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⌘ Vol. 17, No. 17, May 4, 2009

Case Name: Luis Noe Barrios v. The State of Texas

- OFFENSE: Capital Murder - Life Sentence
- COUNTY: Harris
- COURT OF APPEALS: Houston [1st] 2008
- C/A CITATION: Unpublished
- C/A RESULT: Conviction Affirmed
- CCA. CASE No. PD-0891-08 DATE OF OPINION: April 29, 2009
- DISPOSITION: Court of Appeals Affirmed
- OPINION: [Johnson, J.](#) VOTE: 8-1-0
- TRIAL COURT: 184th D/C; Hon. Jan Krocker
- LAWYERS: [Charles Hinton](#) (Defense); [Dan McCrory](#) (State)

Ed Note: (Background Facts) The court's charge on Guilt/Innocence set out the elements of capital murder and continued with an instruction on the procedure that the jury should follow if it did not find proof of that offense beyond a reasonable doubt. "Unless you so find from the evidence beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant of capital murder and next consider whether the defendant is guilty of robbery." The charge next instructed the jury on the elements of robbery and directed it to "acquit the defendant of robbery" unless it found from the evidence "beyond a reasonable doubt" that he was guilty of robbery. The charge continued with an instruction on the benefit of the doubt If you believe from the evidence beyond a reasonable doubt that the defendant is guilty of either capital murder on the one hand or robbery on the other hand, but you have a reasonable doubt as to which of said offenses he is guilty, then you must resolve that doubt in the defendant's favor and find him guilty of the lesser offense of robbery. The charge continued with instructions about a verdict of not guilty. "If you have a reasonable doubt as to whether the defendant is guilty of any offense defined in this charge you will acquit the defendant and say by your verdict 'Not Guilty.'" Appellant made a timely objection to the charge at trial, which the trial court overruled.

⌘ **323 Court's Charge / Lesser Included Offenses:** On appeal, Appellant argued that the trial court erred by instructing the jury that it must unanimously agree that he was not guilty of capital murder before it could consider the lesser included offense of robbery. The Court of Appeals overruled Appellant's point of error, finding that the instruction to the jury did not require the jury to unanimously agree on acquittal. Rather, the instruction allowed the jury to consider the charge as a whole, and it could consider the lesser-included offense before making a decision on the charged offense. The Court granted Appellant's ground for review: the Court of Appeals erred in holding that the "acquittal first" instruction in the trial court's charge would allow the jury to consider the lesser offense of robbery before unanimously deciding to acquit of the greater offense of capital murder.

Holding: While the instruction has a long history in Texas case law, its use of “acquit” as it is understood in relation to delivery of a verdict is at odds with the context of the instruction, which is intended to be considered in relation to jury deliberations. The inartful use of “will acquit,” when the intended meaning seems to be “have a reasonable doubt of or cannot agree on guilt,” could perhaps confuse a jury, although there is no indication that it did so in this case: the jury found Appellant guilty of the greater offense. It may be that a better practice is for trial courts to include an instruction that explicitly informs the jury that it may read the charge as a whole, and to substitute “or if you are unable to agree, you will next consider” for “you will acquit . . . and next consider” so that the charge makes clear to the jury that, at its discretion, it may consider the lesser-included offenses before making a final decision as to the greater offense. We hold that the charge allowed the jury to consider the entire charge as a whole and that the complained-of instruction does not require the jury to unanimously agree that a defendant is not guilty of the greater offense before considering a lesser-included offense. Finding no error in the jury charge, we do not consider whether Appellant was harmed.

Concurring / Dissenting Opinions: Presiding Judge Keller dissented without note.