (Tex. App.—El Paso 2002, no pet.) (stating that the jury determines whether the State has proved "the extraneous offenses beyond a reasonable doubt").

366. *See* Huizar v. State, 12 S.W.3d 479, 484 (Tex. Crim. App. 2000) (discussing when the jury can consider the evidence); Allen v. State, 47 S.W.3d 47, 50 (Tex. App.—Fort Worth 2001, pet. ref'd) (stating that "[o]nce the fact-finder is satisfied beyond a reasonable doubt . . . the fact-finder may use the . . . evidence however it chooses in assessing punishment").

367. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a) (Vernon Supp. 2004) (requiring no hearing); *Arzaga*, 86 S.W.3d at 781 (discussing the options a court may utilize when making preliminary determinations); *Mann*, 13 S.W.3d at 94 (recognizing that "[n]either the statute nor precedent require[s] a hearing" (quoting Welch v. State, 993 S.W.2d 690, 697 (Tex. App.—San Antonio 1999, no pet.))).

368. *See Arzaga*, 86 S.W.3d at 781 (holding that the prosecutor's oral statements to the court regarding how the state would prove the extraneous offense are sufficient); *Mann*, 13 S.W.3d at 93 (finding that the prosecutor's oral outline of intended testimony is sufficient); *Welch*, 993 S.W.2d at 697 (identifying the State's written proffer of how it would prove extraneous offenses sufficient).

369. *See* TEX. R. EVID. 104(c) (allowing that hearings on preliminary matters are to be heard out of the jury's presence when the accused requests and is a witness in the criminal trial).

If the State fails to carry its burden of adducing sufficient evidence to establish the appellant's commission of the extraneous offense beyond a reasonable doubt, the trial court should not admit the evidence.[370] If the trial court erroneously admits an extraneous offense that was not properly proved during a preliminary hearing, but which is subsequently proved beyond a reasonable doubt before the jury, the trial court's erroneous preliminary ruling is deemed harmless.[371] Extraneous offense evidence presented before the jury which has not been proved beyond a reasonable doubt is of course subject to a motion to strike and instruction to disregard.[372]

A trial court must include in the jury charge an instruction regarding the State's burden of proof on extraneous offenses, even where the defendant has failed to request the instruction or has informed the court that he has "no objection" to the charge.[373] A trial court, however, "is not required to give an instruction con-

370. *See* Stewart v. State, 927 S.W.2d 205, 208 (Tex. App.—Fort Worth 1996, pet. ref'd) (stating that the trial court erred and should not have admitted evidence of an extraneous offense where a rational trier of fact would not have believed the elements of the crime beyond a reasonable doubt).

371. *See id.* (finding the erroneous admission harmless where the jury had heard subsequent testimony to establish the finding beyond a reasonable doubt).

372. Rosales v. State, 867 S.W.2d 70. 73 (Tex. App.—El Paso 1993, no pet.) (establishing that the court must grant a motion to strike enhancement evidence if the prosecution fails to link the conviction to the defendant).

373. *See* Ellison v. State, 86 S.W.3d 226, 227-28 (Tex. Crim. App. 2002) (en banc) (recognizing that the trial court must give instruction sua sponte); Huizar v. State, 12 S.W.3d 479, 484 (Tex. Crim. App. 2000) (asserting that the trial court erred in failing to include the reasonable doubt instruction even though the defense never requested it); Vosberg v. State, 80 S.W.3d 320, 322 (Tex. App.—Fort Worth 2002, pet ref'd) (holding that the trial court is required to include a reasonable doubt instruction in the jury charge even after the defense stated that it had no objection to the charge); Bluitt v. State, 70 S.W.3d 901, 906 (Tex. App.—Fort Worth 2002, pet. granted) (commenting that the trial court erred in failing to include a reasonable doubt instruction despite the defendant's declaration that the defense had "no objection" to the charge); *cf.* Elder v. State, 100 S.W.3d 32, 35 (Tex. App.—Eastland 2002, pet. ref'd) (holding that the trial court does not err in failing to submit a reasonable doubt instruction where the defendant introduced the evidence of an extraneous offense). Failure to instruct is subject to harm analysis under *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (en banc). *See Ellison*, 86 S.W.3d at 228 (declaring that the error should be examined under the egregious harm test from *Almanza*); *Huizar*, 12 S.W.3d at 485 (applying the harm analysis set forth in *Almanza*); Allen v. State, 47 S.W.3d 47, 50 (Tex. App.—Fort Worth 2001, pet. ref'd) (implementing the *Almanza* harm analysis).

cerning the burden of proof at the time evidence of unadjudicated offenses and bad acts is admitted."[374]

As with a prior criminal record, the State must provide notice of its intent to introduce unadjudicated offenses or bad acts upon "timely request" by the defense.[375] Notice must be provided for all unadjudicated acts the State wishes to introduce during its case-in-chief; there is not an exception for "same transaction evidence" as there is to the notice requirement under Texas Rule of Evidence 404(b).[376] The methods of request and notice are the same as those for criminal records, except that the statute specifies the information that the prosecution must provide regarding the unadjudicated acts it intends to introduce.[377] Under the statute, notice that the prosecution intends to introduce an extraneous crime or bad act

> that has not resulted in a final conviction in a court of record or a probated or suspended sentence . . . [and] is reasonable only if the notice includes the date on which and the county in which the alleged crime or bad act occurred and the name of the alleged victim of the crime or bad act.[378]

The courts have held that substantial compliance with the statute is sufficient to provide reasonable notice.[379]

---

374. Jackson v. State, 992 S.W.2d 469, 478 (Tex. Crim. App. 1999) (en banc); Robbins v. State, 27 S.W.3d 245, 251 (Tex. App.—Beaumont 2000), *aff'd*, 88 S.W.3d 256 (Tex. Crim. App. 2002).

375. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(g) (Vernon Supp. 2004).

376. *See* TEX. R. EVID. 404(b) (indicating that the notice requirement applies to evidence of other crimes, wrongs, or acts "other than that arising in the same transaction"); *see also* Waltmon v. State, 76 S.W.3d 148, 156 (Tex. App.—Beaumont 2002, no pet.) (requiring notice for unadjudicated acts the State wants to introduce with no exceptions).

377. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(g) (Vernon Supp. 2004) (requiring that the notice must include the date and the county of the alleged crime); TEX. R. EVID. 901(b) (specifying the authentication requirements).

378. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(g) (Vernon Supp. 2004).

379. *See* Cate v. State, 124 S.W.3d 922, 928 (Tex. App.—Amarillo 2004, no pet.) (determining that notice is sufficient despite the failure to state the correct date of the extraneous offense where the date was only a week); Wallace v. State, No. 12-02-00200-CR, slip op. at 5-7, 2004 WL 306120, at *4-6 (Tex. App.—Tyler Feb. 18, 2004, no pet. h.) (finding that notice in which the date of one of the extraneous offense within a month of date testified to at trial and notice of another offenses failed to include the correct county of offense was sufficient when defendant conceded she was not surprised by the evidence); Burling v. State, 83 S.W.3d 199, 202-03 (Tex. App.—Fort Worth 2002, pet. ref'd) (indicating that the State substantially complied with the statute where it listed a three month period for alleged bad acts); Sebalt v. State, 28 S.W.3d 819, 822 (Tex. App.—Corpus Christi 2000, no pet.) (finding that the failure to provide names, dates, and counties of extraneous offenses is not unreasonable where notice included cause numbers of indictments involving

As already observed, error under Article 37.07, Section 3(g) is susceptible to harmless error analysis under Texas Rule of Appellate Procedure 44.2(b).[380]

F. *Evidence of Juvenile Adjudications of Delinquency*

The current version of Article 37.07, Section 3(a) provides that evidence of juvenile "adjudication[s] of delinquency based on a violation by the defendant of a penal law of the grade of a felony; . . . or a misdemeanor punishable by confinement in jail" may be introduced during the punishment phase of trial.[381] Though seemingly simple on its face, there is some question as to what constitutes an "adjudication of delinquency" under the statute. In *Murphy v. State*,[382] the prosecution offered an adjudication of delinquency under an earlier version of Article 37.07, which provided for "the admission of an 'adjudication of delinquency based on a viola-

---

unadjudicated offenses and counties in which indictments had been returned); McQueen v. State, 984 S.W.2d 712, 716 (Tex. App.—Texarkana 1998, no pet.) (recognizing that the failure to list the county of offense is not unreasonable where the offense was a companion case to the case being tried, and listed the victim, a police officer, the date of the offense, and the same date as the offense on trial); Hohn v. State, 951 S.W.2d 535, 537 (Tex. App.—Beaumont 1997, no pet.) (illustrating that substantial compliance is sufficient where the State failed to list the specific date, but verbally informed the defendant that acts were alleged to have occurred over a specific three month period); Splawn v. State, 949 S.W.2d 867, 871 (Tex. App.—Dallas 1997, no pet.) (supporting the concept that notice substantially complied with the statute where the prosecution listed several month periods over which the alleged offenses occurred and listed specific geographical landmarks rather than the county in which the alleged extraneous offenses took place); Nance v. State, 946 S.W.2d 490, 493 (Tex. App.—Fort Worth 1997, pet. ref'd) (noting that the failure to list the county did not render notice unreasonable where the offense was pending in a court of record and the defense had announced ready for trial). *But see* Roethel v. State, 80 S.W.3d 276, 280 (Tex. App.—Austin 2002, no pet.) (discussing the fact that notice is insufficient where the State merely declared that the unadjudicated acts occurred against the defendant's sister when they were children, thus giving no notice of the dates or counties of the alleged offenses).

380. *See* Apolinar v. State, 106 S.W.3d 407, 414 (Tex. App.—Houston [1st Dist.] 2003, pet. granted) (stating that the error in admission of evidence after insufficient notice is subject to a harmless error analysis under Rule 44.2(b) of the Rules of Appellate Procedure); *Roethel*, 80 S.W.3d at 281 (discussing that where notice is unreasonable, the court will analyze the harm of the error); Patton v. State, 25 S.W.3d 387, 394 (Tex. App.—Austin 2000, no pet.) (detailing that where a trial court errs by admitting prior conviction evidence, the error is harmless unless it affects a substantial right); *see also McQueen*, 984 S.W.2d at 716 n.2 (citing that Texas courts use Texas Rule of Appellate Procedure 44.2(b) to examine harm from non-constitutional errors).

381. TEX. CODE CRIME PROC. ANN. art. 37.07, § 3(a)(1) & (2) (Vernon Supp. 2004).

382. 860 S.W.2d 639 (Tex. App.—Fort Worth 1993, no pet.).

tion . . . of the penal law of the grade of felony.' "[383] But the defendant had been adjudicated delinquent for a misdemeanor and placed on probation, which was later revoked for commission of a felony.[384]

The revocation, the court of appeals held, was *not* an "adjudication" under Section 54.03 of the Family Code, since it had not been conducted in accordance with the provisions for an adjudication of delinquency under the Family Code.[385] The finding of delinquent conduct based on a felony violation, though sufficient to revoke the defendant's probation, did not constitute an "adjudication of delinquency."[386] An adjudication of delinquency, then, is something of a term of art. Evidence of an adjudication should therefore be reviewed carefully and used with caution.

Article 37.07 has not been read so narrowly as to preclude the introduction of evidence that the defendant committed unadjudicated crimes as a juvenile. The statute has been held to allow evidence of an adjudication of delinquency, in certain situations, *in addition to* providing for the admissibility of other extraneous crimes or bad acts, including extraneous crimes or bad acts committed as a juvenile.[387]

G. *"Any Matter the Court Deems Relevant to Sentencing"*

The scope of this catch-all provision was not initially addressed by Texas courts, since the published cases shortly after the 1993

---

383. Murphy v. State, 860 S.W.2d. 639, 642 (Tex. App.—Fort Worth 1993, no pet.) (quoting Section 3(a) of Article 37.07).

384. *Id.* at 642.

385. *Id.* at 642-43.

386. *Compare id.* at 644 (finding that the trial court erroneously admitted evidence of delinquency based on a misdemeanor violation), *with* J.K.A. v. State, 855 S.W.2d 58, 62-63 (Tex. App.—Houston [14th Dist.] 1993, pet. denied) (holding that the state may predicate "its motion to modify on a violation of the substantive law underlying the rule of probation").

387. *See* Wallace v. State, No. 12-02-00200-CR, slip op. at 6, 2004 WL 306120, at *4-5 (Tex. App.—Tyler Feb. 18, 2004, no pet. h.) (permitting evidence of extraneous offenses committed when the defendant was a juvenile under Article 37.07, Section (3)(a)); Strasser v. State, 81 S.W.3d 468, 469-70 (Tex. App.—Eastland 2002, no pet.) (interpreting Article 37.07 to allow admission of evidence of extraneous crimes during sentencing when the court finds it relevant); Manley v. State, 28 S.W.3d 170, 174-75 (Tex. App.—Texarkana 2000, pet. ref'd) (permitting evidence other than adjudications offered during punishment); Rodriguez v. State, 975 S.W.2d 667, 687-88 (Tex. App.—Texarkana 1998, pet. ref'd) (approving the admissibility of a prior offense under Article 37.07).

amendment of Article 37.07 all addressed issues that fell within other categories.[388] More recently, however, Texas courts have begun to assess the full scope of the catch-all portion of the statute. The Court of Criminal Appeals has recognized that determining what evidence should be admitted at the punishment phase in a non-capital case is more a function of policy than a question of "logical relevance," so that the relevance of proffered evidence in punishment "cannot be determined by deductive processes."[389] In this light, "the Rule 401 definition of 'relevant' is not a perfect fit in the sentencing context," and thus, determining what is "relevant" in punishment "should be a question of what is *helpful to the jury in determining the appropriate sentence* in a particular case" rather than whether the evidence tends to make the existence of a fact or consequence more or less probable.[390]

Thus, relevant evidence in the context of punishment helps the jury "tailor the sentence to the particular offense . . . [and] to the particular defendant."[391] On multiple occasions, Texas courts have explored a non-exclusive list of policy considerations to rely on when determining the admissibility of punishment evidence, which include: providing the jury with a complete picture to ensure that the appropriate sentence is applied to the defendant; adhering to the theory of optional completeness; and ensuring truth in sentencing.[392]

---

388. *See* Terri Moore & Edward L. Wilkinson, *Punishment Evidence, in* STATE BAR OF TEX., PROF. DEV. PROGRAM, 22 ADVANCED CRIMINAL LAW COURSE, H, H-28 (1996).

389. Sunbury v. State, 88 S.W.3d 229, 233 (Tex. Crim. App. 2002); *see also* Daggett v. State, 103 S.W.3d 444, 451 (Tex. App.—San Antonio 2002, pet granted) (indicating that "[t]he admissibility of evidence at the punishment phase of a non-capital felony offense is a function of policy rather than relevancy").

390. Mendiola v. State, 21 S.W.3d 282, 285 (Tex. Crim. App. 2000) (quoting Rogers v. State, 991 S.W.2d 263, 265 (Tex. Crim. App. 1999) (en banc)); *see also* Najar v. State, 74 S.W.3d 82, 86 (Tex. App.—Waco 2002, no pet) (finding that relevant evidence in the punishment phase is evidence which is "helpful" to the jury). *But see* TEX. R. EVID. 401 (defining relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence").

391. Rogers v. State, 991 S.W.2d 263, 265 (Tex. Crim. App. 1999) (en banc); *Najar*, 74 S.W.3d at 86.

392. *See Sunbury*, 88 S.W.3d at 233-34 (articulating policy reasons previously discussed in Mendiola); *Mendiola*, 21 S.W.3d at 285 (elucidating the policy reasons provided by the appellant in determining admissibility).

Under these rather sweeping guidelines, courts have deemed evidence admissible that would not have been admissible under prior versions of Article 37.07.[393] Recently, several courts of appeals have even held that there is "no logical reason for excluding evidence" of a defendant's suitability for probation, though the Court of Criminal Appeals has in the past repeatedly held such evidence not to be admissible unless the defendant opened the door to the issue.[394] As the lower courts have correctly pointed out, the high court's previous decisions have all interpreted the earlier, narrower versions of Section 3(a).[395]

H. *Other Evidentiary Provisions Under Article 37.07*

Section 3(a) of Article 37.07 is not the only subsection of the statute that addresses the types of evidence admissible at punishment. Section 3(f) also explicitly expands the types of evidence

---

393. *See Sunbury*, 88 S.W.3d at 235 (noting the trial court's error in refusal to admit evidence of sentences the defendant recently received in two trials for similar offenses); *Rogers*, 991 S.W.2d at 266 (ruling that the trial court did not err in admitting evidence of sentences the defendant received in three other prior convictions); Come v. State, 82 S.W.3d 486, 491-92 (Tex. App.—Austin 2002, no pet.) (including a conference brochure with a map and handwritten notations among the admissible evidence to show the defendant's involvement with or interest in an organization concerning itself with sexual activities for boys); *Najar*, 74 S.W.3d at 88 (agreeing with the trial court's inclusion in evidence of a prison inmate classification system and rehabilitative opportunities offered in prison to aid the jury in determining whether to grant community supervision).

394. *Compare* Muhammad v. State, 46 S.W.3d 493, 505 (Tex. App.—El Paso 2001, no pet.) (finding no basis for the exclusion of evidence on appropriateness of probation), *and* Peters v. State, 31 S.W.3d 704, 717 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd) (noting that Article 37.07 widens the admissibility of evidence, which suggests that evidence on suitability for probation is not inadmissible per se), *and* Mock v. State, 848 S.W.2d 215, 224 (Tex. App.—El Paso 1992, pet. ref'd) (ruling that the trial court's instruction in the punishment phase allowing jurors to consider all facts gleaned from the evidence was appropriate), *with* McMillian v. State, 865 S.W.2d 459, 460 (Tex. Crim. App. 1993) (en banc) (noting that the trial court erroneously admitted evidence of an unadjudicated offense during the punishment phase prior to the defendant opening the door for its inclusion), *and* Ortiz v. State, 834 S.W.2d 343, 346 (Tex. Crim. App. 1992) (en banc) (finding that the defendant opened the door for inclusion when she directly raised the issue of suitability for probation), *and* Murphy v. State, 777 S.W.2d 44, 67 (Tex. Crim. App. 1988) (en banc) (explaining that a defendant opens the door to inclusion of rebuttal evidence when he submits "evidence of specific conduct at the punishment phase, or show in the first instance that he has never been in trouble before, or that he can comply with the law if placed on probation").

395. *See Muhammad*, 46 S.W.3d at 503-05 (noting that the courts have generally failed to assess 37.07 in light of its 1989 amendments); *Peters*, 31 S.W.3d at 712-17 (finding that the one case in which the high court confronted the amended version of Article 37.07, the court chose to rely on a case that did not adhere to the amended standards).

that the parties may introduce during the punishment phase. It provides that where punishment is tried to a jury, "either party may offer into evidence the availability of community corrections facilities serving the jurisdiction in which the offense was committed."[396] A "community corrections facility," as defined under the Government Code, is "a physical structure, established by a judicial district after authorization . . . for the purpose of confining persons placed on community supervision and providing services and programs to modify criminal behavior, deter criminal activity, protect the public, and restore victims of crime."[397] The term includes "a restitution center"; "a court residential treatment facility"; "a substance abuse treatment facility"; "a custody facility or boot camp"; "a facility for an offender with a mental impairment"; and "an intermediate sanction facility."[398] Curiously, Section 3(f) does not specifically limit the admissibility of evidence concerning a community corrections facility only to defendants who are eligible for such programs.[399] If the subsection somehow overrides the requirement of relevance under Section 3(a), evidence offered by a defendant who was not eligible for sentencing to a community corrections facility still could be barred under Rule 403.[400]

Article 37.07 also places specific limits on what evidence may be introduced at the punishment phase, even if it might be deemed relevant by a judge. Notwithstanding Section 3(a), evidence may not be introduced at the punishment phase by the prosecution "to establish that the race or ethnicity of the defendant makes it likely that the defendant will engage in future criminal conduct."[401] This subsection was prompted by the much publicized case of *Saldano v. State*,[402] in which the prosecution, without objection, introduced expert testimony during the punishment phase of a capital murder trial that the defendant constituted a future danger because "vari-

396. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(f) (Vernon Supp. 2004).

397. TEX. GOV'T CODE ANN. § 509.001(1) (Vernon 1998).

398. *Id.* § 509.001(1)(A)-(F).

399. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(f) (Vernon Supp. 2004) (noting that either party may submit the availability of community corrections facilities into evidence); *see also* 37 TEX. ADMIN. CODE § 163.39(k)(2)(c) (2003) (enumerating the criteria for eligibility).

400. *See* Rogers v. State, 991 S.W.2d 263, 266-67 (Tex. Crim. App. 1999) (en banc) (holding that evidence admissible under Article 37.07 is still subject to Rule 403).

401. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(2) (Vernon Supp. 2003).

402. 70 S.W.3d 873 (Tex. Crim. App. 2002) (en banc).

ous markers" indicated that he would probably commit future crimes.[403] One of some eighteen "markers" was the fact that Hispanics had a higher incarceration rate than the general population.[404] The Court of Criminal Appeals held that the defense had waived error, if any, by failing to object to the testimony.[405] Presumably, such a holding would still apply, Section 3(f) notwithstanding.[406]

Strangely, perhaps, Article 37.07 also prohibits the introduction by either party of "evidence that the defendant plans to undergo an orchiectomy," or the removal of one or both testes.[407] It is difficult to see how the evidence would be relevant to punishment even under the broadest reading of Section 3(a), so that the provision is not only a curiosity, but superfluous.

I. *The Limits of Admissible Evidence Under Article 37.07*

Even under the broad concept of relevance embodied by Article 37.07 and *Rogers*, the admissibility of punishment evidence is not without limits. The courts have held certain types of evidence to be irrelevant on the grounds that it would not have aided the jury in its assessment of punishment.[408] Furthermore, Texas courts have

403. *See* Saldano v. State, 70 S.W.3d 873, 885 (Tex. Crim. App. 2002) (en banc) (describing Dr. Walter Quijano's discussion of statistical incidences which help establish the possibility that a subject posts a future threat).

404. *See id.* (testifying that "[t]his is one of those unfortunate realities also that blacks and Hispanics are over-represented in the criminal justice system").

405. *Id.* at 890.

406. *See id.*

407. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(h) (Vernon Supp. 2004).

408. *See* Fryer v. State, 68 S.W.3d 628, 630-31 (Tex. Crim. App. 2002) (reiterating that expert opinion testimony on the issue of appropriate punishment is "not one upon which the aid of an expert's opinion would be of assistance to the jury" (citing Sattiewhite v. State, 786 S.W.2d 271, 290-91 (Tex. Crim. App. 1978))); Come v. State, 82 S.W.3d 486, 492 (Tex. App.—Austin 2002, no pet.) (concluding that the trial court abused its discretion in admitting a device that could be used for sexual stimulation, as there was no evidence established that it was used for that purpose); Mendiola v. State, 61 S.W.3d 541, 543-46 (Tex. App.—San Antonio 2001, no pet.) (assessing the trial court's refusal to admit evidence that an indictment for a prior extraneous offense had been dismissed as proper); Contreras v. State, 59 S.W.3d 362, 364-65 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (finding that the trial judge properly refused to admit evidence that the defendant's wife was impregnated by another man after the defense objected, as it was irrelevant to the issue of punishment assessment); Reed v. State, 48 S.W.3d 856, 861 (Tex. App.—Texarkana 2001, pet. ref'd) (explaining the propriety of the trial court's decision to bar evidence of appellant's willingness to submit to a polygraph test to ascertain his compliance with conditions of probation).

held that even where evidence is relevant under the statute, a trial court may nevertheless bar its admission under Texas Rule of Evidence 403.[409] Evidence that will be substantially more prejudicial than probative, or that may prolong the punishment phase or distract the jury, can be barred by the trial court despite its being relevant to sentencing.[410]

Finally, when read literally, the phrase "any matter deem[ed] relevant to sentencing" suggests that evidence deemed relevant by the trial judge is admissible at trial, and that appellate courts may not substitute their view for that of the lower courts.[411] However, as Judge Clinton of the Court of Criminal Appeals pointed out, such a construction of the statute might be unconstitutional.[412] The correct standard for review is, as for the admission of all evidence at punishment, abuse of discretion.[413]

J. *PSI and Article 37.07*

Though not "evidence" in the strictest sense, Article 37.07, Section 3(d), provides that when a judge assesses punishment, he "may order . . . [a pre-sentence] investigative report as contemplated in Section 9 of Article 42.12."[414] The Section further states that after

---

409. *See* Rogers v. State, 991 S.W.2d 263, 266-67 (Tex. Crim. App. 1999) (en banc) (ruling that evidence of length of prior sentences was relevant but still inadmissible because its prejudicial effect was too great); Najar v. State, 74 S.W.3d 81, 89-90 (Tex. App.—Waco 2002, no pet.) (applying Rule 403's balancing test to determine the admissibility of photographs of the victim).

410. TEX. R. EVID. 403.

411. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a) (Vernon Supp. 2004).

412. *See* Beasley v. State, 902 S.W.2d 452, 460 (Tex. Crim. App. 1995) (en banc) (Clinton, J., concurring) (arguing that the current interpretation of Article 37.07, Section 3(a) grants excessive and unconstitutional discretion to trial courts); Grunsfeld v. State, 843 S.W.2d 521, 543-44, 547 (Tex. Crim. App. 1992) (en banc) (Clinton, J., concurring) (claiming that the statute's grant of "unfettered discretion in the trial court" is an unconstitutional legislative delegation of authority); *id.* at 569 (Benavides, J., dissenting) (expressing some of the same concerns brought up by Judge Clinton).

413. *See* Sunbury v. State, 88 S.W.3d 229, 232-33 (Tex. Crim. App. 2002) (explaining that abuse of discretion analysis is appropriate when determining the trial court's "application of law to facts"); Brooks v. State, 961 S.W.2d 396, 401 (Tex. App.—Houston [1st Dist.] 1997, no pet.) (finding the trial court did not abuse discretion in including victim impact testimony).

414. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(d) (Vernon Supp. 2004).

considering the report, "and after the hearing of evidence" under 37.07, the judge shall pronounce sentence.[415]

Though the permissive "may" of the statute suggests that the court's decision to order a pre-sentence investigation (PSI) is discretionary, the Court of Criminal Appeals has opined that it is "now mandatory" for courts to order a PSI unless the case falls into one of the exceptions listed in Article 42.12, Section 9(g).[416] These exceptions apply if:

> (1) punishment is to be assessed by a jury;
> (2) the defendant is convicted of or enters a plea of guilty or nolo contendere to capital murder;
> (3) the only available punishment is imprisonment; or
> (4) the judge is informed that a plea bargain agreement exists, under which the defendant agrees to a punishment of imprisonment, and the judge intends to follow the agreement.[417]

The courts have further held that these exceptions do not apply where the defendant has requested a PSI,[418] and that a trial court must therefore order a PSI upon the defendant's request, even if the defendant is not eligible for probation and even where the court has provided the defendant with a full punishment hearing.[419]

A PSI report, as prepared by a probation officer, includes details of the circumstances surrounding the offense, the proper level of restitution, the defendant's criminal and social background, and

---

415. *Id.*; *see also* Nicolopulos v. State, 838 S.W.2d 327, 328 (Tex. App.—Texarkana 1992, no pet.) (noting that the trial court "is specifically authorized by statute to consider the contents of the presentence report" before sentencing).

416. *See* Whitelaw v. State, 29 S.W.3d 129, 134 (Tex. Crim. App. 2000) (noting that the legislature's amendments to Article 42.12 make PSIs mandatory in all criminal cases, unless it falls under one of the statutory exemptions); Smith v. State, 91 S.W.3d 407, 409 (Tex. App.—Texarkana 2002, no pet.) (explaining that "the general rule is [that] the trial court must order a PSI report unless the exceptions . . . apply"); Buchanan v. State, 68 S.W.3d 136, 139 (Tex. App.—Texarkana 2001, no pet.) (construing the language of the statute to make the issuance of a PSI report mandatory, absent an applicable exception).

417. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 9(g) (Vernon Supp. 2003).

418. *See Whitelaw*, 29 S.W.3d at 134 (noting that the recent amendments remove any ambiguity regarding requirement of a PSI when requested by the defendant); Scarborough v. State, 54 S.W.3d 419, 425 (Tex. App.—Waco 2001, pet. ref'd) (following the *Whitelaw* court's example on the requirement of a PSI when requested in a timely manner by the defendant).

419. *See Whitelaw*, 29 S.W.3d at 132 (explaining that the defendant's timely request for a PSI disables any statutory exceptions); *Scarborough*, 54 S.W.3d at 425 (noting *Whitelaw*'s ruling that a defendant's timely request forces the court to order a PSI, even if community supervision is not available to the defendant).

other facts about the defendant or the offense requested by the court.[420] Additionally, the PSI report informs the court of any applicable restitution to the victim and assists the court in determining the appropriateness of treatment for alcohol or drug abuse in cases where substance abuse had a part in the commission of an offense.[421] The report may also include a supervision plan to be provided to the defendant by the community supervision and corrections department, if the court suspends the sentence or grants deferred adjudication.[422]

Article 42.12, Section 9(a) is broadly worded, and "by its plain language allows inclusion of *any* information relating to the defendant or the offense."[423] Since the rules of evidence generally do not apply to a PSI it may include, and a court may then consider, information that might not otherwise be admissible during punishment.[424]

Before sentencing, a trial court must allow the defendant or his attorney to read the PSI.[425] The court must then "allow the defen-

---

420. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 9(a) (Vernon Supp. 2003); *Buchanan*, 68 S.W.3d at 140.

421. *Scarborough*, 54 S.W.3d at 426.

422. *See Buchanan*, 68 S.W.3d at 140 (describing Section 9(a)'s regime for a client supervision plan).

423. Fryer v. State, 68 S.W.3d 628, 629 (Tex. Crim. App. 2002).

424. *See id.* at 631 (noting that a court may consider the victim's declaration that the defendant did not receive probation contained in PSI); Wilson v. State, 108 S.W.3d 328, 332 (Tex. App.—Fort Worth 2003, pet. ref'd) (determining that the trial court did not err in considering hearsay statements in the PSI); Duncan v. State, 87 S.W.3d 712, 716 (Tex. App.—Texarkana 2002, no pet.) (indicating that a trial court may properly consider a victim's sentencing recommendation in a PSI); *see also* Tamminen v. State, 653 S.W.2d 799, 807 n.6 (Tex. Crim. App. 1983) (en banc) (Onion, P.J., concurring and dissenting) (acknowledging that changes to Article 37.07 permitted the court to consider arrests, pending indictments, and hearsay contained in a PSI for the purpose of determining sentence); Nunez v. State, 565 S.W.2d 536, 540 n.1 (Tex. Crim. App. 1978) (en banc) (Onion, P.J., concurring) (asserting that neither the arrest record nor the indictment are admissible during punishment under the version of Article 37.07 applicable at the time of trial); Clay v. State, 518 S.W.2d 550, 555 (Tex. Crim. App. 1975) (explaining that a court could consider a pending indictment in a PSI); Brown v. State, 478 S.W.2d 550, 551 (Tex. Crim. App. 1972) (noting that a trial court is authorized to consider hearsay statements contained in a PSI); McNeese v. State, 468 S.W.2d 800, 801 (Tex. Crim. App. 1971) (finding that a court could consider an arrest record contained in a PSI); Williams v. State, 958 S.W.2d 844, 845-46 (Tex. App.—Houston [14th Dist.] 1997, no pet.) (explaining that a court could consider hearsay in a PSI); Nicolopulos v. State, 838 S.W.2d 327, 328 (Tex. App.—Texarkana 1992, no pet.) (declaring that a court may consider hearsay in a PSI).

425. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 9(d) (Vernon Supp. 2003).

dant or his attorney to comment upon" the PSI and may allow the defendant to "introduce testimony or other information alleging a factual inaccuracy in" the PSI.[426] The defendant has the burden to demonstrate any inaccuracies found in the report.[427] However, the report will not be rendered inadmissible upon a defendant's allegation of a factual inaccuracy.[428]

Failure to object or to bring to the court's attention its lapse in ordering a PSI waives the error.[429] Error in the failure to order a PSI is susceptible to harmless error analysis under Rule 44.2(b) of the Texas Rules of Appellate Procedure.[430]

K. *Victim Impact Statements and Punishment*

Like a PSI, a victim impact statement is not strictly speaking "evidence," but under state law, it may be considered by a judge in assessing punishment. Article 56.03 of the Code of Criminal Procedure sets out the requirements for a victim impact statement, including what information may be collected.[431] Along with biographical and contact information for the victim and his family, the report may also include statements of: economic loss suffered by the victim, guardian, or relative; any physical or psychological injury suffered by the victim, guardian, or relative; psychological services requested as a result of the offense; any change in the victim's, guardian's, or relative's personal welfare or familial relationship as a result of the offense; whether or not the victim, guardian,

---

426. *Id.* § 9(e).

427. DuBose v. State, 977 S.W.2d 877, 881 (Tex. App.—Beaumont 1998, no pet.); *see also* Garcia v. State, 930 S.W.2d 621, 623-24 (Tex. App.—Tyler 1996, no pet.) (emphasizing that the burden rests with the defendant).

428. *Garcia*, 930 S.W.2d at 623; *see also* Stancliff v. State, 852 S.W.2d 639, 641 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd) (reiterating that factual inaccuracies do not make the PSI report inadmissible).

429. Eddie v. State, 100 S.W.3d 437, 445 (Tex. App.—Texarkana 2003, pet. ref'd); *see also* Smith v. State, 91 S.W.3d 407, 409-10 (Tex. App.—Texarkana 2002, no pet.) (stating that the defendant's failure to object to the introduction of the PSI report did not preserve the issue for appeal); Buchanan v. State, 68 S.W.3d 136, 140 (Tex. App.—Texarkana 2001, no pet.) (noting that the failure to order a PSI is waived if the defendant does not object).

430. *See Buchanan*, 68 S.W.3d at 139-40 (holding that the error was harmless); Yarbrough v. State, 57 S.W.3d 611, 619 (Tex. App.—Texarkana 2001, pet. ref'd) (emphasizing that the harmless error analysis is appropriate); Scarborough v. State, 54 S.W.3d 419, 425-26 (Tex. App.—Waco 2001, pet. ref'd) (agreeing that the harmless error analysis is appropriate).

431. TEX. CODE CRIM. PROC. ANN. art. 56.03(a), (b) (Vernon Supp. 2002).

or relative wishes to be notified of parole hearings;[432] and "any other information, other than facts related to the commission of the offense, related to the impact of the offense on the victim, guardian, or relative."[433]

The statute mandates that a trial court may not inspect the statement until "after a finding of guilt or until deferred adjudication is ordered."[434] Similarly, the contents of the statement are not to be disclosed to "any person" before a finding of guilt.[435] If the defendant pleads guilty or nolo contendere, or if he authorizes the court in writing to inspect the document, the court may review the statement before a pronouncement of guilt and disclose its contents.[436]

"Prior to the imposition of sentence," the court "shall consider the information provided in the statement."[437] The court must provide the defendant time to read the statement, comment on it, and, with the court's approval, introduce testimony or "other information" alleging a factual inaccuracy in the statement.[438]

V. SPECIAL ISSUES

The range of punishment can be affected by the use of special issues during the punishment hearing,[439] such as: sudden passion and adequate cause in a murder case;[440] release in a safe place in a kidnapping case;[441] weapon free zone in a weapons offense; and[442]

---

432. TEX. CODE CRIM. PROC. ANN. art. 56.03(b)(1)-(7) (Vernon Supp. 2002).

433. TEX. CODE CRIM. PROC. ANN. art. 56.03(b)(8) (Vernon Supp. 2002).

434. TEX. CODE CRIM. PROC. ANN. art. 56.03(f) (Vernon Supp. 2002).

435. *Id.*

436. TEX. CODE CRIM. PROC. ANN. art. 56.03(f)(1)-(2) (Vernon Supp. 2002); *see also* Berry v. State, 66 S.W.3d 402, 404 (Tex. App.—Austin 2001, no pet.) (noting that the trial court did not err in reviewing the victim impact statement before a finding of guilt where the defendant pleaded guilty); Watson v. State, 974 S.W.2d 763, 765 (Tex. App.—San Antonio 1998, no pet.) (expressing that the trial court did not err in admitting a victim impact statement when no contest is pleaded).

437. TEX. CODE CRIM. PROC. ANN. art. 56.03(e) (Vernon Supp. 2002).

438. *Id.*

439. *See* TEX. PEN. CODE ANN. § 12.47(a) (Vernon Supp. 2003) (providing that punishment may be increased to that of the next highest category); TEX. CODE CRIM. PROC. ANN. art. 42.014(a) (Vernon Supp. 2003) (explaining that crimes motivated by bias or prejudice may be more severely punished); *cf.* Nixon v. State, 572 S.W.2d 699, 701 (Tex. Crim. App. [Panel Op.] 1978) (commenting that exonerating evidence or evidence supporting an affirmative defense is not admissible at the punishment stage).

440. TEX. PEN. CODE ANN. § 19.02(d) (Vernon 2003).

441. *Id.* § 20.04(d).

442. *Id.* § 46.11(a).

a drug free zone in a drug case.[443] Evidence in support of these special issues will, of course, be relevant to punishment, and hence, will be admissible. The following is a brief discussion of each of the special issues; a discussion of pleading, notice, and particular problems in proving each is beyond the scope of this Article.

A. *Sudden Passion and Adequate Cause*

As of September 1, 1994, the question of whether a defendant has committed voluntary manslaughter is an issue of punishment, not guilt-innocence.[444] The burden of proof is on the defendant to show, during the punishment phase of the trial, by a preponderance of the evidence, that he acted in sudden passion produced by adequate cause.[445] If the defendant successfully carries his burden, the punishment range is lowered to a second degree felony.[446] Offenses committed before the effective date of the act must be tried under the old statute.[447] "[E]vidence of clinical depression or mental impairment . . . is inadmissible on the issue of voluntary manslaughter."[448]

B. *Release in a Safe Place*

As of September 1, 1994, the issue of whether the victim was released in a safe place is a punishment issue in a kidnapping case.[449] The burden of proof rests on the defense to show by a preponderance of evidence that the defendant released the victim in a safe place.[450] If the defendant carries his burden, the offense is a second degree felony.[451]

---

443. TEX. HEALTH & SAFETY CODE ANN. § 481.134(b) (Vernon Supp. 2004).

444. *See* TEX. PEN. CODE ANN. § 19.02(d) (Vernon 2003). (explaining the sudden passion issue); *see also* Welch v. State, 908 S.W.2d 258, 262 n.3 (Tex. App.—El Paso 1995, no pet.) (stating that "[v]oluntary manslaughter is no longer defined as a separable offense"); Corral v. State, 900 S.W.2d 914, 919 n.2 (Tex. App.—El Paso 1995, no pet.) (agreeing that voluntary manslaughter is no longer separable).

445. *See.* TEX. PEN. CODE ANN. § 19.02(d) (Vernon 2003) (explaining the burden of proof).

446. *Id.*

447. *See Corral*, 900 S.W.2d at 919 n.2 (noting that the prior version of the law applied since the incident and trial occurred prior to September 1, 1994).

448. Miller v. State, 770 S.W.2d 865, 867 (Tex. App.—Austin 1989, pet. ref'd).

449. TEX. PEN. CODE ANN. § 20.04(d) (Vernon 2003).

450. *Id.*; *see also* Teer v. State, 895 S.W.2d 845, 848 n.1 (Tex. App.—Waco 1995, no pet.) (per curiam) (explaining that the burden is on the defendant).

451. TEX. PEN. CODE ANN. § 20.04(d) (Vernon 2003).

C. *Weapon Free Zone*

The punishment range prescribed for an unlawful possession of weapons offense under Chapter 46 of the Penal Code is increased to the next highest category if it is shown beyond a reasonable doubt that the defendant committed the offense in a place "within 300 feet of the premises of a school; or on [the] premises where an official school function is taking place; or [where] an event sponsored or sanctioned by the University Interscholastic League is taking place."[452] This enhancement does not affect the punishment for the offense of carrying a prohibited weapon on school grounds under Section 46.03(a)(1) of the Penal Code.[453]

Section 46.12(a) of the Penal Code permits the prosecution to introduce "a map produced or reproduced by a municipal or county engineer for the purpose of showing the location and boundaries of weapons free zones."[454] The map will provide "*prima facie* evidence of the location of the boundaries of those areas if the governing body of the municipality or county adopts a resolution or ordinance approving the map as an official finding and record."[455] This provision does not prevent the prosecution from introducing or relying on any other evidence or testimony to establish any element of the offense on trial.[456] Nor does it prevent the State from using or introducing any other map or diagram otherwise admissible under the Rules of Evidence.[457]

D. *Drug Free Zone*

The punishment range is increased to the next highest category if the State proves that the drug offense was committed within 1,000 feet of the premises of a school or institution of higher learning or a playground, or within 300 feet of the premises of a public or private youth center, public swimming pool, or video arcade facility.[458] Other drug offenses may be similarly enhanced under the

452. *Id.* § 46.11(a).
453. *Id.* § 46.11(b) (Vernon Supp. 2003).
454. *Id.* § 46.12(a).
455. *Id.*
456. TEX. PEN. CODE ANN. § 46.12(d)(1) (Vernon 2003).
457. *Id.* § 46.12(d)(2).
458. TEX. HEALTH & SAFETY CODE ANN. § 481.134(b) (Vernon Supp. 2004).

statute.[459] There is no specific provision for the introduction of a map establishing "drug free zones," as there is under Section 46.12 of the Penal Code. "Punishment that is increased for a conviction for an offense under" the drug free zone enhancement "may not run concurrently with punishment for a conviction under any other criminal statute."[460]

VI. CONCLUSION

Having initiated sweeping changes in the admissibility of punishment evidence, the Texas legislature has shown no inclination to return to the issue and "micro-manage" the admissibility of punishment evidence during a jury trial. Instead, the legislature appears to have turned its attention to issues of the admissibility of evidence before the court in a non-jury trial, widening the scope of what a judge may consider far beyond that which a jury may be entitled to hear.

On the other hand, the courts, after initially balking at implementing the changes the legislature mandated, have generally interpreted Article 37.07 liberally to permit the introduction of a wide range of evidence that was not admissible under older versions of the statute. The courts have indicated that there are limits to what they may permit, particularly in the area of victim impact testimony, and have signaled that they will require the State to adhere to the notice provisions enacted by the legislature.

What remains to be seen is how liberally the courts will construe those notice provisions, and what effect, if any, a harmless error analysis will have. In addition, the courts may revisit admissibility issues surrounding reputation and character testimony that were once thought well-settled, though with the advent of a broader scope of admissible punishment evidence, such testimony will often take a back seat to other more immediate types of punishment evidence.

459. *See id.* § 481.134(c)-(f) (explaining that such offenses within a certain distance of a youth center or school may be enhanced).

460. *Id.* § 481.134(h).