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## YEAR 2006 CASE SUMMARIES

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By  
**The Honorable Pat Garza**

Associate Judge  
386th District Court  
San Antonio, Texas

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### **Failure to charge on eligibility for community supervision was not error where no evidence was offered by defendant that he was eligible for community supervision. [Morris v. State](06-1-5)**

**On November 23, 2005, the Houston Court of Appeals (14<sup>th</sup> Dist.) held that trial court's refusal to submit requested instruction to the jury on eligibility of probation, was not error, where appellant properly filed a sworn motion that he had not previously been convicted of a felony (juvenile adjudication only), but did not offer any evidence at trial in support of this motion.**

¶ 06-1-5. **Morris v. State**, MEMORANDUM, No. 14-04-00765-CR, 2005 Tex.App.Lexis 9770, [Tex.App.— Houston (14<sup>th</sup> Dist.)] 11/23/05.

**Facts:** Todrick Morris a/k/a Taurus Jamal Morris appeals a conviction for possession of a controlled substance with intent to deliver (a jury found appellant guilty and sentenced him to 35 years confinement and a \$ 1,000 fine) on the ground that the trial court erred in refusing to charge the jury on appellant's eligibility for community supervision.

**Held:** Affirmed

**Editor's Note:** This case relates to juvenile law in that it appears that there may have been some confusion as to whether appellant was eligible for community supervision in light of his prior juvenile conviction. An adjudication for delinquent conduct that constitutes a felony offense is a final felony conviction only for habitual offender sentencing purposes and not with respect to eligibility for adult community supervision. See Ex Parte Rodney Keith Cash (Juvenile Law Newsletter ¶ 06-1-1A)

**Memorandum Opinion:** Appellant's sole issue contends that the trial court improperly determined that he was not eligible for community supervision based on his prior juvenile adjudications and, thus, erred by refusing his request to charge the jury on his eligibility for community supervision. We review alleged jury charge error by considering: (1) whether error existed in the charge; and, if so, (2) whether sufficient harm resulted from the error to compel reversal. *Thanh Cuong Ngo v. State*, \_\_ S.W.3d \_\_, 2005 Tex. Crim. App. LEXIS 457, 2005 WL 600353, at \*3 (Tex. Crim. App. 2005). The defendant bears the burden of proving eligibility for community supervision. *Speth v. State*, 6 S.W.3d 530, 533 (Tex. Crim. App. 1999); *Leday v. State*, 983 S.W.2d 713, 724 (Tex. Crim. App. 1998). To do so, a defendant must file a sworn motion with the trial court prior to trial that he has not been convicted of a felony in any state, and the jury must find that the information in the motion is true. See *TEX. CODE CRIM. PROC. ANN. art. 42.12 § 4(d)(3), (e)* (Vernon Supp. 2005). In addition, there must be actual proof at trial of a defendant's eligibility for community supervision in support of the motion. See *Palasota v.*

*State*, 460 S.W.2d 137, 140-41 (Tex. Crim. App. 1970); *Walker v. State*, 440 S.W.2d 653, 659 (Tex. Crim. App. 1969). In the absence of evidence to support the motion, the jury need not be charged on the issue of community supervision. *Tenery v. State*, 680 S.W.2d 629, 640-41 (Tex. App.--Corpus Christi 1984, *pet. ref'd*).

In this case, appellant properly filed a sworn motion that he had not previously been convicted of a felony, but did not offer any evidence at trial in support of this motion, either before the jury or in an offer of proof. n2 The trial court's refusal to submit the requested instruction to the jury in the absence of such evidence was not error. Accordingly, appellant's issue is overruled, and the judgment of the trial court is affirmed.

n2 Nor does appellant complain that the trial court ruled any such evidence inadmissible.

**Conclusion:** Judgment of trial court affirmed.