Chapter 36

The Closing Stage of a Jury Trial: Renewal of the Motion for Acquittal; Closing Argument; Jury Instructions; The Jury's Deliberations and Verdict

Part A. The Renewed Motion for Judgment of Acquittal

§ 36.01 THE RENEWED MOTION FOR ACQUITTAL; PARTIAL DIRECTED VERDICTS

Chapter 35 described the nature and functions of the renewed motion for acquittal in a bench trial, together with various legal doctrines that bear upon the motion. Most of what was said about the latter doctrines there is also pertinent to jury trials. In a jury trial, however, the motion has heightened importance because it determines whether the case will go to the jury or be dismissed by the judge.

The judge may grant a motion for acquittal in whole or in part. S/he may dismiss counts of the Petition and submit others to the jury. S/he may grant an acquittal on the offense charged in the Petition and submit lesser included offenses to the jury. See § 36.05 *infra*.

Whereas defense argument on the motion for acquittal and closing argument are consolidated in a bench trial, they are, of course, separate in a jury trial. At the conclusion of all of the evidence (when both prosecution and defense have "rested"), defense counsel makes his or her renewed motion for acquittal, and the prosecutor responds. (Counsel should request that the jury be excused while the motion is made, argued, and ruled on, so that a denial of the motion does not convey to the jury the impression that the judge has ratified the sufficiency of the prosecution's case.) If the judge denies the motion in whole or in part, the attorneys then submit requests for jury instructions (see § 36.02 *infra*) and thereafter make their closing arguments to the jury (see §§ 36.10-36.12 *infra*).

In a jury trial on a criminal or delinquency charge, the court may not direct a verdict for the prosecution no matter how overwhelming and essentially uncontested the evidence of guilt. *See, e.g., United States v. Martin Linen Supply Co*., 430 U.S. 564, 572-73 (1977) (dictum); *Sandstrom v. Montana*, 442 U.S. 510, 516 n.5 (1979) (dictum); *Standefer v. United States*, 447 U.S. 10, 22 (1980) (dictum); *Rose v. Clark*, 478 U.S. 570, 578 (1986) (dictum); *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993) (dictum); *cf. Jackson v. Virginia*, 443 U.S. 307, 317 n.10 (1979) (dictum); *United States v. Bailey*, 444 U.S. 394, 412 n.9 (1980) (dictum); *Harris v. Rivera*, 454 U.S. 339, 345-46 (1981) (per curiam) (dictum).

Part B. Requests for Jury Instructions

§ 36.02 THE CONFERENCE ON INSTRUCTIONS

In many jurisdictions it is customary or obligatory, prior to the lawyers' closing arguments, for the judge to confer with the prosecutor and defense counsel to determine what the jury will be charged (or to "settle the instructions," as it is often called). This may be done as a matter of routine, or counsel may have to request a conference if s/he wants one.

At the conference the judge may read to counsel, or allow counsel to read, part or all of what the judge proposes to instruct the jury. (Usually the "standard" parts of the charge will not be read or made available to counsel unless specifically requested. If counsel wants to see what the judge is going to charge about the role and obligations of jurors, the process of jury deliberation, the attitudes with which the jurors should approach their deliberations, proof beyond a reasonable doubt, and other "boilerplate" matters, counsel will have to ask explicitly to see these portions of the judge's draft.) The judge will then entertain objections and proposed modifications and will rule on them.

Whether or not the judge is required to or does disclose his or her own draft jury charge, s/he will receive and rule upon proposed instructions by both parties (often called "requests for charge" or "prayers" or "points for charge"). *See, e.g.*, FED. RULE CRIM. PRO. 30 (if a party "request[s] in writing that the court instruct the jury on the law as specified in the request" (Rule 30(a)), "[t]he court must inform the parties before closing arguments how it intends to rule on the requested instructions" (Rule 30(b)); *cf. People v. Clark*, 453 Mich. 572, 589-91, 556 N.W.2d 820, 826-27 (1996) (reversing a conviction and remanding for a new trial because "the judge, after agreeing to a modified instruction, subsequently decided to charge the jury with the unmodified instruction after defense counsel relied on and conformed his closing arguments to the modified instruction"; "The rule that counsel be informed of the instructions to be given to the jury before closing arguments enables counsel to tailor arguments to the proper legal standards. If the instruction is changed after an attorney relies on it, it impairs not only the content and quality of the final argument, but the effectiveness of the representation as well."); *Ardoin v. Arnold*, 653 Fed. Appx. 532, 534-35, 536 (9th Cir. 2016) (the trial court "violated Ardoin's Sixth Amendment right to counsel during closing argument" by refusing to reopen closing arguments after authorizing the jury – during jury deliberations, in response to a question from the jury – to consider a felony murder theory that previously had applied only to Ardoin's co-defendant, thereby depriving counsel for Ardoin of any "opportunity whatsoever to argue felony murder after learning that the jury could convict on that theory"). The parties' requests for instructions are ordinarily required to be submitted to the court and opposing counsel, in writing, at a specified time (usually at the close of the evidence or at such other time as the trial judge orders). *See, e.g.*, FED. RULE CRIM. PRO. 30(a). They may or may not also be filed with the courtroom clerk, depending on local practice. In jurisdictions that have form books of approved jury instructions (sometimes called "pattern instructions"), counsel can simply request "Number 344" or "Number 344 as modified by . . . [*specifying any desired changes*]."

Oral requests for charge are permitted in some localities. However, even when they are permitted, counsel should ordinarily make his or her requests in writing. This enhances the likelihood that the judge will stick to counsel's exact wording if the request is granted, and it

assures an adequate record for appeal if the request is denied.

At the conference, the judge takes up each request for charge and rules on it, usually endorsing each request "allowed" ("granted"), "denied," or "charged in substance" ("covered"). The last of these notations indicates that the judge accepts the principle of the requested instruction but has, or thinks s/he has, adequately dealt with the point in another portion of the draft charge.

Procedures for preserving objections to the court's refusal to adopt proposed defense instructions vary. In some localities all written requests for charge are routinely made a part of the record that will go up on appeal; the judge's endorsement of a request "denied" or "covered" suffices to preserve a claim of error in the refusal of that request. In other localities counsel must arrange specially with the clerk to file the defense requests that the judge has denied. Elsewhere, the judge dictates his or her rulings to the court reporter during or after the conference on instructions – or the entire conference is stenographically recorded – and counsel must object to each ruling as it is dictated or made. In some jurisdictions, counsel may have to incorporate the rulings in formal bills of exceptions. Alternatively or in addition, counsel may be required to specify each denial of a defense request for instructions as a separate claim of error in a postverdict motion for a new trial (see § 37.02(a) *infra*) in order to preserve the claim for appeal. *Cf*. *People v. Fermin*, 36 A.D.3d 934, 935, 828 N.Y.S.2d 546, 548 (N.Y. App. Div., 2d Dep't 2007) ("the defendant's claim that the court erred in refusing to charge the jury as to justification pursuant to Penal Law § 35.15(2) [regarding the use of "deadly physical force in defense"] . . . is preserved for appellate review" even though defense counsel "specifically sought a justification charge pursuant to Penal Law § 35.05" [on "use of physical force"] because the trial court, "in making its ruling in terms pertinent to Penal Law 35.15(2), 'expressly decided the question' now raised on appeal in response to a 'protest by a party'").

In all of these regards, counsel should be sure s/he knows what local practice requires. If, as is commonplace, statutes and rules are silent on the operational details, counsel should seek advice from senior court clerks and from experienced defense attorneys whose practice includes appellate work.

§ 36.03 THE LORE OF CHARGING THE JURY

In addition to the substantive law on which the court will charge the jury and which is discussed at the conference on instructions, there is, in many jurisdictions, a more or less elaborate body of law on the subject of the judge's charge itself – what it must contain, what it may contain, its form, and so forth – that counsel will want to have in mind.

Usually, there are a few matters concerning which the court is obliged on its own initiative to charge the jury and to charge the jury correctly. The failure of counsel to bring omissions or errors in these matters to the court's attention is not fatal to a claim, on post-trial motions or appeal, that the charge was inadequate or erroneous. The matters whose omission or

incorrectness may subsequently be noticed as "plain error in the charge" are commonly limited to (1) the elements of the offense, (2) the statement that the burden of proof is on the prosecution beyond a reasonable doubt, and (3) a statement of the number of jurors who must agree to render a verdict. All other asserted imperfections must be objected to and any asserted omissions must be pointed out, with proposed language to cover the omitted point. *See, e.g.*, *Henderson v. Kibbe*, 431 U.S. 145, 154-55 (1977); *Hankerson v. North Carolina*, 432 U.S. 233, 244 n.8 (1977) (dictum); *cf. United States v. Frady*, 456 U.S. 152 (1982); *Engle v. Isaac*, 456 U.S. 107 (1982).

The judge is ordinarily not required to give the charges requested by counsel in the precise language of the request, even though that language correctly states an applicable legal principle. The judge may cover the matter in his or her own language instead. But the jurisdictions differ in this regard, as they do on the questions (1) whether the judge is forbidden to comment on the evidence in addition to stating the applicable legal principles – and, if so, what constitutes a forbidden "comment" (*compare Gutierrez v. State*, 177 So. 3d 226 (Fla. 2015), *and State v. Girard*, 34 Or. App. 85, 578 P.2d 415 (1978), *and State v. Stukes*, 787 S.E.2d 480, 483 (S.C. 2016), *and State v. Levy*, 156 Wash. 2d 709, 718-25, 132 P.3d 1076, 1080-84 (2006) (dictum), *and State v. Nomura*, 79 Hawai'i 413, 416-17, 903 P.2d 718, 721-22 (1995) (dictum), *with State v. Hopkins*, 108 Ariz. 210, 495 P.2d 440 (1972); and see § 36.13 *infra*); (2) to what extent and under what circumstances the judge is required to give instructions on the theory of the defense (see § 36.06, subdivision (6) *infra*); (3) whether the judge may refuse entirely to give a requested instruction because, although correct in its major outlines, it is incorrect on specific details or whether s/he has an obligation to give the substance of it, corrected as may be required to conform to law (*compare Privette v. State*, 320 Md. 738, 746-49, 580 A.2d 188, 192-93 (1990), *and Thomas v. State*, 67 P.3d 1199, 1202-03 (Wyo. 2003), *with State v. Brazeal*, 247 Or. 611, 431 P.2d 840 (1967)); (4) how exactingly appellate courts will scrutinize particular passages in the charge for erroneous statements, as distinguished from reading the charge as a whole (for example, whether the judge who has given a general charge stating that the prosecution bears the burden of proof beyond a reasonable doubt may use the form "if you find" in defining the several elements of the offense rather than "if you find beyond a reasonable doubt"), and so forth. These various local doctrines relating to the charge and to the process by which it is required to be drawn up will affect the manner in which counsel proceeds at the conference on instructions, and counsel should go into the conference with an adequate grounding in them.

§ 36.04 GENERAL AREAS COVERED BY THE CHARGE

In general, the court's charge will cover:

(1) The elements of the crime charged in the Petition (see § 36.06 subdivision (3) *infra*) and of all lesser included crimes (see § 36.05 *infra*).

(2) The elements of, or the legal principles necessary to evaluate, any defense theory (such as self-defense or entrapment) raised by the evidence (see § 36.06 subdivision (6) *infra*).

(3) The legal principles governing any factual and evidentiary issues presented by the case (such as the preconditions for finding a tacit admission; or the preconditions for basing a conviction of burglary or theft upon a finding of possession of recently stolen property (*see*, *e.g.*, *Walker v. State*, 896 So. 2d 712 (Fla. 2005)).

(4) The number of jurors who must agree in order for the jury to return a verdict.

(5) The prosecution's burden of proof beyond a reasonable doubt; the meaning of the phrase "beyond a reasonable doubt"; the presumption of innocence; any special rules governing the prosecution's burden (such as corroboration requirements); and the allocation and quantum of the burden of proof on subsidiary issues (see §§ 35.03-35.05 *supra*).

(6) Permissive inferences and presumptions bearing on the ultimate issues in the case (see § 35.06 *supra*).

(7) Permissive inferences and presumptions and other "fact-finding aids" relating to standard and recognized fashions of reasoning from the evidence (such as inferences from the failure of a party to call a witness (see § 10.08 *supra*); from a finding that a witness testified falsely in one particular (*see*, *e.g.*, *People v. Johnson*, 225 A.D.2d 464, 639 N.Y.S.2d 802 (N.Y. App. Div., 1st Dep't 1996)); or from factual circumstances that the proof tends to show: flight of the respondent (*see*, *e.g.*, *Thompson v. State*, 393 Md. 291, 901 A.2d 208 (2006)); concealment of evidence (*e.g.*, *Jarrett v. State*, 220 Md. App. 571, 588-91, 104 A.3d 972, 982-84 (2014)); and so forth).

(8) Required or recommended ways of weighing particular sorts of testimony (such as the requirement that the testimony of an accomplice is to be received with caution and scrutinized with care (see § 36.06 subdivision (2) *infra*).

(9) Limitations on the permissible use of certain items of evidence (such as the use of a testifying respondent's prior adjudications or prior [bad] acts only for impeachment, not as the basis for inferring propensity (see §§ 30.07(a), (b) *supra*; § 36.06 subdivision (1) *infra*).

(10) Matters that are to be put out of account or not given described effects in the deliberations of the jury (such as the impermissibility of considering evidence that was struck, of drawing inferences from the respondent's failure to testify, of speculating from objections that were sustained, of treating the statements of counsel as evidence, or of treating the Petition as evidence).

(11) The general role of the jury and the court (including the ultimate responsibility of the jury for fact-finding, the requirement that the jury follow the law charged by

the court, and admonitions not to draw inferences from the court's evidentiary rulings or rulings on motions for a directed verdict and not to speculate upon, or be influenced by, the judge's attitudes toward the case).

(12) [*In some jurisdictions*] A summary of the evidence.

(13) [*In some jurisdictions*] An expression of opinion on the evidence.

(14) [*In jurisdictions where juries fix the sentence for the offense in issue*] The sentence options and the legal principles relating to the jury's sentencing choice.

(15) Procedures that the jury should follow in the process of deliberation (choosing a foreperson, using exhibits, requesting supplemental instructions, separating, and so forth).

Counsel should have considered all of these areas prior to the conference on instructions and should be familiar with the governing principles and aware of what s/he wants to have charged – and *not* to have charged – in each area. S/he will be particularly responsible for charges on the defense theories and on principles of law relating to them and for charges on evidentiary matters. In cases in which the respondent did not testify at trial, counsel will probably be asked specifically whether s/he wants a charge on the impermissibility of drawing any negative inferences from the respondent's failure to testify. See § 33.05 *supra.*

§ 36.05 LESSER INCLUDED OFFENSES

It is especially important that counsel have a well-considered position on the submission of lesser included offenses. *See, e.g., Crace v. Herzog*, 798 F.3d 840, 843, 852-53 (9th Cir. 2015); *McNeal v. State*, 412 S.W.3d 886, 889-90, 893 (Mo. 2013). The general principle theoretically applicable here is that the court may (and ordinarily must, on request of counsel (*see, e.g.*, *Keeble v. United States*, 412 U.S. 205, 208 (1973); *Jeffers v. United States*, 432 U.S. 137, 153-54 (1977) (plurality opinion); *State v. Locke*, 90 S.W.3d 663 (Tenn. 2002); *Sweed v. State*, 351 S.W.3d 63 (Tex. Crim. App. 2011); *Thomas v. State*, 67 P.3d at 1202-06)) submit to the jury any offenses that are lesser included offenses of the crime charged in the charging paper and upon which the evidence would support a conviction. *See also*, *e.g.*, *State v. Montgomery*, 39 So. 3d 252 (Fla. 2010); *compare Beck v. Alabama*, 447 U.S. 625 (1980) (holding that a defendant has a federal constitutional right to the submission of an evidentially supported lesser offense in a capital case), *and Williams v. Trammell,* 539 Fed. Appx. 844 (10th Cir. 2013), *with Schad v. Arizona*, 501 U.S. 624, 645-48 (1991) (rejecting a defendant's contention "that the due process principles underlying *Beck* require that the jury in a capital case be instructed on every lesser included noncapital offense supported by the evidence, and that robbery was such an offense in this case" (*id*. at 646), and holding that instructions which gave the jury "the option of finding . . . [the defendant] guilty of a [*i.e.*, at least one] lesser included noncapital offense" (*id*.) "sufficed to ensure the verdict's reliability" (*id*. at 648)), *and Hopkins v. Reeves*, 524 U.S. 88, 90-91 (1998)

(holding that *Beck* does not require instructions on "offenses that are not lesser included offenses of the charged crime under state law"), *and Hopper v. Evans*, 456 U.S. 605 (1982) (distinguishing *Beck* because the *Hopper* record contained no evidence supporting conviction of a lesser offense), *and Spaziano v. Florida*, 468 U.S. 447 (1984) (distinguishing *Beck* because in *Spaziano* the lesser offense was barred by a statute of limitations; in this situation the Court holds that the accused should be given the choice between waiving the statute or waiving the lesser-included-offense instruction. (*id.* at 456-57)).

A "lesser included offense" is an offense defined by law in such a manner that:

(1) Each of its elements is an element of the crime charged, and

(2) It has no elements that are *not* elements of the crime charged, and

(3) It lacks some element of the crime charged.

See, e.g., Schmuck v. United States, 489 U.S. 705, 717-19 (1989), and authorities cited; *see also Carter v. United States*, 530 U.S. 255, 260-61 (2000). Thus assault is a lesser included offense of the crime of assault with a deadly weapon; assault is also a lesser included offense of rape; but assault with a deadly weapon is not a lesser included offense of rape, even though, in fact, in a particular rape case the assailant may have been armed and may have committed an assault with a deadly weapon.

Difficult technical problems arise with regard to whether some lesser offenses are included in some greater ones, particularly if the lesser offense has an element that is not necessarily coincident with an element of the greater crime in all cases but inevitably is so in a subclass of cases (for example, the question whether unauthorized use of government property is a lesser included offense of grand larceny in a case in which the allegedly stolen item *was* government property). Difficult problems also arise with regard to whether the record will support a conviction on the lesser charge (for example, whether, when theft is shown and the only evidence of the value of the stolen item is the complainant's generic description of it and his or her testimony that it was worth $110, the record will support a conviction of petty theft (theft of an item worth less than $100)).

Defense counsel will have considerable ground for legal contention on these issues. What is important for him or her to decide first is whether s/he *wants* a particular lesser included offense or *any* lesser included offenses submitted. The considerations are complex but boil down basically to the question whether counsel wishes to give the jury a compromise position. A jury faced with the alternatives of convicting on a serious crime or of acquitting *may* acquit, particularly if (a) the evidence is close or (b) the respondent is sympathetic or (c) there are extenuating circumstances or (d) the penalty for the offense charged seems incommensurately harsh. Given the option of conviction on a lesser charge, the jury may buy into the lesser conviction. If counsel senses that the jury is divided and that the stronger jurors favor the

defense, counsel may well want to have the jury decide guilt or innocence of the offense charged on an all-or-nothing basis.

Counsel must take stock of the jurors and decide whether s/he wants to put them to the all-or-nothing choice. There are no general guidelines for this decision; it is a matter of the feel of the case and of the jury. If counsel decides that s/he does not want lesser charges given, s/he should resist them, arguing that they are not available in law or on the record. If s/he wants them, s/he should urge them and be prepared to submit instructions covering the elements of each one that s/he wants charged. As a practical matter, some judges will give considerable deference to the wishes of defense counsel and will not be strictly bound by the theoretical rules requiring the submission of lesser offenses. These judges feel that if counsel and the respondent want to put the jury to a yes-or-no decision on the major crime, they should generally be permitted to take that gamble. Similarly, many judges will submit lesser offenses, at counsel's request, even though there is hardly arguable support for them in the record. A ubiquitous practice, for example, is to submit the lesser offense of second-degree murder in a first-degree prosecution based on the felony-murder theory, even though there is often not a shred of evidence upon which the *mens rea* of second-degree murder can be found.

There is a difference of opinion, among the jurisdictions, about whether the decision to request the submission of a lesser-included offense is a strategic decision to be made by defense counsel or the type of fundamental determination that is reserved for the respondent to make. *Compare, e.g., People v. Colville*, 20 N.Y.3d 20, 23, 979 N.E.2d 1125, 1126, 955 N.Y.S.2d 799, 800 (2012) ("the decision whether to seek a jury charge on lesser-included offenses is a matter of strategy and tactics which ultimately rests with defense counsel"; the conviction is reversed and the case is remanded for a new trial because the trial judge rejected defense counsel's request for submission of lesser-included offenses, which was opposed by the defendant.), *with People v. Brocksmith*, 162 Ill. 2d 224, 229-30, 642 N.E.2d 1230, 1232-33, 205 Ill. Dec. 113, 115-16 (1994) ("we believe that the decision to tender a lesser included offense is analogous to the decision of what plea to enter, and that the two decisions should be treated the same. Because it is defendant's decision whether to initially plead guilty to a lesser charge, it should also be defendant's decision to submit an instruction on a lesser charge at the conclusion of the evidence. In both instances the decisions directly relate to the potential loss of liberty on an initially uncharged offense."; the conviction is reversed because "defense counsel, rather than defendant, made the ultimate decision to tender a lesser included offense instruction"). Even if the decision is a strategic one for counsel to make, "[d]efense counsel undoubtedly has a duty to discuss potential strategies with the [respondent]" (*Florida v. Nixon*, 543 U.S. 175, 178 (2004)), and counsel should accord very great weight to the client's view.

§ 36.06 DEFENSE REQUESTS FOR INSTRUCTIONS

The general theory of the defense determines what instructions counsel should request. S/he should consider, among other possibilities, requests for charges:

(1) *Limiting the use of items of prosecution evidence*. For example, in jurisdictions that allow the prosecutor to impeach the respondent with prior adjudications or prior [bad] acts (see § 30.07(b) *supra*), counsel may request an instruction that evidence of the respondent's prior adjudications or prior [bad] acts may be considered only insofar as the jury finds it relevant in assessing his or her credibility as a witness and may not be considered as bearing directly on the respondent's guilt or innocence, because the law does not permit the speculation that a person may be more or less likely to have committed the present offense simply because s/he has or has not committed an offense at some earlier time. See § 30.07(a) *supra*.

(2) *Depreciating the weight of categories or items of prosecution evidence.* For example, counsel may request an instruction that the incriminating testimony of an alleged accomplice should be viewed with caution and suspicion. *See*, *e.g.*, *Wheeler v. State*, 560 So. 2d 171 (Miss. 1990).

(3) *Listing the elements of the offense charged (and of any lesser included offense submitted) in a form that emphasizes that the elements are distinct and that the jury must find each and every element separately. See*, *e.g.*, *Riley v. McDaniel*, 786 F.3d 719, 723-24 (9th Cir. 2015) (the defendant was denied due process by a jury "instruction [which] defined deliberation as a part of premeditation, rather than as a separate element" where "Nevada first-degree murder law did indeed contain three separate mens rea elements"). Counsel may also request an instruction stating the rule that the jury may consider only the offenses charged in the Petition and its lesser included offenses (*see State v. Hicks*, 768 S.E.2d 373 (N.C. App. 2015); *cf. Cole v. Arkansas*, 333 U.S. 196 (1948)).

(4) *Stating the general burden of proof and burdens on subsidiary issues favorably to the defense.* The two authoritative formulations of the constitutionally requisite standard for conviction are: (a) that an accused may not be convicted "'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged'" (*Cage v. Louisiana*, 498 U.S. 39 [at 39] (1990), quoting *In re Winship*, 397 U.S. 358, 364 (1970)); and (b) that the law " requires that each element of a crime be proved to a jury beyond a reasonable doubt" (*Hurst v. Florida*, 136 S. Ct. 616, 621 (2016)). Because the first formulation focuses on "facts" and the second on "elements," counsel can request that each be stated separately. (Beyond emphasizing that the two requirements are distinct, their statement in separate sentences provides the benefit of repetition of the core phrase, "beyond a reasonable doubt." The value of repetition in persuasion has been recognized for a couple of thousand years at least. *See* [CICERO], RHETORICA AD HERENNIUM, IV, XXVIII, 38.) Useful elaborations of the beyond-a-reasonable doubt standard which counsel should consider include:

(i) "In civil cases, it is only necessary to prove that a fact is more likely true than not or that its truth is highly probable. In delinquency cases such as this, the state's proof must be more powerful than that. It must be beyond a reasonable doubt." *See*, *e.g.*, *State v. Portillo*, 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995), relying on the widely influential Instruction 21 in FEDERAL JUDICIAL CENTER, PATTERN

CRIMINAL JURY INSTRUCTIONS 28 (1987).

(ii) "A reasonable doubt does not mean a doubt for which you have to give a specific reason." *See e.g.*, *State v. Medina*, 147 N.J. 43, 52-53, 685 A.2d 1242, 1246-47 (1996); *State v. Hudson*, 286 N.J. Super. 149, 153, 668 A.2d 457, 458 (1995) ("a reasonable doubt may be one that defies the jury's ability to express or articulate the reasons for it").

(iii) "A reasonable doubt may arise simply because you believe that the prosecution's evidence has failed to exclude every fair and rational hypothesis except that of guilt." *See*, *e.g.*, *State v. Cervantes*, 87 Wash. App. 440, 448, 942 P.2d 382, 385 (1997).

(iv) "The respondent is presumed innocent and this presumption stays with the respondent through each stage of the trial unless it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt. A reasonable doubt as to the guilt of the respondent may arise from the evidence, from conflicting evidence or from the lack of evidence on the part of the prosecution." *Cf*. FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES 3.7 [modified in light of *State v. Boyken*, 217 N.W.2d 218, 219 (Iowa 1974)].

(v) "The requirement of proof beyond a reasonable doubt means that you must return a verdict of not guilty unless you have a firm and abiding conviction of the respondent's guilt." *See Victor v. Nebraska*, 511 U.S. 1, 14-15 (1994) ("An instruction cast in terms of an abiding conviction as to guilt . . . correctly states the government's burden of proof."); FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTIONS, Instruction 21, *supra* ("Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. . . ."); *State v. Frei*, 831 N.W.2d 70, 79 (Iowa 2013), *partially overruled on other grounds*, *Alcala v. Marriott International, Inc.*, 880 N.W.2d 699, 708 & n.3 (Iowa 2016) ("Numerous state courts have . . . adopted the FJC pattern instruction and expressly approved its firmly convinced language").

(vi) "A reasonable doubt is any lack of certainty that a reasonable person could have based upon any shortcoming or questionable aspect of the prosecution's evidence. Because the respondent is presumed to be innocent, [he] [she] does not have to present any evidence. [But when the respondent does present evidence, as in this case, a reasonable doubt may also arise from any genuine question which that evidence raises as to the respondent's guilt.]"

For discussions of various verbal formulations that do and do not adequately convey the concept of reasonable doubt, *see Victor v. Nebraska*, 511 U.S. at 5; *Sullivan v. Louisiana*, 508 U.S. 275 (1993). *See also, e.g.*, *Morris v. Cain*, 186 F.3d 581, 584-88 (5th Cir. 1999); *Smith v. United*

States, 709 A.2d 78, 79-82 (D.C. 1998) (en banc).

(5) *Stating the presumption of innocence.* Under some circumstances a respondent has a federal constitutional right to an instruction on the presumption of innocence *in addition to* an instruction on the prosecution's burden of proof beyond a reasonable doubt. *Compare Taylor v. Kentucky*, 436 U.S. 478 (1978), *with Kentucky v. Whorton*, 441 U.S. 786 (1979) (per curiam).

(6) *Explaining the legal principles underlying defense contentions.* For example, counsel may request an instruction that evidence of intoxication was admitted as bearing upon the question whether the respondent could and did form the requisite intent for the crime; that the specific intent to kill [*or* to steal, or whatever] is an element of the crime which must be proved beyond a reasonable doubt; that the respondent can no more be found guilty of the crime if the jury has a reasonable doubt concerning his or her intent than if it has a reasonable doubt whether s/he did the act of killing [*or* of taking money, or whatever]; and that if, by reason of the evidence presented regarding the respondent's intoxication, the jury has a reasonable doubt with regard to whether the respondent formed the required intent, the jury must acquit the respondent. Whenever the theory of the defense requires the jury to apply legal principles that are not subsumed within the elements of the crime charged, instructions spelling out those principles are necessary. "As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews v. United States*, 485 U.S. 58, 63 (1988). *See also, e.g.*, *Harris v. Alexander*, 548 F.3d 200, 205-06 (2d Cir. 2008); *Peterson v. State*, 24 So. 3d 686, 689-90 (Fla. App. 2009); *General v. State*, 367 Md. 475, 789 A.2d 102 (2002); *State v. Lockwood*, 43 Or. App. 639, 643-46, 603 P.2d 1231, 1234-35 (1979); *Miller v. State*, 815 S.W.2d 582, 585 (Tex. Crim. App. 1991); *State v. White*, 142 Ohio St. 3d 277, 290, 29 N.E.3d 939, 952 (2015) ("A trial court has broad discretion to decide how to fashion jury instructions, but it must 'fully and completely give the jury all instructions which are relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact finder.' . . . We require a jury instruction to present a correct, pertinent statement of the law that is appropriate to the facts. . . . ¶ Here, it is not disputed that White used deadly force in the line of duty, and therefore the jury charge should have been tailored to instruct the jury on when a police officer is justified in using deadly force."); *Jackson v. United States*, 645 A.2d 1099, 1101 (D.C. 1994) ("[i]t is well settled that '[a]s a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor'") (dictum).

(7) *Instructing the jury not to consider matters that occurred during trial and that the jury may be disposed to hold against the respondent.* For example, counsel may request an instruction that the jury is not to infer guilt from the respondent's failure to take the stand. The defense appears to have an unqualified federal constitutional right to an instruction on this subject. *Carter v. Kentucky*, 450 U.S. 288 (1981); *James v. Kentucky*, 466 U.S. 341 (1984); *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014) (dictum); see § 33.05 *supra*.

Attention should also be paid to the possibility of a missing-witness instruction (see §

10.08 *supra*) and to the matter of lesser included offenses, discussed in § 36.05 *supra*.

Whether counsel's proposed charges should be conservative (stating the law as counsel knows s/he can clearly satisfy the court it is) or venturesome (embodying debatable defense theories) depends in part on whether, under local practice, a judge may refuse entirely to charge on a given subject simply because the specific instruction requested by defense counsel does not state the law correctly. See § 36.03 third paragraph, subdivision (3) *supra*. When local law permits a judge thus to deny the whole of any requested instruction that is incorrect in part, counsel who wants to press a venturesome point should prepare alternative proposed charges, clearly designated as such, for submission *seriatim*. The alternatives should be cross-referenced and should specify the order of counsel's preference among them so that s/he can claim error in the failure to give a more favorable one even though a less favorable alternative which s/he proposed was given.

For example, counsel might submit proposed instructions designated Respondent's Requests for Instruction Number 3, Number 3-A, and Number 3-B. Number 3 would tell the jury that the respondent cannot be convicted of assaulting an officer unless s/he actually knew that the person whom s/he assaulted was an officer. Number 3-A would tell the jury that the respondent cannot be convicted of assaulting an officer unless s/he actually knew or was grossly reckless in failing to know that the person whom s/he assaulted was an officer, and it would contain at the top the notation: "If the Court refuses Respondent's Request for Instruction Number 3, respondent objects to that refusal and, without waiving that objection, requests that the Court instruct as follows." Number 3-B (telling the jury that the respondent cannot be convicted of assaulting an officer unless s/he actually knew or unless a reasonable person in the respondent's situation would have known that the individual s/he assaulted was an officer) would bear a similar notation at the top in reference to Number 3-A.

If local practice allows, counsel should delay submitting Number 3-A until after the judge has refused Number 3 and should delay submitting Number 3-B until after the judge has refused Number 3-A. Judges given several alternative formulations at the outset may choose one that is less favorable to counsel than the one that the judge would have accepted if s/he had not been advised of the alternatives that were going to follow. If local practice requires the advance submission of all requests for instructions, then Request Number 3 in the preceding series would bear at the bottom the notation: "If this Request Number 3 is given, Respondent's Requests for Instruction Numbers 3-A and 3-B should not be given" and so forth.

Like defense evidence, defense instructions should ordinarily be selective and should avoid raising too many issues for jury consumption. They should focus squarely on the defense theory of the case. They should state the rules of law underlying that theory clearly and succinctly, in terms that counsel will be able to pick up and use in his or her closing argument.

The requests to charge should not be argumentative. An easy way to connect the applicable law to the facts without being argumentative is to frame each instruction in the form

of a hypothetical syllogism: "If you find *A* and if you find *B*, then you must return a verdict of not guilty [*or* "then you should consider *C*"]" – and adding definitions of *A* and *B* if necessary. There must, of course, be some support in the record for each finding hypothesized, and counsel should be prepared to tell the court what it is.

The drafting of proposed instructions usually warrants counsel's care, and often considerable creativity. Counsel should remember that it is through his or her proposed instructions that s/he has the opportunity to present the principal legal issues in the case – matters of statutory construction, matters of first impression relating to the requisite *mens rea* of offenses, and so forth. It is also at this point that counsel principally exercises a "law-testing" or "law-making" role – for example, by challenging accepted definitions of the crime charged. Finally, the erroneous refusal of the trial court to give requested instructions is a fertile field for error and reversal. Although it is not counsel's job to "plant" error, it is decisively counsel's job to press every legitimate legal claim the client has and to insist that the client not be convicted except at a trial at which those claims have been decided correctly.

§ 36.07 PREPARING AND PRESENTING THE DEFENSE REQUESTS FOR CHARGE

As indicated in the third paragraph of § 36.02 *supra*, requests for charge are ordinarily required to be given to the court in writing at the conclusion of the evidence, just before the lawyers make their closing arguments to the jury. If at all possible, counsel should prepare the requests before the end of the last witness's testimony, so as to avoid being caught in a last-minute rush that will make careful drafting impossible. Since the judge's decision to grant or deny the requests will ordinarily have to be made on the spot, with no time for real research, counsel should bring to court suitably highlighted photocopies of any statutory texts and judicial opinions that s/he can find to support each request. When counsel has not had an opportunity to prepare his or her requests for charge in advance or when additional points come to mind in the closing minutes of the evidentiary trial, counsel should write out the requests in longhand on a legal pad for submission to the court or type them electronically. If there is no natural break (such as a lunch break) in the proceedings between the conclusion of testimony and the commencement of closing arguments and counsel does not have his or her requests for charge completed, s/he should ask for a recess to draft them.

Counsel's requests for instructions should ordinarily not be submitted until the latest possible moment required by local rules or the trial judge's order. If, is as common, the local rules provide that the parties' requests must be submitted "at the close of the evidence" or at such time as the judge requires, counsel should urge the judge not to call for submissions before the prosecution has rested its evidentiary case. Giving the prosecutor detailed elucidation of defense theories or points of law while there is still time to address prosecution evidence to them is bad business.

§ 36.08 LEARNING WHAT THE COURT PLANS TO CHARGE

One important function of the conference on instructions, from the viewpoint of the defense, is the opportunity it affords to learn what the court will charge. This will be important in planning counsel's closing argument.

As indicated in § 36.02 *supra*, some judges will routinely disclose everything of substance that they expect to charge, and in a number of jurisdictions they are required by law to do so. With other judges, counsel may have to inquire specifically what the court intends to charge on each particular point. With still others it is necessary to infer the court's intentions from discussion of the parties' requests to charge; thus, counsel's arguments concerning those requests may have to be pursued in a way that furthers this end.

§ 36.09 OBJECTIONS TO THE COURT'S CHARGE

Local practice may require that all objections to the court's proposed charge be noted at the time of the conference on instructions or may require that objections be noted after the court completes its charge to the jury. Sometimes objection at both times is required. Counsel should be familiar with the requirements.

Part C. Closing Argument

§ 36.10 CLOSING ARGUMENT GENERALLY

As a general matter, the closing arguments of the attorneys recapitulate the theories of each party and attempt to justify the inferences and conclusions that each feels should be drawn from the evidence. In almost all jurisdictions the prosecutor argues first and defense counsel second. In some jurisdictions the prosecutor is always permitted to rebut and thereby have the last word; in other jurisdictions the prosecutor is permitted to rebut only if the defense has presented evidence. Some judges will permit surrebuttal argument by the defense when the prosecutor has obviously sandbagged and reserved most of his or her substantive arguments for rebuttal so as to deprive defense counsel of the opportunity to respond to those arguments.

Counsel should be sure that s/he is familiar with the local rules concerning the order of closing. The shaping of the closing argument for the defense depends critically on whether the prosecutor will or will not have an opportunity for reply.

Closing arguments in a jury trial are radically different from those in a bench trial as described in Chapter 35. Because juries are far less capable than judges of understanding legal doctrines and because jurors tend to be more receptive than judges to factual and common-sense arguments, the defense closing in a jury trial has to stress the facts and avoid lengthy discussion of legal doctrines. See § 36.12 *infra*. The jury's susceptibility to inflammatory arguments also requires that counsel be alert to object to prosecutorial references to prejudicial matters and appeals to the jurors' emotions. See § 36.11 *infra.*

§ 36.11 THE PROSECUTOR'S CLOSING

§ 36.11(a) Content of the Prosecutor's Closing; Impermissible Areas and Arguments

The prosecutor's closing argument will typically emphasize the enormity of the crime, the indisputable character of the prosecution's evidence (the efficiency of the investigating officers, the expertise of the prosecution's experts, the objectivity of its public-spirited eyewitnesses, and so forth), the incredibility and self-serving quality of the defense evidence, and – to the extent possible within the limits of the rule forbidding direct allusion to the respondent's character unless the respondent has opened that issue (see §§ 30.07(a), 33.17 *supra*) – the shabby nature of the respondent and defense witnesses.

The courts have repeatedly held (and counsel will likely be able to find caselaw within his or her jurisdiction holding) that:

(1) The prosecutor must not "misstate the evidence in the record, or argue inferences that the prosecutor knows have no good-faith support in the record" (AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, Standard 3-6.8(a) (4th ed. 2015)). *See*, *e.g.*, *Berger v. United States*, 295 U.S. 78, 85-89 (1935) ("The prosecuting attorney's argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury."; the prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done"; although the prosecutor "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one"; "It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge, are apt to carry much weight against the accused when they should properly carry none."); *Russell v. United States*, 701 A.2d 1093, 1099 (D.C. 1997) (the prosecutor's argument "that Russell aided and abetted Hahn in setting the three fires, including the one on October 14 which led to Russell's conviction," even though "there was not one shred of evidence before the jury connecting Hahn in any way with any of those fires," required reversal despite defense counsel's failure to object; "the trial court committed plain error by failing to intervene *sua sponte* and correct the prosecutor's egregious misstatements of the evidence."); *People v. Benitez*, 120 A.D.3d 705, 706-07, 991 N.Y.S.2d 133, 134-35 (N.Y. App. Div., 2d Dep't 2014) (the prosecutor, in referring to a tip that initiated the police investigation, "strongly implied that whoever had provided the tip had implicated the defendant," thereby improperly "suggest[ing] to the jury, in this one-witness identification case, that the complainant was not the only person who had implicated the defendant in the commission of the robbery"; conviction reversed: "a new trial is necessary.").

(2) The prosecutor must not misstate the law. *See, e.g.*, *Deck v. Jenkins*, 814 F.3d 954,

963, 985, 986 (9th Cir. 2016) (the prosecutor's rebuttal closing argument violated due process by misstating the state law of attempt in a way that "negated an essential element of attempt" and thereby "lowered the prosecution's burden of proof").

(3) The prosecutor must "scrupulously avoid any reference to a . . . [respondent's] decision not to testify" (ABA STANDARDS FOR CRIMINAL JUSTICE, *supra*, Standard 3-6.8(a)). *See, e.g.*, *Gongora v. Thaler*, 710 F.3d 267, 275-83 (5th Cir. 2013) (per curiam) (the prosecutor's closing argument violated the defendant's right to a fair trial by "repeatedly referr[ing] to Gongora's failure to testify": "the prosecutor made a series of at least five comments referring to Gongora's silence as he argued to the jury that Gongora was the shooter," asking the jury repeatedly "'who you would expect to hear from.'"); *Girts v. Yanai*, 501 F.3d 743, 748, 755-56, 760 (6th Cir. 2007) (the prosecutor improperly commented on the defendant's failure to testify by, *inter alia*, stating that "'[t]here has been no evidence offered to say these people [prosecution witnesses] are incorrect,'" and that "'there is only one person that can tell you how . . . [cynanide] was introduced [into the deceased's system], and that's the defendant'"); *Ben-Yisrayl v. Davis*, 431 F.3d 1043, 1049-53 (7th Cir. 2005) (the prosecutor's statement "'Let the Defendant tell you,'" which was "directed at Ben-Yisrayl individually" and was not merely an "'invit[ation] to defense counsel to explain, in its closing argument,'" constituted an improper "suggestion to infer guilt from the defendant's silence"). *See also* § 33.05 *supra*.

(4) The prosecutor must not "argue in terms of counsel's personal opinion," or "imply special or secret knowledge of the truth or of witness credibility" (ABA STANDARDS FOR CRIMINAL JUSTICE, *supra*, Standard 3-6.8(b)). *See, e.g.*, *United States v. Young*, 470 U.S. 1, 7-8 (1985) (dictum) ("Prosecutors sometimes breach their duty to refrain from overzealous conduct by commenting on the defendant's guilt and offering unsolicited personal views on the evidence."); *Newlon v. Armontrout*, 885 F.2d 1328, 1335-38 (8th Cir. 1989) (the prosecutor's closing argument in the penalty phase of a capital trial violated due process by, *inter alia*, "express[ing] . . . [the prosecutor's] personal belief in the propriety of the death sentence and impl[ying] that he had special knowledge outside the record," and by "emphasiz[ing] his position of authority as prosecuting attorney of St. Louis County"); *Shurn v. Delo*, 177 F.3d 662, 667 (8th Cir. 1999) (the prosecutor's closing argument in the penalty phase of a capital trial violated due process by, *inter alia*, "emphasiz[ing] his position of authority and express[ing] his personal opinion on the propriety of the death sentence"); *State v. Walker*, 182 Wash. 2d 463, 468, 477-78, 341 P.3d 976, 979, 985 (2015) (the prosecutor committed "egregious misconduct" by using a PowerPoint presentation in closing argument that, *inter alia*, " repeatedly expressed the prosecutor's personal opinion on guilt – over 100 of its approximately 250 slides were headed with the words 'DEFENDANT WALKER GUILTY OF PREMEDITATED MURDER,' and one slide showed Walker's booking photograph altered with the words 'GUILTY BEYOND A REASONABLE DOUBT,' which were superimposed over his face in bold red letters."). *See also United States v. Weatherspoon*, 410 F.3d 1142, 1146-49 (9th Cir. 2005) (the prosecutor's repeated statements during closing argument that police officers and other prosecution witnesses "'told the truth'" constituted impermissible personal "vouch[ing] for the credibility of [the] witnesses"; "Vouching of that sort is dangerous precisely because a jury 'may be inclined to give

weight to the prosecutor's opinion in assessing the credibility of witnesses, instead of making the independent judgment of credibility to which the defendant is entitled'"; "Although to be sure no lawyer, either public or private, should lay his or her own credibility on the line by expressing his or her own opinion about a witness' [sic] believability, the difference is that a private lawyer's impropriety in that respect carries no implication of official governmental support."); *State v. Ish*, 170 Wash. 2d 189, 196, 241 P.3d 389, 392-93 (2010) (dictum) ("Improper vouching generally occurs (1) if the prosecutor expresses his or her personal belief as to the veracity of the witness or (2) if the prosecutor indicates that evidence not presented at trial supports the witness's testimony").

(5) The prosecutor "should make only those arguments that are consistent with the trier's duty to decide the case on the evidence" (ABA STANDARDS FOR CRIMINAL JUSTICE, *supra*, Standard 3-6.8(c)). *See, e.g.*, *Simpson v. Warren*, 475 Fed. Appx. 51, 64 (6th Cir. 2012) (the prosecutor improperly sought to "inflame the jury's passions" by "twice stat[ing] [in closing argument] that 'dump[ing]' and 'throw[ing]' Officer Weston's 'dead body' before the jury should not be a prerequisite to convicting" the defendant of a charge of assault with intent to commit murder of the officer, who "was not only [still] alive, but testified at . . . [the defendant's] trial"); *United States v. Weatherspoon*, 410 F.3d at 1149-50 (the prosecutor's statements in rebuttal argument encouraging the jury to return "a conviction to protect other individuals in the community," thereby speaking to "the potential social ramifications of the jury's reaching a guilty verdict" rather than seeking a guilty verdict based exclusively on the evidence at trial, "were clearly designed to encourage the jury to enter a verdict on the basis of emotion rather than fact" and, "[a]s such, . . . were clearly irrelevant and improper"); *McGriff v. United States*, 705 A.2d 282, 288-89 (D.C. 1997) (it was improper for the prosecutor to argue to the jury that "'through your verdict you can send them [the defendants] that message that you will not stand for this and that you will not tolerate this in your community'"; "'This court has stated repeatedly that an attorney must not ask a jury to 'send a message' to anyone. . . . Juries are not in the message-sending business. Their sole duty is to return a verdict based on the facts before them. Urging a jury to 'send a message' is impermissible because it implies that there is a reason to find the defendant guilty other than what the evidence has shown."). *See also Romine v. Head*, 253 F.3d 1349, 1367-68 (11th Cir. 2001) (the prosecutor misled the jury in the capital sentencing phase of the trial and rendered the proceeding fundamentally unfair by "quot[ing] scripture as higher authority for the proposition that death should be mandatory for anyone who murders his parents," thereby conveying to the jury that "mercy can have no place in a capital sentencing proceeding [which] is undeniably wrong"); *Farina v. Secretary, Florida Department of Corrections*, 536 Fed. Appx. 966, 983 (11th Cir. 2013) ("the prosecutor's improper use of Biblical reference to proclaim death as the only viable punishment – mandated by the divine – so diminished the jury's decision-making ability [as] to render the proceedings unfair and unjustly prejudicial"). *Cf. Darden v. Wainwright*, 477 U.S. 168, 179-80 & n.12 (1986) (although the prosecutors "made several offensive comments reflecting an emotional reaction to the case," which "undoubtedly were improper," these comments did not "'so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process,'" given that the "prosecutors' argument did not manipulate or misstate the evidence, nor did it implicate other

specific rights of the accused such as the right to counsel or the right to remain silent"; "[m]uch of the objectionable content was invited by or was responsive to the opening summation of the defense"; "[t]he trial court instructed the jurors several times that their decision was to be made on the basis of the evidence alone, and that the arguments of counsel were not evidence"; "[t]he weight of the evidence against [the defendant] . . . was heavy"; and "[d]efense counsel were able to use the opportunity for rebuttal very effectively, turning much of the prosecutors' closing argument against them by placing many of the prosecutors' comments and actions in a light that was more likely to engender strong disapproval than result in inflamed passions against" the defendant.).

(6) The prosecutor must not disparage the respondent's character in ways that violate the rules governing other-crimes evidence (see § 30.07(a), (b) *supra*) or the rules governing rebuttal to good-character evidence introduced by the defense (see § 33.17 *supra*). *See, e.g.*, *Gumm v. Mitchell*, 775 F.3d 345, 381-85 (6th Cir. 2014) (the prosecutor committed misconduct in rebuttal closing argument "by using highly inflammatory and prejudicial evidence, much of which was known to be of questionable reliability, to assert that . . . [the defendant] had a propensity to commit the acts in question" and by "portraying [the defendant] . . . as a sexual deviant whose character aligned with the crimes in this case"); *Simpson v. Warren*, 475 Fed. Appx. at 62, 64 (the prosecutor improperly encouraged the jury to consider the defendant's "'bad character as a thumb on the scale in favor of a finding of guilt'" by arguing, in a trial for assault with intent to commit murder and gun possession, that the apparently "'nice looking fellow'" whom the jury was seeing in the courtroom was actually "'the type of man who knows about all of this ammunition and guns, that hangs out with Hughes and Sharp and Smith, the type of man that carries this gun . . . and points it and shoots it,'" and by using other-crimes evidence introduced at trial to argue that the "'total picture . . . makes out a person who, but for a bad aim, could very well be before you as a killer'").

§ 36.11(b) Objecting to Improper Arguments by the Prosecutor

Some judges consider it a matter of courtesy for opposing counsel not to interrupt one another's closing arguments to the jury by making objections *in media res*. If this is a matter of the individual judge's courtroom etiquette rather than a documentable jurisdiction-wide rule, counsel should elicit the judge's statement on the record that s/he wants objections to opposing counsel's argument to be withheld until the argument is finished. In the absence of such a statement, an appellate court may treat counsel's post-argument objections as untimely.

Even where this courtesy is expected, counsel should not hesitate to interrupt the prosecutor's argument by objecting if the prosecutor plainly goes beyond allowable bounds – for example, by disparaging the respondent's character when no good-character defense has been presented; by arguing from struck evidence or from facts outside the record; by asserting the prosecutor's personal belief in the respondent's guilt; or by implying that there is additional incriminating evidence against the respondent that the prosecutor has not bothered to present. See § 36.11(a) *supra*. Less egregious improprieties should be noted down on counsel's pad or

computer. After the prosecutor has concluded, counsel should approach the bench, describe each impropriety, object to each, and request corrective instructions.

In other localities, contemporaneous objection to improper argument is accepted or required. Counsel should be prompt to make it.

Sometimes counsel will wish to let objectionable arguments go without objection so as to treat them as opening the door to rebuttal. But in considering this tactic s/he must keep in mind who has the last word. See § 36.10 *supra*. When the prosecutor has made a number of factually unsupportable statements, it is often effective for counsel in his or her own closing argument to demonstrate that each of these is belied by the record, then to use the misstatements to portray the prosecution theory as, part and parcel, made up out of whole cloth.

§ 36.12 DEFENSE ARGUMENT

§ 36.12(a) General Considerations

The defense closing argument is the place for counsel to connect everything that has happened during the trial and to weave it into the story that presents the respondent's theory of the case. Counsel presumably will have developed that story line prior to trial and used it to guide all of counsel's actions throughout the trial: – conducting the *voir dire*; opening statement; objections; cross-examination of prosecution witnesses; and the presentation of any defense witnesses and exhibits. *See* Chapter 6. Closing argument provides the opportunity to drive home the messages counsel has been sending throughout the trial. Sometimes that will best be done with explicit, linear, logical reasoning, but often it will be more effective to use rhetorical and narrative devices that shape the jurors' thinking in a subtler manner. Counsel will want to think carefully about the best macrostructure, verbal formulations, and metaphors, along with a host of other factors that go into effective storytelling in closing argument. *See generally* Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y. L. SCH. L. REV. 55 (1992); PHILIP N. MEYER, STORYTELLING FOR LAWYERS (2014).

In general, defense counsel should focus on arguments that will make the jury affirmatively *want* to acquit the respondent. When possible, counsel should attempt to persuade the jury that the respondent is innocent – unjustly accused; a victim of circumstances or of the complainant's malevolence or of police ineptitude; someone entitled to vindication. However, arguments demonstrating innocence should always be combined with a reminder to the jury that it needs not find that the defense has proven the respondent innocent, merely that the prosecution has failed to prove the respondent guilty beyond a reasonable doubt.

The heaviness of the prosecutor's burden is often the most important factor favoring the defense, and in these cases it is crucial for counsel to convey it to the jury. Unfortunately, "reasonable doubt" is also one of the most difficult concepts for a juror to understand. Counsel can help to explain the concept by describing the rationale for the prosecutor's burden: that the

law cannot tolerate the risk of error or mistake in a decision that can affect an individual's life or liberty; therefore, the law has established an extremely high standard of certainty which the prosecution must satisfy. Counsel can also link the concept of reasonable doubt to the gravity of the jury's task when sitting in judgment on a fellow human being, and can emphasize the seriousness of the jury's decision by pointing out that once the jurors have given their verdict, it will be too late for second thoughts and doubts that may occur later, when the jurors think back about what they have done. See also § 36.06 subdivision (4) *supra*.

§ 36.12(b) Structure and Content of the Defense Argument

The following points should be considered for inclusion in counsel's closing. In the order in which they are set out below, they provide the logical structure for an argument that gathers momentum.

(1) An expression of appreciation for the attention and interest of the jurors throughout the trial, and a recognition that jury service is not convenient.

(2) The assertion that the only reason for calling the jurors away from their own affairs and making them sit through a delinquency trial is the vital importance of seeking the judgment of twelve impartial and responsible members of the community when there are questions of fact to be resolved in a delinquency case that could have extremely serious consequences for the life or liberty of a fellow human being.

(3) The assertion that the law recognizes both the difficulty and the importance of that judgment by requiring that the guilt of the accused be proved by the prosecution beyond a reasonable doubt and to the moral satisfaction of every juror; that because there should not be any risk of error or mistake in convicting someone of a crime [even when appearances may be against him or her], the law insists that every juror must be satisfied beyond a reasonable doubt that no mistake is being made.

(4) A succinct summary of the substantive legal rules governing the offenses charged and the defenses presented and, in particular, governing the theory of the defense. (This should ordinarily be preceded by the phrase "As [His] [Her] Honor will tell you in instructing you on the law after the prosecutor and I have completed our arguments" or some equivalent recognition that the jury is expected to get its legal education from the court. Defense counsel is not supposed to instruct the jury on the law but is, of course, permitted to outline the legal principles on which s/he will rely. Ordinarily s/he should do this – even when the law is relatively simple and has been covered unobjectionably by the prosecutor – because counsel does not want it to appear that the defense is less well situated than the prosecutor to draw support for its position from the law. Counsel's statement of the legal rules should track as closely as possible the verbal formulations that counsel expects the judge to charge. Counsel's aim in proposing jury instructions and in attempting to learn in advance exactly what the judge will say to the jury (see §§ 36.02, 36.08 *supra*) was to enable counsel to lay out the law in terms that will be recognizably endorsed by the

court's jury charge.)

(5) A statement of the specific, critical questions that the jury must decide, in light of the law and the evidence. (This may boil down to the credibility of one witness or to the reasonableness of one inference – wherever the defense is strongest. It is usually best to reduce the number and complexity of issues on which the jury will focus, unless the defense is relatively weak on all issues.)

(6) A statement of the answers that the defense is confident the jury will find in considering those questions when it scrutinizes the evidence critically during its deliberations.

(7) A dissection of the prosecution evidence at its weakest points (or of the prosecutor's summary of it if that is as, or more, vulnerable), and a summary of the defense evidence (if there was any), connecting the pieces of defense evidence together and stating what they combine to show. (An important judgment call, which must be made on the facts of each case, is whether counsel should (a) focus discussion of the evidence on the prosecution's theory and use defense evidence solely to poke holes in that theory; (b) focus discussion of the evidence on the defense theory and criticize the prosecution's evidence as insufficient to overcome that theory; or (c) invite an explicit comparison of the prosecution's theory of the case with the defense theory and argue that the defense theory is more plausible.)

(8) A criticism of the logic or fairness of the prosecutor's summary (if this has not been done in connection with the preceding item).

(9) A prediction of the points that the prosecutor will probably make in rebuttal and a statement of the reasons why they should not be viewed as persuasive. (In this connection it is usually helpful to point out that the prosecutor is given the last word under the rules of procedure and that defense counsel will have no chance to reply. The prosecutor should be made to appear unfair insofar as s/he abuses this favorable position to partisan advantage.)

§ 36.12(c) Techniques to Consider Using in Closing Argument

In structuring final argument, counsel should be selective in the choice of materials so that his or her reasoning is easy to follow. A shotgun approach in final argument should be avoided. Useful devices in argument include:

(1) Defining reasonable doubt, giving a hypothetical situation from everyday life ("If the man across the street came over and said he saw your child throw a brick through his window and that your child should be punished, and maybe the man's wife also said that she saw your child throw the brick, but your child denied doing it, and then a neighbor down the block said he saw the person who threw the brick and it didn't look like your child, it looked like the Jones kid . . . ."), and then identifying the weak points in the prosecution's case and the strong points in the defense case that combine to compel a reasonable doubt.

(2) Stressing the heavy burden of proof that the prosecution bears in criminal and delinquency cases and comparing it to the lesser burden in a civil case. (For example: "A party who brings a civil claim into court only needs to carry the ball over the 50-yard line, but the prosecutor in a criminal or delinquency case has to carry it all the way down the field and over the goal line.") See § 36.06 subdivision (4) *supra*.

(3) Using common, daily experiences to support factual arguments by analogy.

(4) Emphasizing the technical, dryly logical, many-step nature of the prosecution's case, as opposed to the immediacy and common-sense position of the defense. (The prosecution's case ordinarily *is* more complex than a good defense because the prosecutor needs to win on more points.)

(5) Quoting verbatim from the prosecutor's closing argument and pointing out exaggerations and unsupported assertions.

(6) Quoting legal rules in the same language that the court will use in its charge and showing how these rules support the defense position.

The devices may be used in varying combinations, depending upon the evidence, but the case is rare in which all of them could be put together effectively.

§ 36.12(d) Limits on Defense Argument

There are, of course, limits to permissible defense argument, just as there are limits to permissible prosecutorial argument. Defense counsel is usually forbidden to rely upon facts that have no basis in the evidence, to urge the jury to disregard the law, to mention matters (such as the sentence facing the respondent if convicted) which it is improper under local practice for the jury to consider, and to express a personal opinion of the client's innocence or of the mendacity of prosecution witnesses. The relevant rules vary considerably from state to state.

Nevertheless, the Supreme Court of the United States has held that the Sixth and Fourteenth Amendments guarantee the accused "a right to be heard [through counsel] in summation of the evidence" (*Herring v. New York*, 422 U.S. 853, 864 (1975) (invalidating a state statute that empowered trial judges to refuse entirely to hear closing arguments in nonjury trials)). This decision necessarily implies that state law limitations on defense summation are subject to federal constitutional review. The *Herring* opinion emphasizes that the "presiding judge . . . is given great latitude in controlling the duration and limiting the scope of closing summations" (422 U.S. at 862); but plainly that latitude does not extend to the imposition of restrictions upon counsel which would frustrate the basic functions of summation that led the Supreme Court to recognize it as a constitutional right: to "argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions" (*id.*). Counsel who find themselves thus frustrated should reserve objections on Sixth and Fourteenth Amendment grounds as well as

on the ground that the court has abused its discretion under state law.

§ 36.12(e) Wrapping Up

The last sentences of the defense closing argument should be the crest of the speech, after which counsel should quickly express confidence that the jury will see the logic of the respondent's position, thank the jurors for their considerate attention, and stop. Stopping promptly after delivering the thrust of an argument leaves the prosecutor little time to collect his or her thoughts and to frame a strong rebuttal.

Part D. The Judge's Charge to the Jury

§ 36.13 TAKING OBJECTIONS TO THE COURT'S CHARGE

Whether or not the court's charge has been thoroughly picked over at a conference on instructions (see § 36.02 *supra*), and whether or not counsel entered objections to it in the course of that conference (see *id*. penultimate paragraph and § 36.09 *supra*), counsel must give it careful attention as it is delivered. What is clear when written may not sound clear when spoken. Even if the judge has agreed to give certain instructions requested by the defense and appears simply to be reading them to the jury, counsel cannot afford to relax. Judges sometimes slip or ad lib, and counsel must be alert to object if the judge does not follow the script. If the judge offsets a defense instruction by charging an inconsistent or countervailing principle or theory elsewhere in the charge – as is quite common – counsel should object to the offsetting portion of the charge. *See Francis v. Franklin*, 471 U.S. 307, 322-25 (1985); *Cabana v. Bullock*, 474 U.S. 376, 383-84 n.2 (1986).

Various kinds of restrictions imposed on the charge in many jurisdictions are noted in § 36.03 *supra* or can be extrapolated from §§ 36.04-36.06. These should be researched under local law and kept in mind.

Even jurisdictions that permit the judge to comment on the evidence impose some limitations on his or her power to do so in ways that are likely to overbear the independence of the jury as the ultimate trier of fact or to sway the jury's judgment by misstating how the jurors should or may evaluate particular evidentiary matters. *See, e.g.*, *Quercia v. United States*, 289 U.S. 466 (1933); *Wheeler v. United States*, 930 A.2d 232 (D.C. 2007); *State v. Hernandez*, 218 Conn. 458, 590 A.2d 112 (1991) (although "[a] trial court has broad discretion to comment on the evidence adduced in a criminal trial" (218 Conn. at 461, 590 A.2d at 114) "the one-sided rendition of the case given by the court was prejudicially unfair" (*id*. at 465, 590 A.2d at 115), requiring that the conviction be reversed and the case remanded for a new trial: the trial judge "extensively detailed the state's claims and its evidence in support thereof, and little or no reference was made to the defendant's exculpatory evidence and his theory of defense" (*id*. at 465, 590 A.2d at 115); "despite the court's disclaimers, . . . the jury was likely to have interpreted the partisan rehearsal of the case as an indication that the court in this 'simple case' believed that

the defendant's claims and evidence, seemingly not worthy of comment, likewise were not worthy of consideration." (*id*. at 465, 590 A.2d at 115)); *cf. State v. J.S.*, 222 N.J. Super. 247, 255-57, 536 A.2d 769, 773-74 (1988). Counsel might do well to clock how much time the judge spends summarizing the prosecutor's case and how much time the judge devotes to the defense. This is a helpful bit of raw data that can be used if counsel decides to approach the bench at the end of the charge and request additional instructions on some aspects of the defense case.

If the judge expresses an opinion on issues of credibility and guilt (as s/he is permitted to do in some jurisdictions), counsel should note the exact phrasing. When comment of this sort is allowed, it is nevertheless required to be qualified so as to leave clear that these issues are ultimately for the jury. The accused "is entitled to have the credibility of his testimony, or that of witnesses called on his behalf, judged by the jury." *United States v. Bailey*, 444 U.S. 394, 415 (1980) (dictum). *A fortiori*, a jury instruction that relieves the prosecution from the burden of proving an element of its case by telling the jurors that the element has been established as a matter of law is constitutionally impermissible. *See*, *e.g.*, *Powell v. Galaza*, 328 F.3d 558 (9th Cir. 2003).

When the judge has completed his or her charge, s/he will ask whether counsel has any objections. (If the judge neglects to ask and counsel has objections, counsel should request leave to come to sidebar. Some fair opportunity must be given to the parties to record objections to the court's charge out of the hearing of the jury. *See Hamling v. United States*, 418 U.S. 87, 132 (1974) (dictum).) In most jurisdictions objections to the charge as given must be made at the bench at this time, before the jury goes out, or they are lost. *See, e.g.*, FED. RULE CRIM. PRO. 30(d). Counsel should state with particularity the portions of the judge's charge to which s/he objects and all of the legal grounds of objection to each of them, and s/he should be sure that the proceedings at the bench are being recorded.

Even if the court's instructions include some misstatement that is harmful to the defense, counsel may not want the court to correct itself because that would once again draw the jury's attention to an aspect of the case that counsel would just as soon have the jury forget. In these circumstances counsel should note this point on the record, explain that the defense has already been prejudiced either way, and let the court cut the Gordian Knot if it chooses. The judge will predictably insist that counsel take a position: "Do you or don't you want additional instruction on the subject?" Counsel should then choose whichever appears to be the lesser evil, but should state that the chosen alternative is an insufficient corrective and that s/he is preserving for consideration on post-trial motions and on appeal the contention that the court's initial instructions were erroneous and prejudicial and that the defense should not be put to the forced choice between leaving the error unremedied and endorsing a purported remedy that will exacerbate the problem.

Should counsel have some objection to the court's demeanor in presenting the charge, counsel must describe the offending behavior in concrete detail. Obviously, this should be done only in extreme cases.

Counsel should always state specifically every objection s/he may have to the charge rather than taking a "general exception." If a general exception or no exception is taken to the charge, the charge will be upheld unless there was "plain error." See § 36.03 *supra*.

In addition to, or instead of, objecting to any portion of the charge as erroneous, counsel may request additional instructions amplifying or clarifying those given. Trial judges often grant these requests in their discretion, even though there was nothing objectionable in the original charge.

Part E. The Jury's Deliberations and Verdict

§ 36.14 CONDUCT OF THE JURY DURING DELIBERATIONS

In many jurisdictions, once the jury's deliberations have begun, the jurors are not permitted to separate until a verdict has been reached. If a verdict cannot be reached before a normal mealtime or day's end, deliberations may be stopped with the permission of the court, and the jury will be fed or housed under the supervision of court attendants. Although the jury is kept together during these recesses, it is not permitted to deliberate outside the jury room. There is a movement among the States to relax the requirement of sequestration during deliberations in noncapital cases (*compare* FLA. RULE CRIM. PROC. 3.370(b), promulgated by *Amendment to Rules of Criminal Procedure – Rule 3.370(b)*, 596 So. 2d 1036 (Fla. 1992), *with Livingston v. State*, 458 So. 2d 235 (1984), and cases cited in *id*. at 238; *and compare* N.Y. CRIM. PRO. LAW § 310.10(2) (effective May 30, 2001), *with People v. Coons*, 75 N.Y.2d 796, 551 N.E.2d 587, 552 N.Y.S.2d 94 (1990)). But whereas sequestration of the jury prior to the submission of the case is an increasingly rare practice (see § 27.05(a)(1) *supra*), post-submission sequestration remains widespread. *See* Allan E. Korpela, Annot., *Separation of jury in criminal case after submission of cause – modern cases*, 72 A.L.R.3d 248 (1976 & Cum. Supp.). Some States that continue to require it do give the trial judge discretion to permit the jurors to go home overnight or to separate briefly for other purposes if the accused waives the right to keep the jury cloistered. *See, e.g.*, *Pope v. State*, 569 So. 2d 1241, 1244 (Fla. 1990). Unless counsel has reason to worry that jurors released from confinement will be exposed to prejudicial media or social-media material or to blandishments by pro-conviction family members and acquaintances, s/he should ordinarily agree to separation of the jury. When jurors have been deliberating for a substantial length of time without returning to court, they are probably at loggerheads to some extent; a hung jury is ordinarily a significant defense victory; and captive jurors are under pressure from each other and their own everyday needs to reach a unanimous verdict.

In some jurisdictions the jury is routinely given a written copy of the court's charge to take into the jury room; in others this procedure is permitted in the court's discretion; elsewhere it is not permitted at all. The jurisdictions also vary on whether exhibits are sent out with the jury routinely, may be delivered to the jury room if specially requested by the jurors, or may not go to the jury room under any circumstances. *See generally* AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, Commentary to Standard 15-5.1 (3d ed. 1996) ("Materials

to Jury Room"). *Cf. State v. Hines,* 173 Wis. 2d 850, 496 N.W.2d 720 (1993) (reversing a conviction because the trial judge permitted a police report to be sent to the jury room at the request of the jurors (who had previously advised the court by eight successive notes that they could not reach a verdict) over defense counsel's objection that the report contained inadmissible hearsay: "A trial court's decision whether to send exhibits to the jury during deliberations is guided by three considerations: (1) whether the exhibit will aid the jury in proper consideration of the case; (2) whether a party will be unduly prejudiced by submission of the exhibit; and (3) whether the exhibit could be subjected to improper use by the jury. *State v. Jensen*, 147 Wis. 2d 240, 260, 432 N.W.2d 913, 921-22 (1988). ¶ The trial court erred when it did not consider these three factors before sending the exhibit to the jury" (173 Wis. 2d at 860, 496 N.W.2d at 724)).

Some courts allow the jurors during trial to take notes for use during their deliberations; others do not. *See generally* AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, Commentary to Standard 15-3.5 (3d ed. 1996) ("Note Taking by Jurors").

During their deliberations, jurors are forbidden to receive extra-record information or materials regarding the case under consideration. "Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." *Mattox v. United States,* 146 U.S. 140 150 (1892). If counsel has a basis for believing that any juror may have been exposed to a violation of this prohibition, counsel should consider requesting a hearing at the earliest opportunity – whether before or after verdict, as soon as the ground for counsel's belief arises – to explore whether a motion for a mistrial or (after verdict) for a new trial on the ground of jury contamination is advisable. *See, e.g., Parker v. Gladden*, 385 U.S. 363 (1966); *Hall v. Zenk*, 692 F.3d 793 (7th Cir. 2012); *Barnes v. Joyner*, 751 F.3d 229 (4th Cir. 2014); *cf. Remmer v. United States*, 347 U.S. 227 (1954); *Turner v. Louisiana*, 379 U.S. 466 (1965). See also §§ 27.02 second paragraph, 27.05(a)(2) concluding paragraph *supra*. Similar procedures should be used if counsel learns about jury misconduct of the sort discussed in § 27.05(a)(2) first paragraph *supra*.

Following a verdict convicting the respondent on all charges, a new trial motion on grounds of jury contamination or misconduct will ordinarily be advised if there is any factual basis for it, because there is seldom any downside. If counsel learns about possible jury contamination or misconduct before verdict, on the other hand, a tactical calculus will have to inform the decision whether to move for a mistrial. Counsel needs to consider the factual and legal strengths of the claim for a mistrial that might be established at a hearing, the likelihood that the respondent will do better before a new jury than before the present jury on the record to date, and the possibility that a hearing directed at the jurors' behavior will itself embarrass or anger them, particularly if it is impossible to conduct the hearing without revealing to the juror[s] that its impetus was a defense claim of jury misbehavior.

If the jury, after a period of deliberation, is irreconcilably divided, it is supposed to report that fact to the court. The court in its discretion may discharge the jurors or have them return to

the jury room for further deliberations.

§ 36.15 JURY REQUESTS FOR SUPPLEMENTAL INFORMATION OR INSTRUCTIONS

After a jury has retired to deliberate, it may request leave of the court to return to the courtroom for a re-reading of a portion of the testimony, or for renewed examination of exhibits, or for a repetition of part or all of the court's charge, or for further instructions on questions of law. *See generally* AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, Commentary to Standard 15-5.2 (3d ed. 1996) ("Jury Request to Review Testimony"). The court, in its discretion, grants or denies these requests. In some jurisdictions any supplemental instructions given by the court are required to be restricted to the questions the jury has asked. *See generally id*., Commentary to Standard 15-5.3 ("Additional Instructions").

Supplemental instructions are given in open court in the presence of counsel and the respondent. They are subject to the same requirements of fairness and legal adequacy as the main charge (see §§ 36.03-36.06, 36.13 *supra*; *and see, e.g.*, *Ardoin v. Arnold*, 653 Fed. Appx. 532, 534-35, 536 (9th Cir. 2016) (summarized in § 36.02 third paragraph *supra*)), and counsel may object to them at sidebar after they are given. In addition to – or in lieu of – objecting, counsel may ask that additional clarifying or qualifying instructions be given. Similarly, if the jury requests a re-reading of part of the testimony, counsel may object or may ask that additional parts of the testimony be re-read. The same discretion is ordinarily afforded to the court, and the same options are ordinarily available to counsel, if the jury requests that exhibits not previously sent to the jury room be shown to them or sent out with them. Whenever a jury interrupts its deliberations to make some request of the court, counsel should be trying to fathom what the request suggests about the directions of the jury's thinking, and counsel should respond with whatever objections or proposals for giving the jurors additional information seem likely to steer that thinking into productive defense channels.

The judge is ordinarily forbidden to send supplemental instructions or other communications or materials out to the jury, in either written or oral form, through the medium of a bailiff or other messenger. See § 27.02 second paragraph *supra*. The only allowable response to a jury's request for information of any sort is to bring the jurors back into open court and deal with the matter in the presence of the respondent and counsel. In some jurisdictions this rule is so strict that it is held reversible error for a court to convey to the jury out of the presence of the parties even a brief note refusing the jury's request for additional instructions.

Since counsel's presence will be promptly required if the jury asks for supplemental instructions or for the reading of testimony or if the jury reports itself deadlocked, counsel should either stay in the courtroom or tell the courtroom clerk where counsel can be reached while the jury is out. Counsel should never be more than a few minutes from the courtroom without obtaining prior permission of the court. Tardiness in returning to deal with any matters that arise during the jury's deliberations will incur the judge's wrath.

§ 36.16 INABILITY OF THE JURY TO AGREE; THE "DYNAMITE CHARGE"

If the jury has deliberated for a considerable time and has reached no agreement, the court may call it back to the jury box and inquire about the prospects of its reaching a verdict. The judge usually asks the foreperson to state, without revealing the current vote or majority position of the jury, whether further deliberations appear likely to produce agreement or whether the jury seems firmly deadlocked. The court may also give the jury additional instructions, although no request is made by the jury for them. The jurisdictions vary widely with regard to the amount of pressure that the judge may apply to the jury at this point by way of instructions admonishing the jurors to give consideration to the reasonable views of others, and so forth. *See generally* AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, Commentary to Standard 15-5.4 (3d ed. 1996) ("Length of Deliberations; Deadlocked Jury").

The so-called "dynamite charge," or *Allen* charge (after *Allen v. United States*, 164 U.S. 492 (1896)), is still permissible in many jurisdictions, although a number of appellate courts have come to condemn it as too strong. *See generally* the ABA STANDARDS Commentary just cited; Wayne F. Foster, Annot., *Instructions Urging Dissenting Jurors in State Criminal Case to Give Due Consideration to Opinion of Majority (Allen Charge) – Modern Cases*, 97 A.L.R.3d 96 (1980 & Supp.). If the judge's charge prods the jury heavily to reach a verdict and if counsel guesses that the majority of the jurors are inclined to convict, counsel should object to the charge – noting with specificity any especially coercive language (*compare Jenkins v. United States*, 380 U.S. 445 (1965) (per curiam), *and United States v. United States Gypsum Co*., 438 U.S. 422, 462 (1978), *with Lowenfield v. Phelps*, 484 U.S. 231, 237-41 (1988)) – on the ground that its effect is to deprive the respondent of the right to an "uncoerced verdict" (*id.* at 241 (dictum)), and thus of the respondent's statutory right to jury trial, see § 21.01 *supra*, and due process right to "accurate factfinding," *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971) (plurality opinion); see § 21.01 *supra. See*, *e.g.*, *Smith v. Curry*, 580 F.3d 1071, 1080 (9th Cir. 2009) ("An analysis of the Supreme Court's decisions, dating back to 1896, requires us to conclude that the California Court of Appeal's approval of the instruction in this case, directing the jurors to the evidence the judge believed supported conviction, crossed the boundary from appropriate encouragement to exercise the duty to deliberate in order to reach a unanimous verdict, and went into the forbidden territory of coercing a particular verdict on the basis of the judge's selective view of the evidence"); *United States v. Haynes*, 729 F.3d 178, 193-94 (2d Cir. 2013) ("the modified *Allen* charge . . . was coercive in the circumstances and context in which it was given" because "the Court had already given a modified *Allen* charge" and "[r]epeating a modified *Allen* charge . . . could reasonably be perceived by the jurors as the Court communicating its insistence on the jury reaching a unanimous verdict"; the court's statement that it "'believe[d]' that the jury would 'arrive at a just verdict' on Monday" could have been viewed by a reasonable juror "as lending the Court's authority to the incorrect and coercive proposition that the only just result was a verdict"; and the judge did not give a "balancing, cautionary instruction that no juror should give up conscientiously held beliefs.").

§ 36.17 MISTRIAL FOR FAILURE TO AGREE

If the court is satisfied that the jurors are unable to agree after reasonable deliberations, it may declare a mistrial and discharge the jury. Should the respondent not object to the mistrial, s/he can be tried again on the same charge. If a mistrial is declared over the objection of the respondent, s/he may challenge the propriety of the court's action by pleading former jeopardy against a new trial. See § 17.08 *supra.* The validity of the double jeopardy claim will hinge on whether the court abused its considerable discretion in declaring the mistrial. See § 34.11(d)(2) *supra.*

§ 36.18 RETURN OF THE VERDICT; POLLING

The jury usually returns its verdict, that is, its finding of guilt or innocence, by the announcement of its foreperson in open court in the presence of counsel and respondent. Local practice may also call for the foreperson to endorse the verdict on the Petition, or the foreperson or all the jurors may be required to sign written verdict forms that have been sent out with the jury.

If the verdict is not guilty, the trial is concluded, the jury is dismissed, and the respondent is discharged. If the verdict is guilty, the prosecutor ordinarily requests that it be recorded. Before it is recorded, defense counsel usually has the right to poll each juror on each count of the Petition.

The crier or clerk of court commonly conducts the poll of the jury. Each count is read to each juror, and the juror is asked to state his or her verdict on it. In complicated cases involving multiple charges, defense counsel should request at sidebar that when polling the jurors, the crier should read the counts in a different order from the order in which they were originally submitted to the jury. Counsel should impress upon the court that s/he is not using this procedure as a strategem but is requesting it because it is a more accurate method of polling than the normal one of reading all the counts in order. The latter procedure lends itself to a rote response by the jurors.

The jury is only polled on those counts on which counsel requests a poll. The poll of a jury can be interrupted by counsel's stating that s/he is satisfied that the jury has agreed as the foreperson stated. Polling is then halted, and the verdict is recorded.

In most jurisdictions, logically inconsistent jury verdicts do not entitle an accused to a new trial or other relief as a matter of right. *See, e.g., United States v. Powell*, 469 U.S. 57 (1984). *Compare People v. DeLee*, 24 N.Y.3d 603, 608-11, 26 N.E.3d 210, 213-15, 2 N.Y.S.2d 382, 385-87 (2014) ("New York's repugnancy jurisprudence," which "affords defendants greater protection than the Federal Constitution requires," provides for the alternative remedies of dismissal of the repugnant count (where the nature of the repugnancy signifies that "'the jury has actually found that the defendant did not commit an essential element [of the repugnant charge], whether it be one element or all'") or affording leave to the prosecution to initiate a new prosecution of the repugnant charge by indictment or information ("where a repugnant charge

was the result, not of irrationality, but mercy")). Even in those jurisdictions that do not provide for a remedy as a matter of right, the inconsistency of verdicts may be considered by the trial judge in exercising his or her discretion to grant a new trial in the interests of justice (see § 37.02(d) *infra*); and counsel who requests a new trial on this ground should urge that the jury's conviction on counts that should not logically have been treated differently from other counts on which the jury acquitted demonstrates jury confusion, the marginal nature of the prosecution's proof of guilt, or both.