Chapter 35

The Closing Stage of a Bench Trial: Renewal of the Motion for Acquittal; Closing Argument

§ 35.01 THE FUNCTIONS OF THE MOTION FOR ACQUITTAL AND CLOSING ARGUMENT IN A BENCH TRIAL; CONSOLIDATION OF THE MOTION AND CLOSING IN A SINGLE ARGUMENT

At the close of all the evidence, the respondent moves for a judgment of acquittal (or a "directed verdict of acquittal," as local practice may style it). This is a renewal of the motion previously made at the close of the prosecution's case and raises the same legal issue. See Chapter 32. However, the issue is now decided on the basis of the evidence presented by both parties. *See, e.g.*, *United States v. Lawrence*, 471 F.3d 135, 139-43 (D.C. Cir. 2006) (stating the general rule that "[i]f the defendant moves for a judgment of acquittal at the close of all the evidence, sufficiency claims must be evaluated in light of all the evidence, including any inculpatory evidence presented in the defense case," but deeming that rule to be inapplicable because only the co-defendant in this joint trial presented evidence, and the co-defendant's evidence cannot be considered "in evaluating the sufficiency of the evidence against the defendant"; accordingly, the determination of the defendant's motion for acquittal can "take into account only the evidence presented in the government's case-in-chief."). The accused in a criminal or delinquency trial ordinarily must move for a directed verdict of acquittal at the close of all of the evidence or lose the right to challenge the sufficiency of the evidence by posttrial motion or on appeal; the accused's motion for acquittal at the close of the prosecutor's case ordinarily will not suffice to preserve the contention unless it is renewed after both sides have rested. *See, e.g.*, *United States v. Wahl*, 290 F.3d 370, 287-89 (D.C. Cir. 2002) (stating the general rule that "if a defendant offers evidence in his own defense after a judge denies his Rule 29 motion [for acquittal at the close of the prosecution's case], then the defendant waives his objection to the denial (absent manifest injustice) unless he renews his motion at the close of all the evidence," but holding that no such waiver occurred in this case despite the failure to renew because the "district court in this case reserved Wahl's motion at the close of the government's case" and then the judge did, "in fact, rule on that motion absent a renewal of that motion at the close of all evidence by the defendant"; under these circumstances, the ruling on the motion for acquittal "should have been made solely on the evidence offered by the government.").

In order to explain the respective functions of the motion for acquittal and closing argument in a bench trial, it is necessary to begin by describing their functions in a jury trial, in which the roles of factfinder and arbiter of legal issues are distinct. In a jury trial, the motion for acquittal is addressed to the judge as the arbiter of legal issues. It asks the judge to rule as a matter of law that the respondent cannot be convicted because, even crediting all of the prosecution's evidence and drawing every reasonable inference from it in favor of the prosecution, no reasonable juror could find the respondent guilty beyond a reasonable doubt. In

contrast, the closing argument to the jury asks the jurors to find as a matter of fact that the prosecution has not sustained its burden of proving the respondent guilty beyond a reasonable doubt.

In a bench trial, in which both legal and factual determinations are made by the judge, the distinction between the motion for acquittal and the closing argument becomes blurred. And as a practical matter, judges often will not tolerate counsel's wasting the court's time by first arguing all of the facts in the context of a motion for a judgment of acquittal and then rearguing the facts in closing argument.

Accordingly, in many jurisdictions it is customary for the defense in a juvenile bench trial to consolidate its argument on the motion for acquittal with its closing argument. The sequence of arguments goes as follows:

(i) At the conclusion of the evidence (after the prosecution and defense have both "rested"), defense counsel renews his or her earlier motion for a judgment of acquittal and asks the court whether it wishes counsel to consolidate argument on the motion with closing argument, since they will address essentially the same facts and law.

(ii) When the court agrees, counsel presents an argument that analyzes the law and the facts, urging that the prosecution has not proved its case beyond a reasonable doubt.

(iii) The prosecution next presents a similarly consolidated argument, responding to the defense motion for acquittal and urging that the court should find the respondent guilty on the facts and the law.

(iv) Defense counsel replies to the prosecution's closing argument. (When first proposing the consolidated procedure, counsel should elicit from the court an assurance that counsel will, indeed, be permitted to reply to the prosecution's arguments. Counsel can point out that if the defense asserted its prerogative of making separate arguments on the motion and closing, the prosecutor would argue first (except in those rare jurisdictions where the defense always argues first in closing) and the defense would be entitled to reply to the prosecutor's arguments.)

(v) In those jurisdictions where the prosecutor is normally permitted to reply to the defense closing, the prosecutor has the last word under the consolidated procedure as well.

If such a consolidated approach is not usually employed in counsel's jurisdiction, and if using it would be advantageous, counsel can ask the court to allow it. Once counsel points out that this approach would be more efficient and would likely avoid the need for repetition of

arguments, the judge is likely to go along.

If, however, a separation of the arguments would be advantageous to the defense, then counsel should suggest this sequence: (i) the defense makes and argues its motion and the prosecution replies; (ii) then the prosecution closes, the defense responds, and the prosecutor replies (except in the rare jurisdictions where the defense closes first).

A judge in a bench trial "is given great latitude in controlling the duration and limiting the scope of closing summations." *Herring v. New York,* 422 U.S. 853, 862 (1975). That discretion is, however, circumscribed by the accused's constitutional "right to be heard [through counsel] in summation of the evidence," even in a bench trial. *Id.* at 864 (invalidating a state statute that empowered trial judges to refuse entirely to hear closing arguments in bench trials). *See also, e.g.*, *People v. Harris*, 31 N.Y.3d 1183, 1185, 107 N.E.3d 541, 543, 82 N.Y.S.3d 321, 323 (2018) (the judge in a misdemeanor bench trial violated the defendant's "right to counsel at the trial under the Sixth Amendment" by "den[ying] defense counsel the opportunity to present summation"); *In the Matter of Shawn M.*, 105 Nev. 346, 348, 775 P.2d 700, 701 (1989) (per curiam) (applying *Herring* to hold that "the juvenile court's outright refusal to hear closing argument constituted reversible error"; "presentation of closing argument by defense counsel based upon the evidence introduced at an adjudicatory hearing is an integral part of a juvenile's right to effective assistance of counsel"). By implication, *Herring* requires trial judges to allow defense counsel to make a closing argument of sufficient scope to perform the functions that led the Court to recognize summation as a constitutional right: to ''argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions." *Herring v. New York*, 422 U.S. at 862.

A tactical issue that counsel must resolve in every case is whether to articulate the differences between the legal standards governing the motion for acquittal, on the one hand, and the determination of guilt or innocence, on the other (see § 35.03 *infra*), and then to address each standard in turn, or whether simply to address the facts of the case in a unified presentation. The key consideration here is the rule that a judge, in deciding a motion for acquittal, must credit all of the prosecution's evidence and draw every reasonable inference from it in favor of the prosecution. In closing argument, by contrast, defense counsel is entitled to analyze the comparative credibility of defense and prosecution witnesses and to urge the court to find the prosecution's evidence unpersuasive. As a rule of thumb, in cases in which the defense has some legal argument that demands acquittal even when all inferences favorable to the prosecution's theory of the case have been indulged, it is advantageous for defense counsel to say so, because this enables the judge to acquit the respondent without resolving issues of credibility. In such cases counsel will ordinarily want to distinguish the two legal standards. If, on the other hand, the whole case boils down to a fact contest, counsel is usually better off simply addressing the facts without distinguishing between the legal standards applicable to the motion and to closing argument.

§ 35.02 GENERAL CONSIDERATIONS REGARDING THE CONTENT OF THE

DEFENSE CLOSING IN A BENCH TRIAL

As indicated in § 27.04 *supra,* a judge will probably be more receptive to legal arguments than to purely factual arguments. Thus, for example, in an assault case in a jurisdiction where the prosecution must show a certain degree of injury in order to make out an aggravated form of assault, an argument that the requisite degree of injury has not been shown beyond a reasonable doubt (citing appellate caselaw that holds equivalent injuries insufficient) is more likely to prevail than a self-defense claim based upon the respondent's testimony and disputed by the complainant's. As mentioned in § 27.04(a), judges are prone to be skeptical of the testimony of the respondent and his or her family or friends (and, conversely, to credit the testimony of police officers uncritically).

Thus, as a general matter, counsel is wise to research each of the elements of the charged offense and to collect any caselaw defining those elements. Whenever the prosecution's case is weak on one or more of the elements, counsel should parse the element, citing pertinent caselaw if there is any.

Counsel will often want to stress whatever burdens of proof the prosecution must satisfy, possibly also citing caselaw that describes the burdens in terms favorable to the defense. The central prosecutorial burden is, of course, the burden of proving each and every element of the offense beyond a reasonable doubt (see § 35.03 *infra*); counsel should research and cite appellate decisions reversing convictions for insufficient evidence on facts similar to those of the respondent's case. As noted in § 35.04 *infra,* many States impose special corroboration requirements on the prosecution in certain kinds of cases: They may, for example, forbid a conviction to be based solely on the respondent's uncorroborated confession or the uncorroborated testimony of an accomplice. In some jurisdictions the respondent's raising of particular defenses activates a prosecutorial burden to disprove those defenses beyond a reasonable doubt. See § 35.05 *infra.*

Counsel also should research and be prepared to invoke other evidentiary doctrines that may favor the defense in a particular case. For example, the "missing witness inference" described in § 10.08 *supra* can be cited in closing argument as one of the several factors raising a reasonable doubt.

Of course, the receptivity of judges to arguments based on legal doctrines similarly requires that counsel be prepared to rebut the prosecutor's invocation of doctrines advantageous to the prosecution. In particular, counsel must become familiar with the roster of presumptions and inferences upon which the prosecutor can rely to prove factual propositions necessary for conviction. See § 35.06 *infra.*

If the judge begins to ask a question during argument, counsel should immediately shut up and listen for all s/he is worth. Questions from the bench provide invaluable discovery of what the judge is thinking, what is worrying the judge about the case. Counsel's first and most

important job is to answer the judge's question as directly as possible. See § 16.07 *supra*. While doing this, counsel should be pondering: *why is that question important to the judge*? *what are the premises and reasoning processes that make it a matter of consequence?* Counsel's second job is to speak to those premises and those reasoning processes. If possible, counsel should draw the judge into a dialogue that will give counsel maximum guidance about what tack s/he needs to take to satisfy the judge's concerns. A good way to get a colloquy going is to ask the judge – after responding fully to his or her question – "Does that answer your Honor's question?" Another useful device is pausing and allowing silence to gather for some moments after concluding each of counsel's major points (preferably without looking flustered or at a loss for words). Just cool it. Judges, like Nature, abhor a vacuum, and are likely to fill it with a question or a revealing observation.

In some jurisdictions the defense is required to submit its motion for acquittal in writing. Usually, the requirement is applied very loosely, and a typed (or even handwritten) short motion will suffice. Whether counsel is practicing in such a jurisdiction or not, s/he should give serious thought to preparing a detailed legal memorandum when the defense turns upon a novel interpretation of the law. In this situation counsel can prepare the memorandum before trial, describing the applicable law but leaving the facts of the case for oral recitation after counsel has seen precisely how the facts emerged from the witnesses' testimony. The memorandum can be handed up to the judge (and copies given to the prosecutor and the clerk) during counsel's oral presentation. This ensures that the judge will have an adequate grounding to follow legal arguments that may not be easy to elucidate orally, and it also ensures that the record for appeal is clear with respect to those arguments. (Counsel should make sure that the courtroom clerk files the memorandum so that it becomes a part of the formal record for the latter purpose.) In cases in which counsel has not had a chance to prepare a memorandum in advance, s/he can ask leave of the court to submit a post-argument written memorandum. This procedure runs the risk, however, that the judge may deny counsel's request and proceed directly to announce his or her verdict.

§ 35.03 THE LEGAL STANDARDS GOVERNING THE MOTION FOR ACQUITTAL AND THE DETERMINATION OF GUILT OR INNOCENCE

The prosecutor's burden in a criminal case – to "prove every ingredient of an offense beyond a reasonable doubt" (*Patterson v. New York*, 432 U.S. 197, 215 (1977) (dictum); *see, e.g.*, *Hurst v. Florida*, 577 U.S. 92, 97 (2016); *Reed v. Ross*, 468 U.S. 1, 3-5 (1984), and cases cited) – governs the determination of guilt or innocence in a delinquency trial as well. *In re Winship,* 397 U.S. 358 (1970). "It is a bedrock principle that 'the [Fourteenth Amendment's] Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" *United States v. Harra*, 985 F.3d 196, 211 (3d Cir. 2021) (quoting *Winship*, 397 U.S. at 364).

As explained in § 35.02 *supra,* the prosecutor's burden will often be a centerpiece of counsel's closing argument.

The burden also shapes the standard by which the judge is required to test the prosecution's proof in ruling on the motion for acquittal. The motion must be granted if no reasonable trier of fact could find that every element of the offense and the respondent's identity as the perpetrator have been proved beyond a reasonable doubt. *See Musacchio v. United States*, 577 U.S. 237, 243-44 (2016); *see also United States v. Powell*, 469 U.S. 57, 67 (1984) (dictum); *United States v. Campos-Ayala*, 70 F.4th 261 (5th Cir. 2023); *United States v. Jackson*, 24 F.4th 1308 (9th Cir. 2022). This is the test that has traditionally been employed in most jurisdictions. In *Jackson v. Virginia,* 443 U.S. 307 (1979), the Supreme Court made clear that it is also the test required by the federal Constitution. *Smith v. Brookhart*, 996 F.3d 402 (7th Cir. 2021).

Because the prosecution has the burden of persuasion, the respondent is not required to submit any evidence to warrant an acquittal, or a directed verdict of acquittal. S/he is entitled to a directed verdict of acquittal unless, on the basis of all the evidence in the case, a reasonable mind could conclude beyond a reasonable doubt that the prosecution has proved each element of the offense and has identified the respondent as its perpetrator.

In some jurisdictions, however, venue needs not be proved beyond a reasonable doubt. A respondent's claim of improper venue must be raised by pretrial motion; if it is, the prosecution's burden on the issue is a preponderance. *See*, *e.g.*, *United States v. Moran-Garcia*, 966 F.3d 966, 969 (9th Cir. 2020); *United States v. Smith*, 22 F.4th 1236, 1242 (11th Cir. 2022), *subsequent history in Smith v. United States*, 143 S. Ct. 1594 (2023); *State v. Mills*, 354 Or. 350, 312 P.3d 515 (2013); *State v. Dent*, 123 Wash. 2d 467, 869 P.2d 392 (1994). Other jurisdictions do require the prosecution to prove venue beyond a reasonable doubt. *See*, *e.g., State v. Mueller*, 301 Neb. 778, 779, 920 N.W.2d 424, 427 (2018), *modified*, 302 Neb. 51, 921 N.W.2d 584 (Mem) (2019) (per curiam) (Supreme Court's syllabus: "Proof of venue is essential in a criminal prosecution, and in the absence of a defendant's waiver by requesting a change of venue, the State has the burden to prove proper venue beyond a reasonable doubt."); *accord*, *Hill v. State*, 797 So.2d 914, 916 (Miss. 2001) (dictum); *Sims v. State*, 312 Ga. 322, 326, 862 S.E.2d 534, 539 (2021) (dictum) ("'Venue is a jurisdictional fact that the State must prove beyond a reasonable doubt and can do so by direct or circumstantial evidence,' and '[d]etermining whether venue has been established is an issue soundly within the province of the jury.'"); *but see Worthen v. State*, 304 Ga. 862, 874, 823 S.E.2d 291, 300 (2019) (allowing juries to "infer that a crime committed near a location [which witnesses testify is] in one [particular] county was committed in the same county").

§ 35.04 INCREASED PROSECUTORIAL BURDEN IN SOME CASES; CORROBORATION REQUIREMENTS

In virtually every jurisdiction, there are statutory or common-law rules that increase the burden on the prosecutor in some sorts of cases.

In some jurisdictions, a statute or court rule or caselaw declares that certain kinds of evidence alone are insufficient to support a conviction and that the prosecution must also present "corroboration" of such evidence. The most common rules of this sort provide that:

(1) An accused's confession alone is not sufficient to support a conviction and must be corroborated by other evidence. *See, e.g., United States v. Adams*, 583 F.3d 457 (6th Cir. 2009); N.Y. FAM. CT. ACT § 344.2(3) (2023); PA. CONS. STAT. ANN. tit. 42, § 6338(b) (2023); TEX. FAM. CODE ANN. § 54.03(e) (2023); WASH. REV. CODE ANN. § 13.40.140(8) (2023); *In the Matter of R.A.B.,* 399 A.2d 81, 83 (D.C. 1979).

(2) The uncorroborated testimony of an accomplice is not sufficient to support a conviction. *See, e.g.,* N.Y. FAM. CT. ACT § 343.2(1) (2023); TEX. FAM. CODE ANN. § 54.03(e) (2023); *In re Dugan,* 334 N.W.2d 300, 304 (Iowa 1983) (applying adult criminal court rule to delinquency cases); *In re Anthony W.*, 388 Md. 251, 273, 879 A.2d 717, 728 (2005) (same); *In the Matter of the Welfare of D.S.,* 306 N.W.2d 882, 883 (Minn. 1981) (same).

Another type of rule enhances the prosecution's burden by requiring that the prosecution produce more than a single witness to prove guilt. Rules of this sort may apply to:

(i) Particular types of crimes. Common examples are the rule that, to support a conviction of perjury, the testimony of two witnesses or its equivalent must be shown (*see, e.g.*, *Mason v. State*, 225 Md. App. 467, 126 A.3d 129 (2015) (dictum); *Hall v. State*, 751 So.2d 1161 (Miss. 1999)), and the rule requiring that, in prosecutions for false pretenses, unwritten representations must be proven either by the testimony of two witnesses or by testimony of a single witness together with corroborating circumstances (*see, e.g.*, CAL. PENAL CODE § 532(b); OKLA. STAT. ANN. tit. 22, § 743).

(ii) Particular types of witnesses. For example, the testimony of a minor child may be insufficient to support a conviction in certain types of cases. *See, e.g.*, N.Y. FAM. CT. ACT § 343.1(2)-(3) (2023) (if the court determines that a child witness who is less than nine years old is unable to "understand the nature of an oath" (see § 30.05 *supra*) but the court nonetheless allows the witness to testify by giving "unsworn evidence," a "respondent may not be found to be delinquent solely upon [such] unsworn evidence")*; Robinson v. United States*, 357 A.2d 412, 415 (D.C. 1976) ("In a prosecution for taking indecent liberties with a minor child, corroboration of the complainant's testimony by independent evidence is an indispensable prerequisite to conviction").

(iii) Particular types of factual scenarios. *See, e.g.*, *People v. Delamorta*, 18 N.Y.3d 107, 110, 960 N.E.2d 383, 385, 936 N.Y.S.2d 614, 616 (2011) ("Over a century ago, *People v. Ledwon*, 153 N.Y. 10, 46 N.E. 1046 (1897) established that a criminal conviction is not supported by legally sufficient evidence if the only evidence of guilt is supplied by a witness who offers inherently contradictory testimony about the defendant's culpability").

§ 35.05 "AFFIRMATIVE DEFENSES"

There is often considerable confusion in the jurisprudence on the subject of "affirmative defenses" – that is, factual contentions upon which the accused is said to have the burden of proof.

There are, to be sure, certain issues – involving "defenses" in the nature of confession and avoidance – on which the accused does have the burden of proof (usually by a preponderance of the evidence) under the law of some jurisdictions. These include duress, *see Dixon v. United States*, 548 U.S. 1, 8 (2006), insanity (*i.e.*, lack of criminal responsibility), *see Patterson v. New York,* 432 U.S. 197, 202-06 (1977) (dictum); *Jones v. United States,* 463 U.S. 354, 368 n.17 (1983) (dictum); *Clark v. Arizona*, 548 U.S. 735, 768-69 (2006) (dictum); *but see Burks v. United States,* 437 U.S. 1, 3 n.2 (1978) (dictum) (federal practice), withdrawal from a criminal conspiracy, *see Smith v. United States*, 568 U.S. 106, 112-13 (2013) (federal practice), and self-defense, *see Martin v. Ohio,* 480 U.S. 228 (1987); *Hankerson v. North Carolina,* 432 U.S. 233, 240 n.6 (1977) (dictum).

But in many jurisdictions the accused's burden on issues such as insanity or self-defense is not the burden of persuasion; it is merely the burden of going forward. That is, unless the accused presents some evidence on the issue, the issue is not in the case; the prosecution may survive a motion for acquittal with no evidence at all addressed to the issue. *Cf. Hankerson v. North Carolina,* 432 U.S. at 237 n.3. If the accused does present "some evidence," however, the issue is raised, and once it is raised, the prosecution must prove its case on the issue beyond a reasonable doubt, just as it must prove every element of the crime beyond a reasonable doubt. *See*, *e.g.*, *Connolly v. Commonwealth*, 377 Mass. 527, 387 N.E.2d 519 (1979) (self-defense in a murder prosecution); *State v. McCullum*, 98 Wash. 2d 484, 656 P.2d 1064 (1983) (self-defense in a murder prosecution); *State v. Garcia*, 2001 UT App 19, 18 P.3d 1123 (Utah App. 2001) (self-defense in a manslaughter prosecution); *Speed v. United States*, 562 A.2d 124 (D.C. 1989) (self-defense in a simple assault prosecution); *State v. W.R. Jr.*, 181 Wash. 2d 757, 336 P.3d 1134 (2014) (consent in a forcible rape case). (The phrase "some evidence" commonly used to describe how much the accused must adduce to justify submission of an issue, has different meanings in different jurisdictions. In some jurisdictions it signifies enough evidence to support a finding; in others it signifies enough evidence to "warrant consideration" or to raise a reasonable doubt.)

Furthermore, there are numerous matters that are not "affirmative defenses" in any sense, analytic or operational, although they may look like it. An alibi, for example, is not a defense. It is simply one way in which the accused may seek to disprove – technically, to throw a reasonable doubt upon – the question of identity, on which the prosecution plainly has its normal burden. If alibi testimony suffices to create a reasonable doubt, the respondent is entitled to be found not guilty; and if it compels a reasonable doubt in a reasonable mind, the respondent is entitled to the granting of a motion for acquittal. The same is ordinarily true with respect to intoxication as a "defense" to a charge requiring proof of specific intent. And the prosecution's burden is not

lessened simply because the respondent relies upon certain sorts of evidence (such as accomplice testimony) for which strict evaluative standards (such as "care and caution") are accepted. *See Cool v. United States,* 409 U.S. 100, 103-04 (1972).

Finally, the same defensive evidence or theory of the case may bear on two or more issues. For example, in a homicide case the fact that the deceased initiated the fight in which s/he was killed by the respondent may go both to refute the existence of "premeditation and deliberation," an element of first-degree murder, and to establish self-defense, a justification. Even in jurisdictions where the respondent bears the burden of proof of the fact for the second purpose, s/he does not bear it for the first. *See Martin v. Ohio,* 480 U.S. at 233-34; *Smith v. United States*, 568 U.S. at 110 (if an affirmative defense "'negate[s] an element of the crime,'" the "State is foreclosed from shifting the burden of proof to the defendant").

The law on all of these subjects varies from jurisdiction to jurisdiction and is unsettled or in flux in many jurisdictions. When it is not expressly governed by statute or a recent decision of the State's highest court, counsel should be alert to challenge even long-accepted local usages making "affirmative defenses" out of issues that should not analytically be treated as such. In addition to arguments based upon state-law analyses, counsel can argue that the federal constitutional requirement of proof beyond a reasonable doubt (see § 35.03 *supra*) is offended by treating essential components of criminal liability as "affirmative defenses" so as to relieve the prosecution of the burden of proving them. *Compare Mullaney v. Wilbur,* 421 U.S. 684 (1975), *with Rivera v. Delaware,* 429 U.S. 877 (1976) (per curiam), *and Patterson v. New York,* 432 U.S. at 210, *and Martin v. Ohio,* 480 U.S. at 231-34, *and Smith v. United States*, 568 U.S. at 110-12. There are numerous issues here that are worth counsel's while to research, raise, and preserve for appeal if they are not won at the trial level. *See, e.g.*, *Conley v. United States*, 79 A.3d 270 (D.C. 2013) (D.C. statute making it "'unlawful for a person to be voluntarily in a motor vehicle if that person knows that a firearm is in the vehicle, unless the firearm is being lawfully carried or lawfully transported'" (*id*. at 274) – "even if the person has no connection to or control over the weapon and is not involved in any wrongdoing" (*id*. at 272) – unconstitutionally shifted "the burden of persuasion with respect to a critical component of the crime" (*id*. at 272-73) by providing that "'[i]t shall be an affirmative defense to this offense, which the defendant must prove by a preponderance of the evidence, that the defendant, upon learning that a firearm was in the vehicle, had the specific intent to immediately leave the vehicle, but did not have a reasonable opportunity under the circumstances to do so" (*id*. at 274); "the essence of the offense is the defendant's voluntary presence in a vehicle after he learns that it contains a firearm" (*id*. at 272), and "because voluntary presence is an undisputed element of the offense . . . , the Due Process Clause forbids shifting the burden to the defendant to negate that element by proving that his presence was not voluntary." (*id*. at 278-79)). In a bench trial, such issues are ordinarily raised by inclusion in counsel's arguments on the motion for acquittal or in counsel's closing argument. In a jury trial they may be raised either in argument on the motion for acquittal or by requests for jury charges. See § 36.06 *infra*.

§ 35.06 THE EFFECT OF INFERENCES AND PRESUMPTIONS

Another area of entrenched confusion that requires counsel's study of local law and may reward counsel's attack upon some aspects of it is the subject of inferences and presumptions.

As these terms are used by most writers on evidence, *inferences* and *presumptions* are descriptions of reasoning processes that lead from one factual proposition, *A,* to another proposition (factual or legal or both), *B.* The reasoning process tells how to get from *A* to *B.* Any given statute or common-law doctrine that prescribes the reasoning process may make the transition permissive or may make the transition mandatory; that is, it may tell triers of fact who have found *A* that the triers are *permitted* to go to *B,* or it may tell triers who have found *A* that they are *required* to go to *B,* under some or all circumstances.

§ 35.06(a) Inferences

An *inference* (more properly, a permissive inference) tells a trier that if *A* is established by the requisite quantum of proof, the trier may thereupon find *B.* The trier needs not find *B,* but s/he may. *See*, *e.g.*, *Lindsey v. Commonwealth*, 293 Va. 1, 795 S.E.2d 311 (2017). This means, if *B* is an element of a crime, that the trier may, but needs not, rest a conviction (insofar as that element is concerned) upon proof beyond a reasonable doubt of *A.* For example, statutes in some States provide that on the trial of a person for an intentional crime of violence, proof that the person was armed with an unlicensed handgun is *prima facie* evidence of intent to commit the violent crime. These statutes are ordinarily construed as creating a permissive inference. On proof that the accused carried an unlicensed gun, the trier of fact *may* find the requisite criminal intent and thereby may convict, but it is not required to do so.

The effect of a permissive inference on the respondent's motion for acquittal is to require its denial if the prosecution proves fact *A.* Although the statute makes *B* criminal, the prosecution can survive a motion for acquittal by proving *A.* The permissive inference empowers a trier who has found *A* beyond a reasonable doubt to infer *B* and convict.

The term *inference* would also be used if the trier were permitted to find *B* beyond a reasonable doubt and to convict upon a finding that *A* was established by a preponderance of the evidence. Probably, statutes and common-law doctrines creating most permissive inferences do not intend to allow this. Thus, under the common form of unlicensed handgun statute mentioned earlier, it would probably be error for a judge to base a conviction of a crime of violence requiring specific intent upon a finding by a preponderance of the evidence that the respondent had an unlicensed gun. Unless the judge finds the fact of possession of an unlicensed gun beyond a reasonable doubt, s/he should not convict.

§ 35.06(b) Presumptions Generally

The term *presumption* is a mixed bag. Apart from the fact that it is often used improperly to denote permissive inferences as described in the preceding subsection, it has no uniform

meaning. Writers on evidence often distinguish three kinds of presumptions: (i) presumptions that shift the burden of going forward (described in § 35.06(c) *infra*); (ii) presumptions that shift the burden of proof (§ 35.06(d) *infra*); and conclusive presumptions of law (§ 35.06(e) *infra*).

§ 35.06(c) Presumptions That Shift the Burden of Going Forward

In describing the trier's reasoning process from *A* to *B,* a presumption that shifts the burden of going forward says that when the proponent of evidence proves *A,* the trier must find *B* unless the opposing party presents some evidence that *B* is not true. If the opponent presents some evidence that *B* is not true, the presumption ceases to have effect in the case, and the proponent can win only if s/he satisfies the jury that *B* is true according to the ordinary standard of proof. (Of course, the same basic fact *A* that gave rise to the presumption may *also* give rise to a permissive inference of *B,* but it may not.)

In a number of jurisdictions, for example, the presumption of malice from an intentional killing is this sort of presumption. If the prosecution satisfies the factfinder that there was an intentional killing and the accused does not come forward with some evidence of justification or mitigation, the factfinder *must* convict of murder. If the accused comes forward with some evidence, the prosecution resumes its burden of proving malice beyond a reasonable doubt. How much evidence constitutes "some" evidence appears to vary from jurisdiction to jurisdiction, and the standard is often unclear. Compare § 35.05 *supra.*

The reasoning involved in presumptions that shift the burden of going forward is, of course, generally similar to the reasoning described in § 35.05 relating to the burden of proof in some jurisdictions on such issues as self-defense and insanity. The accused must come forward with some evidence of insanity; if s/he does, the prosecution must prove sanity beyond a reasonable doubt. Indeed, the "presumption of sanity" is sometimes spoken of. But the "presumption of sanity" is not a presumption at all because it does not deal with the relations between two factual propositions. It states a rule that is uniformly applied, without the necessity of proof of any fact *A.* It is, in short, a burden-of-proof statement. *See Clark v. Arizona*, 548 U.S. 735, 766-69 (2006). So is the most celebrated presumption of them all, the "presumption of innocence." *See id*. at 765-67; *Taylor v. Kentucky,* 436 U.S. 478, 483-84 n.12 (1978). The confusion about presumptions is only compounded by these uses of the term to describe burdens of proof. *Cf. Lavine v. Milne,* 424 U.S. 577, 584-85 (1976).

§ 35.06(d) Presumptions That Shift the Burden of Proof

Under a presumption that shifts the burden of proof, the proponent of evidence, charged with the burden of proof of fact *B,* is entitled to win by proving fact *A* unless his or her opponent disproves *B.* This was the effect of the presumption of malice in some States prior to *Mullaney v. Wilbur,* 421 U.S. 684 (1975). In those States the jurors were charged that if they found that the accused had killed the deceased intentionally, they *must* convict unless the accused proved that the killing was justifiable or that some circumstance of mitigation existed.

This sort of presumption, like presumptions that shift the burden of going forward, may have differing effects, depending upon the extent ("the quantum") of the burden that is shifted to the accused: proof by a preponderance, proof by clear and convincing evidence, and so forth.

To complicate complications, there is another frequently encountered set of doctrines that look like presumptions that shift the burden of proof but are not presumptions as the term is used here. These are the effect of common-law rules or statutes that relate to what a factfinder may do with certain "unexplained" conduct of the accused. For example, unexplained possession of recently stolen property is *prima facie* evidence of theft. Unexplained possession of narcotics is *prima facie* evidence of their illegal importation. Unexplained presence at the site of an illegal enterprise is *prima facie* evidence of operating it. Insofar as these statutes require "explanation" from the accused, they appear to be presumptions shifting the burden of proof. But they do not shift the burden of proof because, in each case, unexplained possession merely authorizes conviction and does not compel it. If the trier of fact finds unexplained possession of recently stolen property, for example, it *may* convict, but it is not required to convict. What is involved is a hybrid permissive inference (see § 35.06(a) *supra*) and presumption. The accused has the burden of persuasion of avoiding an inference.

§ 35.06(e) Conclusive Presumptions of Law

The type of legal doctrine that is often called a "conclusive presumption of law" is really not a presumption at all. It functions in the manner of an outright rule of law. It says that when *A* is proved, *B* is treated as proved, and that is that. The statutory definition of the crime reads in terms of *B,* but *A* is the actual element of the crime for practical purposes.

This is the relationship between killing in the course of a felony and malice in most jurisdictions. Although the language of "presumption" is sometimes still used, it is clear that killing in the course of a felony *is* malicious killing and *is* murder. The factfinder needs find nothing more.

To say that *operationally* a "conclusive presumption" functions precisely in the nature of a legal rule substituting the basic fact for the presumed fact is not to say, however, that for all legal purposes a "conclusive presumption" is treated as equivalent to a legal rule which turns upon the basic fact. The two may be treated differently, for example, for the purpose of applying certain constitutional limitations upon "presumptions" (§ 35.06(f) *infra*). See the distinction of *Vlandis v. Kline,* 412 U.S. 441 (1973), in *Weinberger v. Salfi,* 422 U.S. 749, 770-72 (1975); *cf. Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 22-24 (1976).

§ 35.06(f) Constitutional Issues Concerning Presumptions; Conclusion

The preceding discussion of inferences and presumptions has not been designed to explicate the law but to alert counsel to its complexity. The adjudication of delinquency cases involves a bewildering array of formalized inferences and presumptions (in the sense used here,

meaning articulate legal doctrines of greater generality than the inferences drawn by a trier of fact in any particular case), most of which serve to get the prosecutor past a motion for acquittal. For listings, see 9 WIGMORE, EVIDENCE §§ 2499-2540 (James H. Chadbourn rev. 1981 & Supp.); 22 C.J.S. *Criminal Law* §§ 41-44 (2006 & Supp.); 22A C.J.S. *Criminal Law* §§ 954-971 (2006 & Supp.); 31A C.J.S. *Evidence* §§ 204-288 (2008 & Supp.). The statutes and judicial decisions that create or recognize them seldom say what kind of inferences or presumptions they are or prescribe their effects. General terms are used, such as "shall be presumed," "shall be *prima facie* evidence," "shall be presumptive evidence." An inordinate number of rulings on motions for acquittal depend upon the construction of these general terms and may construe them incorrectly or at least challengeably.

For example, it is almost invariably assumed that any doctrine allowing the presumption of the elements of an offense in a criminal or delinquency case allows the prosecution to survive a motion for acquittal. This is not so, of course. If the presumption is of the kind that shifts the burden of going forward (see § 35.06(c) *supra*) and if it is not accompanied by a permissive inference (see § 35.06(a) *supra*) and if the respondent comes forward as required, the prosecution cannot make a submissible case on the presumption alone. And the Supreme Court of the United States has held that at least one statute providing that "presence . . . shall be deemed sufficient evidence to authorize conviction" does not mean what it says and does not invariably allow the prosecution to defeat a motion for acquittal solely by proof of presence. *United States v. Gainey,* 380 U.S. 63, 68 (1965).

In addition to problems of statutory construction and of the application of old but obscure common-law inferences and presumptions, constitutional problems lurk in all of these devices that ease or satisfy the prosecution's ultimate burden of proof. *See, e.g., Leary v. United States,* 395 U.S. 6, 32-53 (1969), and cases cited; *Turner v. United States,* 396 U.S. 398 (1970); *Mullaney v. Wilbur,* 421 U.S. 684 (1975); *Hankerson v. North Carolina,* 432 U.S. 233 (1977); *Sandstrom v. Montana,* 442 U.S. 510 (1979); *Connecticut v. Johnson,* 460 U.S. 73 (1983); *Reed v. Ross,* 468 U.S. 1 (1984); *Francis v. Franklin,* 471 U.S. 307 (1985); *Yates v. Aiken,* 484 U.S. 211 (1988); *Yates v. Evatt*, 500 U.S. 391, 400-01 (1991); *Barnes v. United States,* 412 U.S. 837, 844-46 (1973) (dictum); *Hall v. Haws*, 861 F.3d 977 (9th Cir. 2017); *Bey v. Superintendent Greene SCI*, 856 F.3d 230, 239-40 (3d Cir. 2017); *compare Cupp v. Naughten,* 414 U.S. 141 (1973); *Patterson v. New York,* 432 U.S. 197 (1977); *County Court of Ulster County v. Allen,* 442 U.S. 140, 156-67 (1979); *Sherrod v. State*, 280 Ga. 275, at 275, 627 S.E.2d 36, 37 (2006) (in a prosecution under a statute that prohibits theft by conversion of leased personal property, a statutory presumption (which the court characterizes as mandatory) that a person possessing such property who fails to return it within five days after the mailing of a letter demanding its return "shall be presumed to have knowingly converted such personal property to such person's own use in violation of such lease or agreement" is unconstitutional); *People v. Pomykala*, 203 Ill. 2d 198, 204, 784 N.E.2d 784, 788, 271 Ill. Dec. 230, 234 (2003) (in the wake of *Sandstrom v. Montana*, *supra*, "under Illinois law, all mandatory presumptions [that operate against the defendant and relieve the prosecution of the need to prove an element of an offense] are now considered to be *per se* unconstitutional"); *State v. Brake*, 796 So.2d 522, 529 (Fla. 2001) (in a

prosecution under a statute that prohibits intentionally luring a child into an enclosed place for "other than a lawful purpose," a statutory presumption (which the court appears to treat as a mandatory rebuttable presumption, requiring "the jury to find the presumed element once the State has proven the predicate facts giving rise to the presumption, unless the defendant persuades the jury that such a finding is unwarranted") that "permits the State to prove the mens rea element of the offense ('for other than a lawful purpose') by proving lack of parental consent for the child to enter the . . . [enclosure] with the defendant" is unconstitutional); *People v. Greco*, 204 Ill. 2d 400, 408, 790 N.E.2d 846, 852, 274 Ill. Dec. 73, 79 (2003) ("A permissive inference is one that simply allows, but does not require, the finder of fact to infer the existence of the ultimate or presumed fact upon proof of the predicate fact, without placing any burden on the defendant. . . . In situations where there is some corroborating evidence of a defendant's guilt, the constitutionality of a permissive inference should be judged under a 'more likely than not' standard. Under this standard, the permissive presumption [sic] will satisfy due process concerns if the presumed fact is more likely than not to flow from the predicate fact. . . . Where the permissive presumption [sic] is the lone basis for a finding of guilt, however, the presumed fact must flow beyond a reasonable doubt from the proven, predicate fact."); *People v. Heyward*, 71 Misc. 3d 470, 143 N.Y.S.3d 172 (N.Y. Crim. Ct., Bronx Cty. 2021) (holding that a statutory permissive inference that all occupants of a vehicle have possession of a firearm found in the vehicle would be unconstitutional if applied to a case in which the firearm was in a bookbag in a car's locked trunk). For "[i]n the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Estelle v. Williams,* 425 U.S. 501, 503 (1976) (dictum). The pertinent federal constitutional caselaw is murky, conceding an "inability to lay down any 'bright line' test" and "leav[ing] the constitutionality of statutes . . . to depend upon differences of degree." *McMillan v. Pennsylvania,* 477 U.S. 79, 91 (1986). Therefore, counsel's preparation for argument of the motion for acquittal and for closing argument in any case in which the prosecution may rely upon a statutory or common-law inference or presumption should include imaginative consideration of possible challenges to its applicability, its sufficiency to satisfy the prosecutor's ultimate burden of proof, and its state and federal constitutional validity.

§ 35.07 VARIANCE BETWEEN THE PROSECUTION'S PROOF AT TRIAL AND THE ALLEGATIONS OF THE PETITION

The prosecution's proof may make out a sufficient case of violation of the offense charged but one that deviates considerably in factual detail from the allegations of the Petition. When this occurs, counsel should move for a judgment of acquittal on grounds of variance or, in the alternative, for a continuance adequate to permit the defense to meet the prosecutor's unexpected proof. In most jurisdictions the motion for acquittal will be denied, and the prosecution will be permitted to amend the Petition, although the defense will often be granted the requested continuance to gather evidence to meet the prosecution's new theory. *Cf. Fisher v. People*, 2020 CO 70, 471 P.3d 1082, 1089 (Colo. 2020) (holding that the trial court abused its discretion by permitting the prosecution to make a "mid-trial amendment [of the information] that expanded the date range [of the crime, and thereby] adversely affected Fisher's substantial

right to prepare and present his alibi defense," and remanding for a new trial); *State v. Ancira*, 2022-NMCA-053, 517 P.3d 292, 296-97 (N.M. App. 2022) (alternative ground). If the variance is so substantial that its effect is to deprive the respondent of "notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge," *Cole v. Arkansas,* 333 U.S. 196, 201 (1948), a refusal to grant a defense continuance is assailable on federal constitutional grounds. See § 9.09(b)(2) *supra.*

In some jurisdictions the applicable statute or caselaw establishes limitations upon the prosecutor's power to amend the Petition to adjust to variances in proof at trial. *See, e.g.*, N.Y. FAM. CT. ACT § 311.5 (2023) (although the prosecutor ordinarily may amend a Petition "before or during the fact-finding hearing . . . with respect to . . . variances from the proof relating to matters of form, time, place, names of persons, and the like" – such amendments giving rise to an automatic defense right to a continuance "necessary to accord the respondent an adequate opportunity to prepare his defense" – no amendment is permitted if it would "tend to prejudice the respondent on the merits" or if the amendment is sought for "the purpose of curing: (a) a failure to charge or state a crime; or (b) legal insufficiency of the factual allegations; or (c) a misjoinder of crimes"). Local practice must be consulted.

§ 35.08 REQUESTING FINDINGS OF FACT AND CONCLUSIONS OF LAW IN THE EVENT OF CONVICTION

When a judge convicts a respondent in a bench trial, counsel should consider asking the court to enter specific findings of fact and conclusions of law. Such a request is advised particularly in cases involving debatable questions of substantive law – concerning, for example, the construction of the statute under which the respondent is charged (compare § 36.06 *infra*) or the applicability or operation or constitutionality of standardized inferences and presumptions (see § 35.06 *supra*) – because a general finding of guilty will be sustained on appeal if there is sufficient evidence to support it under any available legal theory, whereas special findings enable the convicted respondent to obtain appellate review of the trial court's resolution of these contested legal issues. *See, e.g.*, *Petion v. State*, 48 So.3d 726, 737 (Fla. 2010) (the appellate court's customary presumption that a "trial court judge [in a bench trial] rested its judgment on admissible evidence and disregarded inadmissible evidence" does not apply if the "record demonstrates that the presumption is rebutted through a specific finding of admissibility or another statement that demonstrates the trial court relied on the impermissible evidence"); *cf. Moore v. United States,* 429 U.S. 20 (1976) (per curiam). Special findings may also improve the respondent's chances of succeeding on appeal on a contention of insufficiency of the evidence or on a contention that the conviction was the product of "arbitrariness that would undermine confidence in the quality of the judge's conclusion" (*cf. Harris v. Rivera,* 454 U.S. 339, 346 (1981) (per curiam) (dictum)). *See*, *e.g.*, *Owens v. Duncan,* 781 F.3d 360, 363-65 (7th Cir. 2015), *cert. dismissed*, 577 U.S. 189 (2016) ("The eyewitness identification . . . [presented by the prosecution at a bench trial] could, we assume despite the substantial doubts that have been raised concerning the reliability of eyewitness evidence . . . , have supported a finding beyond a reasonable doubt that Owens had murdered Nelson. But . . . at the end of the parties' closing

arguments the judge said: 'I think all of the witnesses skirted the real issue. The issue to me was you have a seventeen year old youth on a bike who is a drug dealer [Nelson], who Larry Owens knew he was a drug dealer. Larry Owens wanted to knock him off. I think the State's evidence has proved that fact. Finding of guilty of murder.' ¶ That was all the judge said in explanation of his verdict, and it was nonsense. No evidence had been presented that Owens knew that Nelson was a drug dealer or that he wanted to kill him . . . or even knew him . . . . The judge . . . said nothing to suggest that he thought the real issue in the case was identification. If one may judge from what he said, which is the only evidence of what he thought, he thought that Owens' knowledge that Nelson was a drug dealer was the fact that dispelled reasonable doubt of Owens' guilt. . . . ¶ We are mindful that only clearly established violations of a defendant's constitutional rights permit us to reverse a state court decision challenged in a federal habeas corpus proceeding. . . . But there's no question that the right to have one's guilt or innocence adjudicated on the basis of evidence introduced at trial satisfies that exacting standard.").

In deciding whether to ask for specific findings of fact and conclusions of law, counsel should keep in mind the risk that a judge who realizes s/he committed an error during the trial may try to cleanse the record by, for example, disavowing reliance on an item of improperly admitted evidence. *See, e.g.*, *People v. Pabon*, 28 N.Y.3d 147, 157-58, 65 N.E.3d 688, 665-66, 42 N.Y.S.3d 659 (2016) (if an appellate court finds that a judge in a bench trial "erroneously allowed inadmissible evidence over proper objection," an appellate court cannot find harmless error based upon a general rule that a judge in "a bench trial . . . may be presumed to rely only on admissible evidence" unless the judge makes an "on-the-record statement" that s/he was not factoring the inadmissible evidence into his or her verdict or provides some other "reliable indication that, notwithstanding the erroneous ruling, the judge knows that the evidence must be disregarded"; the Court of Appeals concludes that the judge's improper admission of an "investigator's opinion testimony that defendant lied to him during the interview" was harmless error because "the judge's on-the-record statement that he was 'not taking [the investigator's] judgment' provides sufficient assurance that he was not adopting the investigator's assessment of defendant's honesty.").

Special findings should obviously not be requested in cases in which the trial judge is likely to find against the respondent on all of the alternative legal grounds that s/he can muster. In such cases, a general verdict is preferable. *See Thomas v. Collins,* 323 U.S. 516 (1945). Nor should special findings ordinarily be requested in cases in which counsel has preserved claims of error in the admission of apparently important pieces of prosecution evidence over defense objection, because the judge's failure to rely on those particular pieces of evidence in specific findings of fact may lead an appellate court to find that their erroneous admission was harmless error.

If the respondent is acquitted by a judge following a bench trial, special findings should always be avoided. This is so because the prosecution may be permitted to appeal from a ruling in favor of the respondent that is based solely upon an assailable conclusion of law, whereas an appeal by the prosecution from a ruling in favor of the respondent based in any part upon factual

findings would be barred by double jeopardy principles. *See United States v. Scott,* 437 U.S. 82, 96-97 & n.9 (1978) (dictum) (apparently endorsing the suggestion to this effect in *United States v. Jenkins,* 420 U.S. 358, 366-68 (1975), while overruling *Jenkins* on another point); *see also Smith v. Massachusetts*, 543 U.S. 462, 466-69 (2005); *compare Sanabria v. United States,* 437 U.S. 54, 63-73 (1978); *Smalis v. Pennsylvania,* 476 U.S. 140, 144-45 (1986); *Lockhart v. Nelson,* 488 U.S. 33, 39-40 (1988) (dictum); and *State v. Sago*, 2013 WL 1943006 (Minn. App. 2013) (distinguishing *Lockhart*).

Many juvenile court judges will be unfamiliar with the concept of special findings of fact. Counsel will often be able to find statutes or caselaw prescribing the procedure in adult criminal bench trials, *see, e.g.,* FED. RULE CRIM. PRO. 23(c) (2023), which can be cited by analogy.