CAPITAL MURDER
SPECIAL PUNISHMENT ISSUES

Defense Perspective

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I. SCOPE OF PAPER

This paper focuses on the statutes and case law which apply to the punishment phase of a Texas capital murder trial.

II. HISTORICAL BACKGROUND

A. Furman v. Georgia

1. In 1972 the Supreme Court found that imposition of the death penalty constituted cruel and unusual punishment. *Furman v. Georgia*, 408 U.S. 238, 239 (1972). In the various separate concurring and dissenting opinions filed in *Furman*, the Court indicated that the death penalty was not necessarily cruel and unusual punishment and that it might be possible to write a death penalty statute that passed constitutional muster.

B. Texas's Response To Furman

1. Immediately after *Furman*, many state legislatures amended their death penalty schemes in an effort to create a constitutional means by which to execute persons. Texas's effort was article 1257 of the Texas Penal Code, which later became Tex. Penal Code Ann. § 19.03 (Vernon Supp. 2002) and Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 2002).

2. Most states adopted something similar to § 210.6 of the Model Penal Code, which provides a detailed procedure for considering specified aggravating and mitigating circumstances. Texas chose a different route.

3. In our first post-*Furman* statute, the jury is asked to answer two, sometimes three, special issues.

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

4. The Texas scheme was held not *facially* unconstitutional. *Jurek v. Texas*, 428 U.S. 262, 276 (1976); *see also Pulley v. Harris*, 465 U.S. 37, 51 (1984); *Barefoot v. Estelle*, 463 U.S. 880, 906 (1983). Despite its arguable *facial* constitutionality, the peculiarity of our statute has several times caused the United States Supreme Court to render decisions which threatened to clear Texas death row of inmates. *See Estelle v. Smith*, 451 U.S. 454 (1981); *Adams v. Texas*, 448 U.S. 38 (1980).

5. Then came *Penry v. Lynaugh*, 492 U.S. 302 (1989).

C. Penry I

1. Penry was mildly to moderately mentally retarded and had himself been the victim of extensive child abuse. *Penry v. Lynaugh*, 492 U.S. 302, 307-308 (1989). At trial he objected to the punishment charge on several grounds. He complained because the first special issue failed to define "deliberately" and because the second special issue failed to

define "probability," "criminal acts of violence," and "continuing threat to society." He also objected that the charge failed to "authorize a discretionary grant of mercy based upon the existence of mitigating circumstances;" because it "failed to require as a condition to the assessment of the death penalty that the State show beyond a reasonable doubt that any mitigating circumstances found to exist outweigh any mitigating circumstances;" and, because the charge failed to tell the jury that it could take into consideration all of the evidence, whether mitigating or aggravating, submitted in the full trial of the case. The objections to the charge were overruled, and, consistent with Texas law, the jury was instructed on the bare special issues, without elaboration. *Id*. at 310-11.

2. Penry argued in the Supreme Court that the mitigating evidence of his mental retardation, and his childhood abuse had "relevance to his moral culpability beyond the scope of the special issues, and that the jury was unable to express its 'reasoned moral response' to that evidence in determining whether death was the appropriate punishment." The Court, in a 5-4 decision on this issue, agreed. *Id*. at 322. Penry's conviction and sentence were reversed and remanded for a new trial. "In this case, in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision." *Id*. at 328.

D. Article 37.071, Post-Penry

1. Article 37.071 was amended in 1991 in an effort to provide for consideration of mitigating circumstances, as required by *Penry*.

a. The defendant and his counsel are permitted to present "evidence of the defendant's background or character or the circumstances of the offense that mitigates against the imposition of the death penalty. TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(a)(1)(Vernon Supp. 2002).
The state may not, however, rely on evidence "secured in violation of the Constitution of the United States or of the State of Texas." *Id*. *See also Zimmerman v. State*, 750 S.W. 2d 194, 205 (Tex. Crim. App. 1988)(letter obtained in violation of article 38.22 is inadmissible). And, the state may not offer evidence "to establish that the race or ethnicity of the defendant makes it likely that the defendant will engage in future criminal conduct." TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(a) (2)(Vernon Supp. 2002).

b. If the jury answers the first two special issues affirmatively, it must then answer the following:

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(e)(1) (Vernon Supp. 2002).

c. The jury is instructed that it may not answer the mitigation special issue "no" unless it agrees unanimously, and may not answer it "yes" unless 10 or more jurors agree. TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(f)(2) (Vernon Supp. 2002).

d. Additionally, the

jury is instructed that it "need not agree on what particular evidence supports an affirmative finding on the issue." TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(f)(3) (Vernon Supp. 2002).

e. And, the jury is instructed that it "shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness." TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(f)(4) (Vernon Supp. 2002).

2. The new statute, article 37.071 of the Texas Code of Criminal Procedure, applies only to offenses committed on or after September 1, 1991.

3. For offenses committed prior to September 1, 1991, article 37.0711 governs. Article 37.0711 is discussed below, in § IX.

III. THE FUTURE DANGEROUSNESS SPECIAL ISSUE

A. Article 37.071 § 2(b)(1)

1. The current statute's first special issue is identical to the former statute's second special issue. It requires submission of the following issue, upon conclusion of the punishment evidence: "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(b)(1)(Vernon Supp. 2002).

B. Probability Beyond A Reasonable Doubt: Execrable And Absurd

1. The uniqueness (to put it gently) of requiring the state to prove beyond a reasonable doubt the probability of future dangerousness has evoked its proper share of criticism. *See*, *e.g.*, *Horne v. State*, 607 S.W.2d 556, 565 (Tex. Crim. App. 1980)(Roberts, J., concurring)(labeling the Texas scheme as "execrable" and "absurd"). In *Ex parte Davis*, 866 S.W. 2d 234 (Tex. Crim. App. 1993), applicant complained that his trial counsel had been ineffective for not objecting when the prosecutor argued, "you don't have to believe beyond a reasonable doubt that he will commit acts of violence in the future but that there's a probability he will commit them in the future, that he's likely to commit them in the future." The court of criminal appeals disagreed with applicant's contention that this was an impermissible attempt to reduce the standard of proof. "It seems at least as likely, however, if not more so, that the prosecutor was simply conveying to the jury that what it must find beyond a reasonable doubt is not that applicant *will*, *certainly* commit future acts of violence, but that he *probably* will." *Id*. at 242. Is that clear?

2. Still, special issue number two has survived facial constitutional scrutiny. *See Jurek v. Texas*, 428 U.S. 262, 272-276 (1976). And, it cannot be doubted today that this is a constitutionally acceptable criterion for imposing the death penalty. *See Barefoot v. Estelle*, 463 U.S. 880, 896 (1983).

3. Use of the term "probability" does not unconstitutionally allow the jury to answer the second special issue on evidence less than beyond a reasonable doubt. *Lagrone v. State*, 942 S.W. 2d 602, 618 (Tex. Crim. App. 1997); *Matchett v. State*, 941 S.W. 2d 922, 938 (Tex. Crim. App. 1996).

C. Factors To Be Considered By The Jury

1. The jury determining future dangerousness is entitled to consider a variety of factors at punishment, including, but not limited to the following:

a. the circumstances of the offense, including the defendant's state of mind and whether he was acting alone or with other parties;

b. the calculated nature of the defendant's acts;

c. the forethought and deliberateness exhibited by the crime's execution;

d. the existence of a prior criminal record, and the severity of that record;

e. the defendant's age and personal circumstances at the time of the offense;

f. whether the defendant was acting under duress or the domination of another at the time of the commission of the offense;

g. psychiatric evidence;

h. character evidence.

Keeton v. State, 724 S.W. 2d 58, 61 (Tex. Crim. App. 1987); *accord Barley v. State*, 906 S.W. 2d 27, 30 n.1 (Tex. Crim. App. 1995); *Boyle v. State*, 820 S.W.2d 122, 139 (Tex. Crim. App. 1989); *Stoker v. State*, 788 S.W.2d 1,7 (Tex. Crim. App. 1989); *Valdez v. State*, 766 S.W.2d 162, 166 (Tex. Crim. App. 1989).

2. "[T]he State [has] the burden of proving beyond a reasonable doubt that there is a probability that appellant, if allowed to live, would commit criminal acts of violence in the future, so as to constitute a continuing threat, whether in or out of prison." *Ladd v. State*, 3 S.W. 3d 547, 557 (Tex. Crim. App. 2000).

3. Dissenting in *Wilkerson v. State*, 881 S.W. 2d 321 (Tex. Crim. App. 1994), Judge Baird argued that the majority erred by focusing on only the aggravating factors in this non-exclusive list when deciding the sufficiency of future dangerousness evidence. Seven of the eight factors militated in favor of a life sentence, and the only one which did not was misleading. "In effect, the majority chooses to ignore the cumulative weight of the evidence mitigating towards reforming appellant's sentence from death to life imprisonment. Nonetheless, when examined as a whole, the weight of the evidence suggests that appellant has a reasonable chance of rehabilitation and is probably *not* a *continuing* threat to society. Consequently, a rational jury could not have affirmatively answered the second punishment issue beyond a reasonable doubt. Therefore, to affirm appellant's sentence would be to 'wantonly' and 'freakishly' impose a death sentence, in violation of the United States Constitution." *Id*. at 344 (Baird, J., dissenting).

4. "Rehabilitation is obviously a proper consideration under special issue number two." *Jackson v. State*, 819 S.W.2d 142, 149 (Tex. Crim. App. 1990).

5. "The 'ultimate penalty' is reserved for those few incorrigibles that pose such a great threat to society that they cannot be incarcerated without fear of further violent outbursts toward others, and it is that future probability that a jury is called on to decide." *Nobles v. State*, 843 S.W.2d 503, 510 (Tex. Crim. App. 1992).

6. In *Garcia v.State*, 919 S.W. 2d 383 (Tex. Crim. App. 1994), the court seemed to conduct a balancing analysis of the *Keeton* factors:

> When we consider this evidence with relation to the *Keeton* factors, we find

> the jury's affirmative answer to the second punishment issue is supported by: the circumstances of he offense; the calculated and deliberate nature in which appellant acted; psychiatric evidence presented by the State; appellant's prior criminal record; his commission of capital murder subsequent to the instant offense; and, the lack of evidence that appellant was under duress or domination of another. We find the following *Keeton* factors militate against an affirmative answer to the second punishment issue: appellant's age; his co-defendant's participation in the instant offense; and, appellant's history of alcohol abuse. Considering all the evidence, we conclude a reasonable juror could have found a probability that appellant would commit criminal acts of violence that would constitute a continuing threat to society.

Id. at 382-83.

7. It is permissible for the prosecution to argue that evidence of mental retardation is relevant to future dangerousness. *Bell v. State*, 938 S.W. 2d 35, 48-49 (Tex. Crim. App. 1996).

8. "While theft and burglary are not the most violent of crimes, going from theft to burglary of a habitation shows an escalating pattern of disrespect for the law from which a jury could draw an inference of future dangerousness." *King v. State*, 953 S.W. 2d 266, 271 (Tex. Crim. App. 1997).

9. The jury can consider "as evidence of future dangerousness the fact that appellant was on parole when he committed this crime." *Trevino v. State*, 991 S.W. 2d 849, 854 (Tex. Crim. App. 1999). In his concurring opinion, Judge Meyers asked: "Why is it worse for a parolee to commit a crime than it is for a former felon to commit a crime?" *Trevino v. State*, 991 S.W. 2d 849, 855 (Tex. Crim. App. 1999)(Meyers, J., concurring).

10. "Murder by its very nature is brutal, but we have recognized that a stabbing death is particularly brutal." *King v. State*, 953 S.W. 2d 266, 272 (Tex. Crim. App. 1997).

11. That the state offered appellant a plea bargain of 55 years imprisonment "'may be minimally relevant to a State District Attorney's office belief that the defendant was not a future danger.'" However, this evidence is excludable under Rule 403, because its probative value is substantially outweighed by the danger of both unfair prejudice and of misleading the jury. *Prystash v. State*, 3 S.W. 3d 522, 527-28 (Tex. Crim. App. 1999).

D. Sufficiency Of The Evidence

1. Formerly it was thought that sufficiency of the evidence to support the future dangerousness issue was a pure legal sufficiency analysis under *Jackson v. Virginia.* Thus, the question on appeal was whether any rational trier of fact could have found beyond a reasonable doubt that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. *Burns v. State*, 761 S.W. 2d 353, 355-56 (Tex. Crim. App. 1988). In *Burns*, the defendant's participation in a rob-bery/murder was "senseless," but not "so shocking or heinous as to evince a particularly 'dangerous aberration of character.'" *Id*. at 354.

In addition to the circumstances of the offense, the state proved that he had participated as a party in another murder, had taken an active role in an aggravated assault and kidnapping, had a bad reputation for peaceableness, and had arguably shown a dispassionate, or even prideful, view of his part in the instant murder. *Id*. The sufficiency challenge in *Burns* was rejected, though "not without some trepidation."

> We would not say on this quantum of evidence that appellant has been proven beyond peradventure to be completely incorrigible. However, following our precedents, we conclude it represents more than a 'mere modicum' of evidence to support the jury's conclusion it is probable he would commit criminal acts of violence that would constitute a continuing threat to society.

Id. at 356; *accord Rachal v.State*, 917 S.W. 2d 799, 805 n. 2 (Tex. Crim. App. 1996)(court has "long rejected" as inappropriate arguments that it may reweigh mitigating evidence against aggravating evidence); *see Lackey v. State*, 819 S.W.2d 111, 117 (Tex. Crim. App. 1989)(more that a "mere modicum"). An attack on the sufficiency of evidence of future dangerousness is reviewed in a light most favorable to the verdict. If evidence exists which supports the jury's verdict, their decision must be upheld. *Lawton v. State*, 913 S.W. 2d 542, 561 (Tex. Crim. App. 1995). "Reasonable minds could disagree that this evidence supports the jury's verdict beyond a reasonable doubt, but that is not the standard of review; we look only for evidence sufficient to rationally support the jury's verdict without reweighing the evidence ourselves." *Id*. *See also Delk v. State*, 855 S.W. 2d 700, 708-09 (Tex. Crim. App. 1993)(emphasis supplied)("Though we perceive the evidence of future dangerousness in this cause to be *minimal*, viewing it in the most favorable light, we cannot say a rational jury could not have found appellant would commit criminal acts of violence that would constitute a continuing threat to society"); *Burns v. State*, 761 S.W. 2d 353, 356 n.4 (Tex. Crim. App. 1988)(court has now "abandoned any pretense of . . . balancing mitigating and aggravating evidence so as to determine, independently of the jury's verdict, the 'appropriateness' or 'justness' of imposition of the death sentence in a given case").

2. In determining the sufficiency of evidence on appeal, the court will look first to the facts of the crime itself:

> If the offense was shown to be sufficiently cold-blooded or calculated, then the facts of the offense alone may support a finding that the defendant will pose a continuing threat to society. If, however, the facts of the case were not sufficiently compelling, we look for other evidence to support the jury's finding, such as psychiatric evidence, character evidence, prior criminal record, prior extraneous offenses, and possible mitigating factors such as the defendant's youth or state of mind at the time of the offense.

Kunkle v. State, 771 S.W.2d 435, 449 (Tex. Crim. App. 1986); *accord Willingham v. State*, 897 S.W.2d 351, 356 (Tex. Crim. App. 1995)(that appellant burned home with three children inside and played music and laughed afterwards was sufficient alone to justify an affirmative answer to the second special issue); *cf. Hughes v. State*, 897 S.W. 2d 285, 291 (Tex. Crim. App. 1994)("subject offense did not involve facts which, alone, would justify an affirmative answer to the second issue"). The

facts of the crime alone may be sufficient to sustain a death penalty, even under the new statute. *Sonnier v.State*, 913 S.W. 2d 511, 517 (Tex. Crim. App. 1995).

3. *Flores v. State*, 871 S.W. 2d 714 (Tex. Crim. App. 1993), was a fairly thin punishment case in which the state put on psychiatric testimony. With regard to this sort of evidence, the court noted that it had "not found the evidence in any case to be insufficient where the State offered psychiatric testimony that the defendant would constitute a continuing danger to society." *Id*. at 717. Having said that, the court hastened to add the following: "We do not by these observations intend to suggest that where the State offers psychiatric testimony that the defendant will be a future danger to society, the evidence will *never* be insufficient to support an affirmative finding on the second issue. However, we make the observation that where there is such psychiatric testimony, it is more likely that we will come to the conclusion that a rational jury could find that the defendant will constitute such a threat." *Id*. at 718 n.4.

4. In *Barley v. State*, 906 S.W. 2d 27, 30-31 (Tex. Crim. App. 1995), after listing nine offenses and recognizing that none were "overtly violent," the court nonetheless found that "they do show an escalating and ongoing pattern of disrespect and continued violations of the law. Plus, a reasonable juror could have interpreted some of the offenses like the delivery charges as evidencing an intent to indirectly harm another." *Id*.

5. Not just any evidence will prove future dangerousness, though:

a. In *Garcia v. State*, 626 S.W. 2d 46 (Tex. Crim. App. 1981), a psychologist testified that defendant would be dangerous in the future based on a 30 minute silent observation of him in jail. The court called this testimony "ludicrous" and refused to "seriously consider[] [it] in assaying the evidence to support the finding to special issue no. 2 under Article 37.071 . . . ." *Id*. at 51.

b. Participation in high school football and hunting with dad does not show a violent disposition. *Ellason v. State*, 815 S.W.2d 656, 663 (Tex. Crim. App. 1991); *but cf. Martinez v.State*, 924 S.W. 2d 693, 697-98 (Tex. Crim. App. 1996) (distinguishing between killing with a gun and a knife, noting that appellant lied to the police, after surrendering, and that appellant had shown a "complete disrespect for the law and authority" by committing the blatant and frequent unadjudicated crimes of underage drinking and shoplifting); *Heiselbetz v. State*, 906 S.W. 2d 500, 507 (Tex. Crim. App. 1995)(that appellant, after killing two people, broke into their home and stole two cans of tomato sauce and a package of frozen hamburger meat showed callousness and a lack of remorse which supported the jury's conclusion as to future dangerousness); *Johnson v. State*, 853 S.W. 2d 527, 533 (Tex. Crim. App. 1992)(in finding the second special issue evidence sufficient, the court notes, among other things, that appellant once shot and killed his dog); *Farris v. State*, 819 S.W.2d 490, 497 (Tex. Crim. App. 1990)(in finding second special issue evidence sufficient, court notes, among other things, that appellant once unlawfully shot a cow, and that he once wantonly shot and killed a buffalo).

6. The Texas Court of Criminal Appeals has reversed several cases for insufficient proof of future dangerousness. *See Ellason v. State*, 815 S.W.2d 656, 663 (Tex. Crim. App. 1991). *Smith v. State*, 779 S.W.2d 417, 419-422 (Tex. Crim. App. 1989); *Huffman v. State*, 746 S.W.2d 212, 225 (Tex. Crim. App. 1988); *Beltran v. State*, 728 S.W. 2d 382, 390 (Tex. Crim. App. 1987); *Keeton v. State*, 724 S.W.2d 58, 64 (Tex. Crim. App. 1987); *Roney v.*

State, 632 S.W.2d 598, 603 (Tex. Crim. App. 1982); *Garcia v. State*, 626 S.W.2d 46, 52 (Tex. Crim. App. 1981); *Wallace v. State*, 618 S.W.2d 67, 69 (Tex. Crim. App. 1981); *Brasfield v. State*, 600 S.W.2d 288, 294 (Tex. Crim. App. 1980); *Warren v. State*, 562 S.W.2d 474, 477 (Tex. Crim. App. 1978). Most of these cases have several things in common, including a defendant with no prior record for violent crimes, a lack of credible psychiatric testimony, and a lack of bad character evidence. Additionally, although any capital crime is senseless and brutal, these were not the sorts of crimes which, on their face, proved a probability of future dangerousness. *Cf. e.g.*, *Green v. State*, 682 S.W.2d 271, 289 (Tex. Crim. App. 1984), *cert. denied*, 470 U.S. 1034 (1985); *McMahon v. State*, 582 S.W.2d 786, 792 (Tex. Crim. App. 1978), *cert. denied sub nom. McCormick v. Texas*, 444 U.S. 919 (1979); *Duffy v. State*, 567 S.W.2d 197, 208 (Tex. Crim. App. 1978), *cert. denied*, 439 U.S. 991 (1978). It is also important to note that the most recent reversal for insufficient punishment evidence happened in 1991.

7. The court of criminal appeals is "bound by the law to make certain that the death sentence is not 'wantonly or freakishly' imposed, and that the purposes of Art. 37.071 . . . are accomplished." *Ellason v. State*, 815 S.W.2d 656, 660 (Tex. Crim. App. 1991). In *Ellason*, the defense did a tremendous job of putting on mitigating evidence, causing the court to find the evidence insufficient, even though there was aggravating evidence in the form of bad reputation and extraneous offenses.

8. In *Martinez v.State*, 924 S.W. 2d 693 (Tex. Crim. App. 1996), the twenty year old appellant stabbed a store clerk during the course of a robbery. He testified that he had been drinking and that the robbery was impulsive. He turned himself in almost immediately, and had no prior adjudicated extraneous offenses. This is about as thin a punishment case as you will see. Nonetheless, the court found the evidence sufficient. "Given the brutal facts of the stabbing itself, including the fact that the majority of the knife thrusts were into the back of an already fallen victim; the conflicting testimony as to why appellant decided to commit a robbery; the number of lies that he told the police; and his apparent disregard for the law and authority; we conclude that a rational jury could have determined beyond a reasonable doubt that appellant would be a continuing threat to society." *Id*. at 697-98. The court was careful to distinguish the *Smith* case, discussed above, because the two cases are very similar, factually. Indeed, the casual observer would likely to think the state had a far stronger case in *Smith*. Judge Baird, dissenting, criticized the court for not following the *Keeton* factors. "The majority opinion will only serve to encourage the sparse, selective and spotty application of capital punishment in Texas. In light of the majority opinion, there is no longer any assurance that the death penalty will not be wantonly or freakishly imposed." *Id*. at 706 (Baird, J., concurring and dissenting). Judge Maloney, joined by Judge Overstreet, observed that "[t]his opinion will probably set precedent ensuring that never again will there be facts that this Court will find insufficient to support an affirmative answer to the second special issue." *Id*. at 706 (Maloney, J., concurring and dissenting). Judge Maloney believes this opinion "renders article 37.071 a nullity." *Id*. at 711 (Maloney, J., concurring and dissenting).

9. "Special issue two requires a finding not only that the accused will likely commit violent crimes in the future but also that his violent conduct will pose a continuing threat to society." *Sigler v. State*, 865 S.W. 2d 957,959 (Tex. Crim. App. 1993).

10. *Marras v. State*, 741 S.W.2d 395 (Tex. Crim. App. 1987), is

exceptional. In that case substantial evidence of extraneous violent offenses was proven at the punishment phase. *Id*. at 400. However, the trial judge erroneously charged the jury that it could consider these offenses only to determine the defendant's intent regarding the offense charged in the indictment. *Id*. at 407. The appellate court presumed that the jury followed this erroneous instruction, and therefore, in assessing the sufficiency of the punishment evidence, the court excluded the extraneous offenses. Without these offenses, the remainder of the evidence was found to be insufficient. *Id*. at 408.

11. When punishment evidence is determined insufficient on appeal, the court shall reform the sentence to life. TEX. CODE CRIM. PROC. ANN. art. 44.251(a)(Vernon Supp. 2002). If retrial is had, the death penalty cannot be assessed. *See Bullington v. Missouri*, 451 U.S. 430 (1981); *Sanne v. State*, 609 S.W.2d 762, 767 (Tex. Crim. App. 1980); *but cf. Padgett v. State*, 717 S.W.2d 55, 58 (Tex. Crim. App. 1986)(first jury's inability to answer the second question at earlier trial did not collaterally estop state from seeking death at subsequent trial involving different victim). *See generally State ex rel. Curry v. Gray*, 726 S.W.2d 125 (Tex. Crim. App. 1987).

12. In *Hughes v. State*, 897 S.W. 2d 285 (Tex. Crim. App. 1994), appellant contended that the court should adopt a more rigorous standard -- against the overwhelming weight of the evidence -- when reviewing evidence of future dangerousness under the Texas Constitution. The court found it unnecessary to "decide today whether or not this Court should adopt a different standard of sufficiency review under the Texas Constitution because even under the type of factual sufficiency review urged by appellant, the overwhelming weight of the evidence would *not* lead to the conclusion that the jury's affirmative finding on the second issue was not rational." *Id*. at 293.

13. A punishment charge instructing the jury to answer the first special issue affirmatively if it believes that the mitigating evidence militates in favor of a life sentence is not fundamental error. *Pondexter v. State*, 942 S.W. 2d 577, 588 (Tex. Crim. App. 1996).

14. A *factual* sufficiency review of the jury's determination of the probability of future dangerousness is not constitutionally required. *McGinn v. State*, 961 S.W. 2d 161, 169 (Tex. Crim. App. 1998). *Accord Conner v. State*, 67 S.W. 3d 192, 199 (Tex. Crim. App. 2001); *Chamberlain v. State*, 998 S.W. 2d 230, 233 (Tex. Crim. App. 1999); *Brooks v. State*, 990 S.W. 2d 278, 285 (Tex. Crim. App. 1999); *Whitaker v. State*, 977 S.W. 2d 595, 599 (Tex. Crim. App. 1998). In *McGinn*, Judge Baird wrote the following: "In light of the majority's resolution of these points of error, and our decision in *Martinez v. State*, 924 S.W.2d 693, 694-98 (Tex.Cr.App. 1996), this Court now provides no meaningful appellate review of the punishment issues of art. 37.071. The failure to do so violates the Eighth Amendment." *McGinn v. State*, 961 S.W. 2d at 173 (Baird, J., concurring and dissenting). Judge Womack believes that "[t]he Court should review the factual sufficiency of the evidence to support the jury's verdict on the probability that the appellant would commit criminal acts of violence that would constitute a continuing threat to society." *Chamberlain v. State*, 998 S.W. 2d 230, 238 (Tex. Crim. App. 1999)(Womack, J., concurring).

15. Judge Overstreet, concurring and dissenting in *McGinn* wrote the following:

> However, a true application of the

> *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, (1979) legal sufficiency standard of review would result in each and every future dangerousness finding being upheld - the facts of any capital murder, when viewed in the requisite *Jackson v. Virginia* light most favorable to the prosecution and verdict, would be sufficient. When viewed in that most favorable light, how can a jury be irrational in concluding that someone who has committed any capital murder would be a future danger, i.e. that there is a reasonable probability that that person would commit acts of criminal violence that would constitute a continuing threat to society? It would appear to me that it is impossible to truly view the evidence in the light most favorable to a jury's finding of future dangerousness and not find the evidence sufficient to support that finding in light of the facts of any capital murder. However, such automatic approval of the future dangerousness finding, when coupled with the refusal to review the finding on the mitigation special issue, would not provide the above-noted required "meaningful" appellate review of a death sentence.

McGinn v. State, 961 S.W. 2d at 176 (Overstreet, J., concurring and dissenting).

E. Definitions And Instructions

1. In *Cuevas v. State*, 742 S.W. 2d 331 (Tex. Crim. App. 1987), the court stated that "'[p]robability' does not have a statutory definition, thus, it is to be taken and understood in its usual acceptation in common language. Jurors can be presumed to know and apply such meaning." *Id*. at 346(citations omitted). *Cf. Smith v. State*, 779 S.W.2d 417, 421 (Tex. Crim. App. 1989)("the second special issue calls for proof of more than a bare chance of future violence").

> Dictionary definitions of "probability" include: "likelihood; appearance of reality or truth; reasonable ground of presumption; verisimilitude; consonance to reason. . . . A condition or state created when there is more evidence in favor of the existence of a given proposition than there is against it." "Something that is probable, "with "probable" meaning "supported by evidence strong enough to establish presumption but not proof; likely to be or become true or real."

Cuevas v. State, 742 S.W.2d at 347(citations omitted). *Cf. Smith v. State*, 779 S.W.2d 417, 421 (Tex. Crim. App. 1989)("the second special issue calls for proof of more than a bare chance of future violence"). The *Cuevas* court was not asked to, and did not, say that a defendant is entitled to such a definition. In other cases, however, the court has held that "probability" need not be defined. *E.g., Goff v. State*, 931 S.W. 2d 537, 551 (Tex. Crim. App. 1996)*; Bigby v. State*, 892 S.W. 2d 864, 890 (Tex. Crim. App. 1994); *Wicker v. State*, 667 S.W. 2d 137, 143 (Tex. Crim. App. 1984); *Barefoot v. State*, 596 S.W. 2d 875, 887 (Tex. Crim. App. 1980); *King v. State*, 553 S.W. 2d 105, 107 (Tex. Crim. App. 1977).

2. "Deliberately," "probability" and "criminal acts of violence" need not be

defined, even though it would be helpful to the jury. *Caldwell v. State*, 818 S.W.2d 790, 797 (Tex. Crim. App. 1991); *see also Feldman v. State*, 71 S.W. 3d 738, 757 (Tex. Crim. App. 2002); *Ladd v. State*, 3 S.W. 3d 547, 572-73 (Tex. Crim. App. 1999)*; Chamberlain v. State*, 998 S.W. 2d 230, 238 (Tex. Crim. App. 1999)*; Brooks v. State*, 990 S.W. 2d 278, 287 (Tex. Crim. App. 1999); *Patrick v. State*, 906 S.W. 2d 481, 494 (Tex. Crim. App. 1995); *Chambers v. State*, 903 S.W. 2d 21, 35 (Tex. Crim. App. 1995); *Clark v. State*, 881 S.W. 2d 682, 698, 699 (Tex. Crim. App. 1994); *Earhart v. State*, 877 S.W. 2d 759, 768 (Tex. Crim. App. 1994); *Burks v. State*, 876 S.W. 2d 877, 910-911 (Tex. Crim. App. 1994); *Robertson v. State*, 871 S.W. 2d 701, 713 (Tex. Crim. App. 1993; *Coble v. State*, 871 S.W. 2d 192, 207 (Tex. Crim. App. 1993); *Camacho v. State*, 864 S.W. 2d 524, 536 (Tex. Crim. App. 1993); *Corwin v. State*, 870 S.W. 2d 23, 36 (Tex. Crim. App. 1993); *Zimmerman v. State*, 860 S.W. 2d 89, 101 (Tex. Crim. App. 1993), *vacated on other grounds*, 114 S.Ct. 374 (1993); *Rousseau v. State*, 855 S.W. 2d 666, 687 (Tex. Crim. App. 1993); *Goss v. State*, 826 S.W. 2d 162, 171 (Tex. Crim. App. 1992).

3. A juror who has a faulty understanding of "probability," equating it with no more than "possibility," is challengeable for cause. "Requiring more than a mere possibility that the defendant would commit criminal acts of violence and would constitute a continuing threat to society prevents the freakish and wanton assessment of the death penalty." *Hughes v. State*, 878 S.W. 2d 142, 148 (Tex. Crim. App. 1993). The error was harmless, though, because the trial court granted an extra cause challenge. *Id*. at 152; *But cf. Jenkins v.State*, 912 S.W. 2d 793, 820 (Tex. Crim. App. 1995)(is a "probability" of 9 in 92 the same sort of "probability" contemplated by the statute).

4. The term "society," as used in the second issue, is undefined, and the juror is free to give it its ordinary meaning. It does include the "society" that is within the Texas Department of Corrections. *Sterling v. State*, 830 S.W.2d 114, 120 n.5 (Tex. Crim. App. 1992); *Rougeau v. State*, 738 S.W. 2d 651, 660 (Tex. Crim. App. 1987). No definition need be given. *Caldwell v. State*, 818 S.W.2d 790, 798 (Tex. Crim. App. 1991). If this is not error in the face of a requested definition, it is clearly not egregiously harmful under *Almanza*. *Felder v. State*, 848 S.W. 2d 85, 101 (Tex. Crim. App. 1992). *See also McFarland v. State*, 928 S.W. 2d 482, 524 (Tex. Crim. App. 1996). No definition is required, even if the jury requests it. *McDuff v. State*, 939 S.W. 2d 607, 620 (Tex. Crim. App. 1997). Although the state errs in arguing that "society" refers only to those outside of prison, error is cured by an instruction to disregard. *Felder v. State*, 848 S.W. 2d 85, 97 (Tex. Crim. App. 1992).

5. "A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion." *Stringer v. Black*, 503 U.S. 222, 235 (1992). "In Texas, the aggravating factor is contained in the definition of the crime and in our requirement at punishment that the jury find the defendant to be a continuing threat to society." *McFarland v. State*, 928 S.W. 2d 482, 520 (Tex. Crim. App. 1996).

6. In *Arave v. Creech*, 507 U.S. 463 (1993), the Court considered the constitutionality of an Idaho aggravator which asked whether the defendant "exhibited utter disregard for human life." The Court found that this phrase did pass constitutional muster because the Idaho courts had adopted a limiting construction, concluding that it was the action of a "cold-blooded, pitiless slayer." Cold-blooded and pitiless are not subjective, but instead describe a defendant's state of mind,

ascertainable from the surrounding facts. The Court acknowledged that the question was close. *Id*. at 475. In Texas, of course, the court of criminal appeals has consistently refused to require any limiting construction at all for the words and phrases contained in the three special issues. *E.g., Cantu v. State*, 939 S.W. 2d 627, 643 (Tex. Crim. App. 1997).

7. The term "probability" is not unconstitutionally vague and indefinite. *Kemp v. State*, 846 S.W. 2d 289, 309 (Tex. Crim. App. 1992); *Jones v. State*, 843 S.W.2d 487, 496-97 (Tex. Crim. App. 1992). Nor is it unconstitutionally confusing that the Texas statute juxtaposes the terms "probability" and "reasonable doubt." *Cantu v. State*, 939 S.W. 2d 627, 643 (Tex. Crim. App. 1997).

8. The court's refusal to define the terms of the second special issue "is founded upon respect for the division of authority between the legislature and the judiciary established by Article II, Section 1 of the Constitution of the State of Texas." *Camacho v. State*, 864 S.W. 2d 524, 536 (Tex. Crim. App. 1993).

9. "Because the phrase 'criminal acts of violence' as used in the second special issue is not defined for the jury, error in the voir dire examination occurs when the State attempts to limit the venire to its definition." Here, the state did not attempt to limit the venireperson, but merely suggested offenses other than murder, while emphasizing that it would be up to the juror to determine this in his own mind. This was not error. *Coble v. State*, 871 S.W. 2d 192, 208 (Tex. Crim. App. 1993).

10. Arson is an act of violence *per se*. Burglary may or may not be an act of violence, depending on the facts. *Burks v. State*, 876 S.W. 2d 877, 894 (Tex. Crim. App. 1994).

11. "Where the charge to the jury properly requires the State to prove each of the special punishment issues beyond a reasonable doubt, no burden of proof instruction concerning extraneous offenses is required." *Burks v. State*, 876 S.W. 2d 877, 911 (Tex. Crim. App. 1994); *accord Prystash v. State*, 3 S.W. 3d 522, 533 (Tex. Crim. App. 1999); *Ladd v. State*, 3 S.W. 3d 547, 574-75 (Tex. Crim. App. 1999); *Jackson v. State*, 992 S.W. 2d 469, 477 (Tex. Crim. App. 1999). Nor is the jury entitled to any *contemporaneous* instruction concerning the burden of proof at the time misconduct is offered. *Id*. at 477-78.

12. The defendant is not entitled to have the jury specially instructed that it cannot consider extraneous offenses in support of the second special issue unless it believes beyond a reasonable doubt that they were committed by the defendant. *Jones v. State*, 944 S.W. 2d 642, 654 (Tex. Crim. App. 1996); *Coble v. State*, 871 S.W. 2d 192, 208 (Tex. Crim. App. 1993); *Boyd v. State*, 861 S.W.2d 105, 123 (Tex. Crim. App. 1991); *Marquez v. State*, 725 S.W. 2d 217, 226 (Tex. Crim. App. 1987); *Santana v. State*, 714 S.W. 2d 1, 11 (Tex. Crim. App. 1986); *Johnson v. State*, 629 S.W. 2d 731, 736 (Tex. Crim. App. 1981); *but cf. Ernster v. State*, 308 S.W. 2d 33, 34 (Tex. Crim. App. 1957)(limiting instruction required in non-capital case).

13. The trial court does not err in refusing a limiting instruction that directs the jury to separately consider the evidence of each extraneous offense, or that each extraneous offense must be proven beyond a reasonable doubt, or that appellant is presumed innocent of each extraneous offense until the state proves the same. The jury was told that the state had the burden of proving future dangerousness beyond a reasonable doubt, and "beyond a reasonable doubt" was defined. "Given this, it was not error for the trial judge to refuse to give

any of the requested instructions." *Skinner v. State*, 956 S.W. 2d 532, 545-46 (Tex. Crim. App. 1997).

14. "[A]ppellant was not entitled to an instruction limiting the consideration of extraneous offenses to the future dangerousness issue, because those offenses were also relevant to the mitigation special issue." *Jackson v. State*, 992 S.W. 2d 469, 478 (Tex. Crim. App. 1999); *see Prystash v. State*, 3 S.W. 3d 522, 533 (Tex. Crim. App. 1999).

15. Appellant is not entitled to special-verdict forms which would specify whether the jury had found each unadjudicated offense to have been committed. *Prystash v. State*, 3 S.W. 3d 522, 534 (Tex. Crim. App. 1999).

16. Article 37.071 § 2(d)(1) requires the judge to instruct the jury to "consider all evidence admitted at the guilt or innocence stage *and* the punishment stage. . . ." In *Ovalle v. State*, 13 S.W.3d 774 (Tex. Crim. App. 2000), the court instructed the jury to consider the guilt/innocence evidence, but omitted the requirement that they also consider evidence from "the punishment stage." This was error. *Id*. at 785-86.

F. Constitutional Questions

1. This provision does not make the statute unconstitutional because it encourages jurors to consider mitigating evidence in an aggravating way. No evidence is mitigating as a matter of law. The jury may give any evidence whatever mitigating or aggravating weight it deems appropriate. *Williams v. State*, 937 S.W. 2d 479, 490 (Tex. Crim. App. 1996).

2. "The first special issue reduces the class of death-eligible capital defendants . . . thus satisf[ying] the narrowing requirement in *Furman v. Georgia*. . . ." *Eldridge v. State*, 940 S.W. 2d 646, 654 n. 11 (Tex. Crim. App. 1996). "On its face, Article 37.071 § 2(b) is the only part of the stature that involves aggravating evidence." *Id*. at 654.

3. The statute is not unconstitutional because an untrained jury is incapable of predicting whether a defendant might commit future acts of criminal violence constituting a continuing threat to society. *Rhoades v. State*, 934 S.W. 2d 113, 129 (Tex. Crim. App. 1996).

4. The use of the word "probability" in the first special issue does not unconstitutionally diminish the state's burden of proof. *McGinn v. State*, 961 S.W. 2d 161, 166 (Tex. Crim. App. 1998).

5. The court rejected appellant's argument that the statute is unconstitutional because the wording of the first special issue provides considerably more opportunity for an affirmative answer based on race. "Special issue one, pertaining to the defendant's future dangerousness, is worded in a racially-neutral manner." *Ladd v. State*, 3 S.W. 3d 547, 572 (Tex. Crim. App. 1999).

G. Expert Testimony

1. In *Nenno v. State*, 970 S.W. 2d 549 (Tex. Crim. App. 1998), a special agent in the Behavioral Science unit of the FBI testified that appellant was a pedophile, and, based on a hypothetical, testified that he would be an extreme threat to society, especially children. This testimony was admissible under Rules 702 and 403 of the Texas Rules of Evidence. *Id*. at 559-562.

2. The trial court did not abuse its discretion in permitting the state's witness to

give an opinion on future dangerousness where the witness had been a special agent with the FBI, and a psychologist in several prison units. "Given [the witness's] specialized education and experience, and the effort he took to 'fit' his evaluation to this particular case, we cannot say that the trial judge abused her discretion in determining that Brantley's testimony would be helpful to the jury." *Griffith v. State*, 983 S.W. 2d 282, 288 (Tex. Crim. App. 1998).

3. Qualified expert testimony that appellant was a psychopathic manipulator and that psychopathic manipulators include sex offenders was admissible because it "clarified previous testimony from the State's medical experts and demonstrated the increased probability that this type of individual would be a future danger." *Wyatt v. State*, 23 S.W. 3d 18, 28 (Tex. Crim. App. 2000).

IV. THE ANTI-PARTIES SPECIAL ISSUE

A. Article 37.071 § 2(b)(2)

Under the new statute, the second special issue reads as follows:

> in cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party under Sections 7.01 and 7.02, Penal Code, whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.

TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(b)(2)(Vernon Supp. 2002).

B. Case Law

1. Under the former statute, a defendant was entitled to a charge instructing the jury to consider only the conduct of the defendant, and not that of his parties, when answering the special issues. Now, pursuant to article 37.071, § 2(b)(2), the jury is asked whether the evidence proves that "the defendant himself" actually caused the death. "Under the new statute, the jury is instructed specifically to consider the defendant's behavior alone. We hold that this adequately serves the same purpose." *McFarland v. State*, 928 S.W. 2d 482, 516 (Tex. Crim. App. 1996)(citations omitted); *accord Wood v. State*, 18 S.W. 3d 642, 648-49 (Tex. Crim. App. 2000).

2. The court will not consider the unconstitutionality of the anti-parties issue when this issue is not submitted in the case before it. *Williams v. State*, 937 S.W. 2d 479, 492 (Tex. Crim. App. 1996).

3. In *Colella v. State*, 915 S.W. 2d 834 (Tex. Crim. App. 1995), appellant complained that the trial court was mandatorily bound to submit the anti-parties charge, even though he made no such request at trial, since he was convicted as a party. The court disagreed, holding that a review of the charge at guilt/innocence and a review of the evidence and the argument of the state made it clear that appellant was charged as the primary actor and not under the law of parties. Accordingly, the trial court did not err in failing to give the anti-parties charge. *Id*. at 840.

4. In *Lawton v. State*, 913 S.W. 2d 542 (Tex. Crim. App. 1995), appellant complained that article 37.071 § 2(b)(2) violated the principles set forth in *Tison v. Arizona* and *Enmund v. Florida* because it permits a death penalty upon the mere finding that appellant anticipated that a human life would be taken. The court disagreed, noting that appellant could not even have been convicted of capital murder

unless the jury had already found that he harbored the specific intent to promote or assist the commission of intentional murder. "In short, that the jury may have found that appellant only anticipated that death would result under Article 37.071 is inconsequential to *Enmund* and *Tison* concerns; the jury had already found that appellant intended to at least promote or assist in the commission of *an intentional murder*." *Id.* at 555 (emphasis in original); *accord Cantu v. State*, 939 S.W. 2d 627, 644-45 (Tex. Crim. App. 1997)*; see Ladd v. State*, 3 S.W. 3d 547, 573 (Tex. Crim. App. 1999).

5. In *Prystash v. State*, 3 S.W. 3d 522, 529-532 (Tex. Crim. App. 1999), appellant told the trial court that he did not want the anti-parties issue submitted to the jury, and the trial court did not submit it. On appeal, appellant complained that the court erred in not so instructing the jury. The court of criminal appeals disagreed, holding that, pursuant to the doctrine of invited error, "we will not permit this appellant to complain of the trial court's deleting a jury charge as he requested."

6. Where the court gives the statutorily mandated anti-parties instruction, it need not go further and instruct the jury to disregard the parties instruction given earlier at the guilt innocence phase of the trial. *Solomon v. State*, 49 S.W. 3d 356, 369 (Tex. Crim. App. 2001).

V. THE MITIGATION SPECIAL ISSUE

A. Mitigating Circumstances

1. Article 37.071 § 2(e)(1)

If the jury answers the first two special issues affirmatively, it must then determine:

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(e)(1) (Vernon Supp. 2002).

2. Article 37.071 § 2(f)(4)

The jury is also instructed that it "shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness." TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(f)(4)(Vernon Supp. 2002).

3. **Burden of proof: Mitigating circumstances**

a. A frequent challenge leveled at the statute is that it is unconstitutional because it does not assign a burden of proof regarding mitigating evidence. The court has rejected this challenge. *E.g.*, *Ladd v. State*, 3 S.W. 3d 547, 573-74 (Tex. Crim. App. 1999); *Medina v. State*, 7 S.W. 3d 633, 644 (Tex. Crim. App. 1999); *Jackson v. State*, 992 S.W. 2d 480-81 (Tex. Crim. App. 1999); *Brooks v. State*, 990 S.W. 2d 278, 288 (Tex. Crim. App. 1999); *Raby v. State*, 970 S.W. 2d 1, 8-9 (Tex. Crim. App. 1998); *Cantu v. State*, 939 S.W. 2d 627, 641 (Tex. Crim. App. 1997); *Shannon v. State*, 942 S.W. 2d 591, 600 (Tex. Crim. App. 1996); *Matchett v. State*, 941 S.W. 2d 922, 936 (Tex. Crim. App. 1996); *Morris v. State*, 940 S.W. 2d 610, 614 (Tex. Crim. App. 1996); *Anderson v. State*, 932 S.W. 2d 502, 508 (Tex. Crim. App. 1996) *McFarland v. State*, 928 S.W. 2d 482, 497 (Tex. Crim. App. 1996); *Eldridge v. State*, 940 S.W. 2d 646, 654 (Tex. Crim. App. 1996).

b. Article 37.071 § 2(e)(1) is not facially unconstitutional for failing expressly to assign a burden of proof as to mitigating evidence. Nor is the statute unconstitutional for implicitly assigning the burden of proof to the appellant. Nor is the failure to assign clear burdens of proof a constitutional problem. "The federal constitution's requirement of clarity defining death eligibility is not applicable to provisions which allow the jury to consider and give effect to mitigating evidence." *Lawton v. State*, 913 S.W. 2d 542, 558 (Tex. Crim. App. 1995).

c. In *Barnes v. State*, 876 S.W. 2d 316, 329-330 (Tex. Crim. App. 1994), the court rejected appellant's contention that the so-called *Penry* instruction did not place the burden on the state to negate the mitigating circumstances. "Because neither legislation nor constitution places a burden of proof upon the State to negate the existence of mitigating evidence, we refuse to fault the trial court for failing to give the jury such an instruction." *Id*. at 330. In a footnote, the court noted that subsequently, the legislature enacted article 37.071(c). Although section (c) does not expressly assign a burden of proof, it might be argued that it "implicitly assigns the burden of proof to the beneficiary of a finding of 'sufficient mitigating . . . circumstances to warrant that a sentence of life . . . be imposed.'" The court declined to answer this question in *Barnes*. *Id*; *accord Lewis v. State*, 911 S.W. 2d 1, 6 n. 13 (Tex. Crim. App. 1995); *Green v. State*, 912 S.W. 2d 189, 195 (Tex. Crim. App. 1995). Subsequently, in *Penry v. State*, 903 S.W. 2d 715, 766 (Tex. Crim. App. 1995), the court declined to reconsider that part of *Barnes* which held that the state has no burden to negate the existence of mitigating evidence. *See also Matchett v. State*, 941 S.W. 2d 922, 935 (Tex. Crim. App. 1996)*; Rhoades v. State*, 934 S.W. 2d 113, 128 (Tex. Crim. App. 1996); *Wolfe v. State*, 917 S.W. 2d 270, 278 (Tex. Crim. App. 1996)*; Broussard v. State*, 910 S.W. 2d 952, 959 (Tex. Crim. App. 1995).

d. In *Colella v. State*, 915 S.W. 2d 834 (Tex. Crim. App. 1995), appellant asked the court of criminal appeals to find his mitigating evidence sufficient to outweigh any other factors. The court refused to do so. First, the court held: "No burden of proof exists for either the State or the defendant to disprove or prove the mitigating evidence." Then the court wrote: "Because the weighing of 'mitigating evidence' is a subjective determination undertaken by each individual juror, we decline to review the evidence for sufficiency." *Id*. at 845.

e. In *Prystash v. State*, 3 S.W. 3d 522, 535 (Tex. Crim. App. 1999), appellant argued "that the mitigation special

issue permits the introduction of nonstatutory aggravating evidence in addition to mitigating evidence, and this nonstatutory aggravating evidence is not subject to a burden of proof in violation of *Walton v. Arizona*, 497 U.S. 639 (1990). The court of criminal appeals disagreed.

4. **Burden of proof: Aggravating circumstances**

a. The statute does, however, explicitly place the burden on the prosecution to prove aggravating factors contained in the first two special issues. *McFarland v. State*, 928 S.W. 2d 482, 518 (Tex. Crim. App. 1996).

b. In *Williams v. State*, 937 S.W. 2d 4.79 (Tex. Crim. App. 1996), the court rejected appellant's argument that the mitigation special issue is unconstitutional because it fails to place on the state the burden of proving aggravating circumstances. "Because Texas law imposes the burden of proof upon the State to prove certain prescribed aggravating elements, a burden of proof need not be prescribed for aggravating circumstances that might be considered in conjunction with Texas' open-ended mitigation issue." *Id*. at 491. *Accord Moore v. State*, 999 S.W. 2d 385, 408 (Tex. Crim. App. 1999).

5. **What is mitigating evidence?**

a. Mitigating evidence is evidence relevant to the defendant's character, record, or the circumstances of the offense, which might serve as a basis for a sentence less than death. *See Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Mitigating evidence, but not necessarily *"Penry"* evidence, includes, but is not limited to, the following:

i. Mental retardation and child abuse. *Penry v. Lynaugh*, 492 U.S. 302, 320 (1989). Evidence that appellant's IQ is below 70, though, standing alone, does not prove that he is retarded. *Tennard v. State*, 960 S.W. 2d 57, 61 (Tex. Crim. App. 1997).

ii. Good behavior in prison or jail. *Franklin v. Lynaugh*, 487 U.S. 164, 177 (1988); *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986); *Lauti v. State*, 810 S.W. 2d 176, 177 (Tex. Crim. App. 1989); *but see Hovila v. State*, 562 S.W. 2d 243, 249 (Tex. Crim. App. 1978).

iii. An "exceptionally unhappy and unstable childhood." *Burger v. Kemp*, 483 U.S. 776, 789, 789 n.7 (1987).

iv. Childhood drug abuse and economic deprivation. *Hitchcock v. Dugger*, 481 U.S. 393, 397 (1987);

v. Youth. *Eddings v. Oklahoma*, 455 U.S. 104, 115-116 (1982); *Ellason v. State*, 815 S.W.2d 656, 663 (Tex. Crim. App. 1991); *Willis v. State*, 785 S.W. 2d 378, 387 (Tex. Crim. App. 1989); *Burns v. State*, 761 S.W. 2d 353, 355 n.3 (Tex. Crim. App. 1988); *see Ex parte Davis*, 866 S.W. 2d 234, 240 (Tex. Crim. App. 1993)(21 must be considered youthful, though "it is at least on the cusp of mature adulthood"). "Youth is neither a mitigating nor an aggravating factor as a matter of law." *Moore v. State*, 999 S.W. 2d 385, 406 (Tex. Crim. App. 1999)(not error for the prosecutor to argue that youth is aggravating).

vi. Voluntary intoxication. *Havard v. State*, 800 S.W.2d 195, 207 (Tex. Crim. App. 1989); *Cordova v. State*, 733 S.W. 2d 175, 189 (Tex. Crim. App. 1987)(if

the intoxication causes temporary insanity).

vii. The opinion testimony of lay witnesses that defendant will not be a danger in the future. *Cass v. State*, 676 S.W. 2d 589, 592 (Tex. Crim. App. 1984).

viii. Psychiatric opinion testimony that defendant will not be dangerous in the future. *Robinson v. State*, 548 S.W. 2d 63, 77 (Tex. Crim. App. 1977).

ix. Drug dependency. *Burns v. State*, 761 S.W. 2d 353, 355 n. 3 (Tex. Crim. App. 1988).

x. Illiteracy. *Cannon v. State*, 691 S.W. 2d 664, 678 (Tex. Crim. App. 1985).

xi. The trial court erred in excluding evidence that defendant's mother had an unstable marriage, which tended to show a troubled childhood, and that defendant had once worked in a hospital and a church. *Burns v. State*, 761 S.W. 2d 353, 358 (Tex. Crim. App. 1988). Even though this evidence "would not appear compelling in the abstract," neither was the state's evidence. "We cannot say that, on balance, the jury could not have found appellant's proffered evidence of some, perhaps even critical significance. Consistent with *Lockett*, supra, and its progeny, and particularly in light of the limited role this Court has assumed in reviewing appropriateness of death verdicts in capital cases, we cannot tolerate the risk that appellant has been sentenced to death in spite of factors a reasonable jury could find justify the less severe penalty of life imprisonment." *Id*. at 358-59.

xii. Provocation by the victim. *Evans v. State*, 601 S.W. 2d 943, 946-47 (Tex. Crim. App. 1980).

b. Even "substantial mitigating evidence" will not render the state's punishment evidence insufficient. *See Madden v. State*, 799 S.W.2d 683, 694 (Tex. Crim. App. 1990).

c. Is *gender* mitigating? *See Fuentes v. State*, 991 S.W. 2d 267, 275 (Tex. Crim. App. 1999)("appellant cites no authority that the jury should not be allowed to consider gender a mitigating circumstance"); *see also Guidry v. State*, 9 S.W. 3d 133, 139-40 (Tex. Crim. App. 1999)(trial judge's observations during voir dire that some people find gender mitigating were not objectionable where he did not suggest that male gender should or could be considered aggravating).

d. Not just any evidence proffered by the defendant qualifies as mitigating:

i. "Residual doubt" about the defendant's guilt is not mitigating. *Franklin v. Lynaugh*, 487 U.S. 164, 174 (1988).

ii. Evidence of the co-party's criminal record. *Cook v. State*, 858 S.W. 2d 467 (Tex. Crim. App. 1993).

iii. Evidence that the death penalty is not effective as a deterrent is not relevant to the special issues. *Granviel v. State*, 723 S.W. 2d 141, 156 (Tex. Crim. App. 1986).

iv. Evidence of a co-defendant's conviction and sentence cannot mitigate defendant's culpability for the crime. *Evans v. State*, 656 S.W. 2d 65, 67 (Tex. Crim. App. 1983). Evidence that the state chose not to seek the death penalty against appellant's two

co-defendants is not constitutionally relevant mitigating evidence. *Morris v. State*, 940 S.W. 2d 610, 613 (Tex. Crim. App. 1996).

v. Evidence that the defendant received a life sentence for another, different murder by another jury is not mitigating evidence. *Evans v. State*, 656 S.W. 2d 65, 67 (Tex. Crim. App. 1983).

vi. Parole eligibility under Texas law is beyond the purview of the capital jury, and is therefore not a mitigating circumstance. *King v. State*, 631 S.W. 2d 486, 490 (Tex. Crim. App. 1982).

vii. The trial court properly excluded opinion testimony by the defendant's psychologist that a life sentence was appropriate. *Satterwhite v. State*, 786 S.W.2d 271, 291 (Tex. Crim. App. 1989).

viii. Evidence discussing appellant's mother's hospitalization for post-partum psychosis, which did not discuss actual or potential abuse of appellant, was not relevant. *Penry v. State*, 903 S.W. 2d 715, 762 (Tex. Crim. App. 1995). *But cf. Gribble v. State*, 808 S.W. 2d 65, 75-76 (Tex. Crim. App. 1990)(Mother's mental health records admissible to prove childhood instability and sexual abuse).

ix. Although evidence that the state offered appellant a life sentence might be minimally relevant, it is not admissible because the pr.obative value of such evidence is substantially outweighed by its potential for unfair prejudice, confusion of the issues and misleading the jury. *Smith v. State,* 898 S.W. 2d 838, 843 (Tex. Crim. App. 1994); *accord Prystash v. State*, 3 S.W. 3d 522, 527-28 (Tex. Crim. App. 1999).

x. "In our view, photographs of appellant which depict a cheerful early childhood are irrelevant to appellant's moral blameworthiness for the commission of a violent double-murder because such evidence has no relationship to appellant's conduct in those murders. That appellant was once a child does not diminish his moral culpability for the act of murder." *Rhoades v. State*, 934 S.W. 2d 113, 126 (Tex. Crim. App. 1996); *accord Jackson v. State*, 992 S.W. 2d 469, 480 (Tex. Crim. App. 1999).

e. Evidence of remorse, although mitigating, is not admissible in the form of hearsay. *Lewis v. State*, 815 S.W.2d 560, 568 (Tex. Crim. App. 1991).

f. An instruction on voluntary intoxication pursuant to § 8.04 of the Texas Penal Code may impermissibly limit consideration of mitigating circumstances, but a defendant who requests such instruction is precluded from complaining on appeal if his request is granted. *See Tucker v. State*, 771 S.W. 2d 523, 534 (Tex. Crim. App. 1988); *accord Matchett v. State*, 941 S.W. 2d 922, 938 (Tex. Crim. App. 1996). *Cf. Cantu v. State*, 939 S.W. 2d 627, 647-48 (Tex. Crim. App. 1997)(instruction is not egregiously harmful under *Almanza* where appellant's jury is also instructed on mitigating evidence under article 37.071, § 2(e)). In *Williams v. State*, 937 S.W. 2d 479, 489-90 (Tex. Crim. App. 1996), the trial court instructed the jury, at the guilt-innocence phase of the trial, that voluntary intoxication was not a defense. Appellant complained that he was entitled to an instruction at punishment that voluntary intoxication was mitigating, so that the jury would not be confused. "We have previously held that the federal constitution does not require an instruction concerning voluntary intoxication as it might relate to mitigation of punishment." Appellant was not entitled to argue to the jury, nor was he entitled to have the jury instructed, that the jury was required to

consider voluntary intoxication in mitigation of punishment. *Raby v. State*, 970 S.W. 2d 1, 6 (Tex. Crim. App. 1998)(trial court does not err in refusing to instruct the jury that voluntary intoxication may negate the specific intent necessary to support a conviction for capital murder). Absent evidence that the appellant used drugs at or before the offense, or that he was intoxicated at the time of the offense, he is not entitled to an instruction on the mitigating effect of voluntary intoxication. *Martinez v. State*, 17 S.W. 3d 677, 691 (Tex. Crim. App. 2000).

g. There is no need to define the word "militates" in the punishment charge, since this is such a word that can be given its ordinary meaning. Indeed, a cautious judge might think it smart not to vary from the charge required by the statute. "Following the law as it is set out by the Texas Legislature will not be deemed error on the part of a trial judge." *Martinez v.State*, 924 S.W. 2d 693, 699 (Tex. Crim. App. 1996). Of course, following the law is set out by the Texas Legislature is exactly what caused the entire *Penry* fiasco.

h. "We note initially that Article 37.071 does not objectively define 'mitigating evidence,' leaving all such resolutions to the subjective standards of the jury." *Cantu v. State*, 939 S.W. 2d 627, 640 (Tex. Crim. App. 1997).

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i. In *McFarland v. State*, 928 S.W. 2d 482 (Tex. Crim. App. 1996), appellant complained that the statutory definition of "mitigating evidence" was too narrow because it did not include evidence relevant to his character, history or circumstances of the crime which militate in favor of a life sentence. The court disagreed, holding first that appellant did not object at trial, and second, that, in appellant's charge, mitigating circumstance *was* defined as including any aspect of appellant's character, background, record, or circumstances of the crime. The point was therefore moot, since, even if the statute was deficient, he did not suffer. *Id*. at 518; *see Shannon v. State*, 942 S.W. 2d 591, 597 (Tex. Crim. App. 1996)(statute is not unconstitutionally narrow since "the consideration and weighing of mitigating evidence is an open-ended, subjective determination engaged in by each individual juror"); *Morris v. State*, 940 S.W. 2d 610, 615 (Tex. Crim. App. 1996)(rejecting this point where appellant presented no evidence of history of kindness, religious devotion or special ability in some field which could not have been considered under the special issues submitted); *see also King v. State*, 953 S.W. 2d 266, 274 (Tex. Crim. App. 1997); *Jones v. State*, 944 S.W. 2d 642, 656 (Tex. Crim. App. 1996)*;*

j. In *Lawton v. State*, 913 S.W. 2d 542 (Tex. Crim. App. 1995), appellant complained that the definition of mitigating evidence in article 37.071 § 2(f)(4) unconstitutionally excluded evidence of appellant's character, history and the circumstances of the offense. The court disagreed, finding that Texas's statutory definition of mitigating evidence "is congruent with that of the United States Supreme Court." *Id*. at 555-56; *accord Bell v. State*, 938 S.W. 2d 35, 54 (Tex. Crim. App. 1996).

k. "There is no evidence that must be viewed by a juror as having a definitive mitigating effect, per se." *Rhoades v. State*, 934 S.W. 2d 113, 128 (Tex. Crim. App. 1996).

l. The trial court does not err in refusing to instruct the jury that it must consider youth and mental health testimony as mitigating. *Cantu v. State*, 939 S.W. 2d 627, 640 (Tex. Crim. App. 1997). The trial court does not err in refusing to instruct the

jury that it may not consider mitigating evidence in aggravation of punishment. "It is for the jury to determine what evidence, if any, constitutes mitigating evidence, and how much weight it should be given." *Pondexter v. State*, 942 S.W. 2d 577, 588 (Tex. Crim. App. 1996).

m. Appellant will not be heard to argue that the definition of mitigating evidence is unconstitutionally narrow unless he can show that he would have offered relevant mitigating evidence that could not have been used by the jury to answer one of the special issues submitted. *Williams v. State*, 937 S.W. 2d 479, 492 (Tex. Crim. App. 1996).

n. It is improper to instruct the jury that it must give only mitigating effect to evidence when it believes the evidence is both mitigating and aggravating. *Zimmerman v. State*, 860 S.W. 2d 89 103 (Tex. Crim. App. 1993), *vacated*, 510 U.S. 938 (1993); *see Curry v. State*, 910 S.W. 2d 490, 497 Tex. Crim. App. 1995)(jury need not be instructed that evidence it believes is mitigating and aggravating can only be considered as mitigating).

o. There is no requirement that the charge on mitigating evidence apply the law to the mitigating facts presented. *Garcia v. State*, 887 S.W. 2d 846, 860-861 (Tex. Crim. App. 1994); *see Penry v. State*, 903 S.W. 2d 715, 766 (Tex. Crim. App. 1995)(no requirement that court affirmatively submit defensive theory of mitigation).

p. There is no requirement that the trial court instruct the jury that certain factors are mitigating as a matter of law, or concerning the weight to be given such factors. *Chambers v. State*, 903 S.W. 2d 21, 34 (Tex. Crim. App. 1995).

q. The post-*Penry* statute makes no reference at all to a nexus requirement. Rather, it indicates that everyone facing the possibility of a death sentence is entitled to the statutory instruction on mitigating evidence. In *Cantu v. State*, 939 S.W. 2d 627 (Tex. Crim. App. 1997), the prosecutor suggested to the jury in her summation that the jury should impose a nexus requirement, and appellant objected that this misstated the law. The court of criminal appeals affirmed. The court refused to agree that nexus need not be shown, and footnote 6 noted that the statute "is essentially a codification of the dictates set out in *Penry*. . . ." Even assuming, "arguendo" that appellant was correct about nexus, however, the prosecutor did not misstate the law, but merely suggested that the jury look at the evidence her way, and this was not error. *Id*. at 632-33.

r. The trial court did not err in refusing to instruct the jury that evidence of youth and mental health history could not be considered as aggravating evidence. *Raby v. State*, 970 S.W. 2d 1, 7-8 (Tex. Crim. App. 1998).
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s. The evidence must concern characteristics peculiar to appellant. *Mosley v. State*, 983 S.W. 2d 249, 266 (Tex. Crim. App. 1998). Evidence which does not relate to appellant's characteristics and background is not admissible. *Id*.

6. **Sufficiency Review**

a. "Because the weighing of 'mitigating evidence' is a subjective determination undertaken by each individual juror, we decline to review that evidence for 'sufficiency.'" *McFarland v. State*, 928 S.W. 2d 482, 498 (Tex. Crim. App. 1996); *accord Rojas v. State*, 986 S.W. 2d 241, 247 (Tex. Crim. App. 1998)*; Fuentes v. State*, 991 S.W. 2d 267, 280 (Tex. Crim. App. 1999)*; Brooks v. State*, 990 S.W. 2d 278, 285 (Tex. Crim. App. 1999)*; Griffith v. State*, 983 S.W. 2d 282, 289

(Tex. Crim. App. 1998); *Nenno v. State*, 970 S.W. 2d 549, 552 (Tex. Crim. App. 1998); *McGinn v. State*, 961 S.W. 2d 161, 166 (Tex. Crim. App. 1998); *Morris v. State*, 940 S.W. 2d 610, 614 (Tex. Crim. App. 1996); *Moore v. State*, 935 S.W. 2d 124, 128 (Tex. Crim. App. 1996); *Green v. State*, 934 S.W. 2d 92, 106 (Tex. Crim. App. 1996); *Colella v. State*, 915 S.W. 2d 834, 845 (Tex. Crim. App. 1995). "The determination as to whether mitigating evidence calls for a life sentence is a value judgment left to the discretion of the factfinder." *Dewberry v. State*, 4 S.W. 3d 735, 740 (Tex. Crim. App. 1999). Because appellant is the beneficiary of mitigating evidence, he bears the burden of production. If the jury verdict is against him, he "can only argue that the verdict was against the great weight and preponderance of the evidence." *McFarland v. State*, 928 S.W. 2d at 497 n. 9. Appellant did not make this argument in this case. *Accord Eldridge v. State*, 940 S.W. 2d 646, 652 n. 9 (Tex. Crim. App. 1996). In *Bell v. State*, 938 S.W. 2d 35, 43-44 (Tex. Crim. App. 1996), though, the court held that it could not review mitigation evidence either *de novo or for factual sufficiency* "because it is a subjective determination left exclusively to the jury." (emphasis supplied).

b. In *Lawton v. State*, 913 S.W. 2d 542 (Tex. Crim. App. 1995), appellant argued on appeal that the evidence was insufficient to support the jury's negative answer to the mitigation special issue. The court of criminal appeals rejected this argument, finding that appellate review of a negative answer regarding mitigating evidence was "neither constitutionally required nor possible under our current law." *Id*. at 556. "We decline to declare any evidence mitigating as a matter of law or to usurp the jury's role of discerning the credibility and weight of evidence." *Id*. *See Salazar v. State*, 38 S.W. 3d 141, 146 (Tex. Crim. App. 2001); *Pondexter v. State*, 942 S.W. 2d 577, 587 (Tex. Crim. App. 1996) *Matchett v. State*, 941 S.W. 2d 922, 936 (Tex. Crim. App. 1996); *Morris v. State*, 940 S.W. 2d 610, 614 (Tex. Crim. App. 1996); *Janecka v. State*, 937 S.W. 2d 456, 461 (Tex. Crim. App. 1996); *Colella v. State*, 908 S.W. 2d 437, 448 (Tex. Crim. App. 1996).

c. Although it is impossible to conduct a meaningful appellate review of the mitigation special issue, this does not render our capital punishment scheme unconstitutional. *Lawton v. State*, 913 S.W. 2d 542, 557 (Tex. Crim. App. 1995). *Accord Tong v. State*, 25 S.W. 3d 707, 715 (Tex. Crim. App. 2000); *Wood v. State*, 18 S.W. 3d 642, 649 (Tex. Crim. App. 2000); *Prystash v. State*, 3 S.W. 3d 522, 536 (Tex. Crim. App. 1999); *Ladd v. State*, 3 S.W. 3d 547, 573 (Tex. Crim. App. 1999); *Jackson v. State*, 992 S.W. 2d 469, 481 (Tex. Crim. App. 1999); *Moore v. State*, 999 S.W. 2d 385, 407-408 (Tex. Crim. App. 1999); *Baker v. State*, 956 S.W. 2d 19, 21 (Tex. Crim. App. 1997); *Jones v. State*, 944 S.W. 2d 642, 649 (Tex. Crim. App. 1996); *Shannon v. State*, 942 S.W. 2d 591, 599 (Tex. Crim. App. 1996); *Pondexter v. State*, 942 S.W. 2d 577, 588 (Tex. Crim. App. 1996); *Eldridge v. State*, 940 S.W. 2d 646, 652 (Tex. Crim. App. 1996); *Bell v. State*, 938 S.W. 2d 35, 44 (Tex. Crim. App. 1996); *Williams v. State*, 937 S.W. 2d 479, 492 (Tex. Crim. App. 1996); *Janecka v. State*, 937 S.W. 2d 456, 474 (Tex. Crim. App. 1996); *Green v. State*, 934 S.W. 2d 92, 107 (Tex. Crim. App. 1996); *Lane v. State*, 933 S.W. 2d 504, 508 (Tex. Crim. App. 1996); *Cockrell v. State*, 933 S.W. 2d 73, 92 (Tex. Crim. App. 1996).

d. Article 44.251(a) of the code of criminal procedure provides that the court of criminal appeals shall reform a death sentence if there is insufficient evidence to support a negative answer to the mitigation special issue. The court of criminal appeals agrees that article 44.251(a) is "problematic," because it implies, on its face "that what we

have held to be unnecessary if not impossible is possible." *Lawton v. State*, 913 S.W. 2d 542, 557 n.13 (Tex. Crim. App. 1995). Problematic, maybe, but not unconstitutional. "[W]e are convinced that the flaw in Article 44.251(a) is unimportant to the constitutionality of our capital punishment scheme in general and to the constitutionality of Article 37.071 in particular. So long as the jury is not precluded from hearing and effectuating mitigating evidence, our capital punishment scheme is constitutional regardless of whether appellate review of the jury's mitigation verdict is possible." *Id*. at 557; *see Prystash v. State*, 3 S.W. 3d 522, 536 (Tex. Crim. App. 1999)*; Eldridge v. State*, 940 S.W. 2d 646, 652 (Tex. Crim. App. 1996); *Cantu v. State*, 939 S.W. 2d 627, 648 (Tex. Crim. App. 1997)*; Bell v. State*, 938 S.W. 2d 35, 44 (Tex. Crim. App. 1996)*; Janecka v. State*, 937 S.W. 2d 456, 474 (Tex. Crim. App. 1996).

e. "This Court makes sufficiency reviews of Texas juries' guilt/innocence and Article 37.071 § 2(b)(1) future dangerousness decisions. These. decisions are fact-bound and hence reviewable for sufficiency of the evidence. As long as these determinations can be reviewed, we are satisfied that the constitutionality of Article 37.071 is not contingent on appellate review of the second special issue." *Eldridge v. State*, 940 S.W. 2d 646, 652 (Tex. Crim. App. 1996).

7. **Proportionality review**

a. In *Honda Motor Company Ltd. v. Oberg*, 512 U.S. 415 (1994), the Supreme Court held that the Due Process Clause requires appellate review of jury awards of punitive damages in civil cases. In *Janecka v. State*, 937 S.W. 2d 456, 474-75 (Tex. Crim. App. 1996), appellant asserted that this principle requires a comparative proportionality review on appeal of the deathworthiness of each person sentenced to death in Texas. The court of criminal appeals disagreed. *See also Ladd v. State*, 3 S.W. 3d 547, 574 (Tex. Crim. App. 1999)*; Moore v. State*, 999 S.W. 2d 385, 408 (Tex. Crim. App. 1999)*; Brooks v. State*, 990 S.W. 2d 278, 287 (Tex. Crim. App. 1999)*; Morris v. State*, 940 S.W. 2d 610, 616 (Tex. Crim. App. 1996)*; Bell v. State*, 938 S.W. 2d 35, 52 (Tex. Crim. App. 1996); *Cockrell v. State*, 933 S.W. 2d 73, 92 (Tex. Crim. App. 1996); *Anderson v. State*, 932 S.W. 2d 502, 508 (Tex. Crim. App. 1996).

b. In *Anderson v. State*, 932 S.W. 2d 502, 508 (Tex. Crim. App. 1996), the court rejected appellant's contention that it must conduct a comparative proportionality review of the death worthiness of each defendant sentenced to death.

> The federal Constitution requires more than the minimal safeguard of a comparative proportionality review to ensure the fair imposition of the death penalty. Because death is qualitatively different from any other punishment, the federal Constitution requires the highest degree of reliability in the determination that it is the appropriate punishment. To ensure this reliability, the United States Constitution imposes requirements of proportionality of offense to punishment, of a narrowly defined class of death eligible defendants, and of an opportunity for each juror to consider and give effect to circumstances mitigating against the imposition of the death sentence. In short, the due process principles

> governing the imposition of a sentence of death are distinct and more onerous than those governing the imposition of a civil judgment.
>
> It is for good reason, therefore, that the United States Supreme Court has not held that due process requires a comparative proportionality review of the sentence of death, but instead has held that such a review would be "constitutionally superfluous."

Id. at 509-09.

8. **Constitutionality, in general**

a. The mitigation issue is not unconstitutional because it permits open-ended discretion condemned in *Furman*. *E.g., Hall v. State*, 67 S.W. .3d 860, 877 (Tex. Crim. App. 2002); *Moore v. State*, 999 S.W. 2d 385, 408 (Tex. Crim. App. 1999)*; Brooks v. State*, 990 S.W. 2d 278, 288 (Tex. Crim. App. 1999)*;King v. State*, 953 S.W. 2d 266, 274 (Tex. Crim. App. 1997); *Jones v. State*, 944 S.W. 2d 642, 656 (Tex. Crim. App. 1996); *Shannon v. State*, 942 S.W. 2d 591, 598 (Tex. Crim. App. 1996); *Pondexter v. State*, 942 S.W. 2d 577, 587 (Tex. Crim. App. 1996); *Morris v. State*, 940 S.W. 2d 610, 614 (Tex. Crim. App. 1996); *Williams v. State*, 937 S.W. 2d 479, 491 (Tex. Crim. App. 1996).

b. The mitigation issue is not unconstitutional for allowing the untrammeled discretion in imposing the death sentence. *Cockrell v. State*, 933 S.W. 2d 73, 92-93 (Tex. Crim. App. 1996). *See also Whitaker v. State*, 977 S.W. 2d 595, 599-600 (Tex. Crim. App. 1998).

c. The mitigation issue is not unconstitutional because it fails to require the jury to consider mitigating evidence when answering it. "This court has held the law does not require a juror to consider any particular piece of evidence as mitigating; all the law requires is that a defendant be allowed to present relevant mitigating evidence and that the jury be provided a vehicle to give mitigating effect to that evidence if the jury finds it to be mitigating." *Green v. State*, 912 S.W. 2d 189, 195 (Tex. Crim. App. 1995).

d. The statutory definition of "mitigating evidence" is not facially unconstitutional because it limits the Eighth Amendment concept of "mitigation" to factors that render a capital defendant less morally "blameworthy" for commission of the capital murder. *King v. State*, 953 S.W. 2d 266, 274 (Tex. Crim. App. 1997)("moreover, appellant fails to specify what if any evidence he presented which was mitigating but the jury was unable to con.sider"); *accord Ladd v. State*, 3 S.W. 3d 547, 574 (Tex. Crim. App. 1999); *See Moore v. State*, 999 S.W. 2d 385, 408 (Tex. Crim. App. 1999)*; Raby v. State*, 970 S.W. 2d 1, 8 (Tex. Crim. App. 1998); *see also Prystash v. State*, 3 S.W. 3d 522, 535 (Tex. Crim. App. 1999)(statutory requirement that jury consider all the evidence provides the jury with a vehicle to respond to a broader range of mitigating circumstances than those which merely reduce moral blameworthiness).

e. The Texas statute is not unconstitutionally arbitrary in view of the many different sentencing schemes that have been in operation in Texas since 1989. *Moore v. State*, 999 S.W. 2d 385, 408 (Tex. Crim. App. 1999).

f. The Texas scheme is not unconstitutional because racial discrimination taints it. The court disagrees

with appellant's statistical studies. Also, appellant fails to explain why Texas statutes cannot make his conduct subject to the death penalty, or that the scheme was unconstitutionally applied to him. *Moore v. State*, 999 S.W. 2d 385, 409 (Tex. Crim. App. 1999). *See also Brooks v. State*, 990 S.W. 2d 278, 289 (Tex. Crim. App. 1999).

g. The statute is not unconstitutional because it fails to adequately structure the jury's discretion regarding mitigating and aggravating factors. *Ladd v. State*, 3 S.W. 3d 547, 574 (Tex. Crim. App. 1999).

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h. Since article 37.071 was amended effective 1991, a variety of constitutional challenges have made their way to the court of criminal appeals. In *Busby v. State*, 990 S.W. 2d 263 (Tex. Crim. App. 1999), the court summarized its viewpoint about many of these challenges in a single paragraph:

> In point of error one, appellant provides a laundry list of contentions on why the current death penalty scheme is unconstitutional. All of these contentions have been decided adversely to his position. He complains that the term "probability" in the future dangerousness special issue is not defined. We rejected that claim in *Camacho v. State*, 864 S.W.2d 524, 536 (Tex. Crim. App. 1993), *cert. denied*, 510 U.S. 1215 (1994). He claims that the mitigation special issue impermissibly shifts the burden of proof on mitigating circumstances. We rejected that claim in *Matchett v. State*, 941 S.W.2d 922, 935 (Tex. Crim. App. 1996), *cert. denied*, __ U.S. __117 S. Ct. 2487 (1997). He argues, relying upon *Walton v. Arizona*, 497 U.S. 639 (1990), that the mitigation special issue impermissibly shifts the burden of proof on aggravating circumstances. We rejected that claim in *Williams v. State*, 937 S.W.2d 479, 491 (Tex. Crim. App. 1996). He contends that the mitigation issue is unconstitutional because the open-ended and unstructured nature of the issue gives the jury unfettered discretion. We rejected that claim in *King v. State*, 953 S.W.2d 266, 274 (Tex. Crim. App. 1997). He contends that the mitigation issue's failure to enumerate a list of mitigating and aggravating factors prev.ents meaningful appellate review. We rejected that claim in *Green v. State*, 934 S.W.2d 92, 107 (Tex. Crim. App. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 1561 (1997). He complains that the mitigation special issue is unconstitutional because it limits mitigating factors to those that evidence moral blameworthiness. We rejected that claim in *King*, 953 S.W.2d at 274. And finally, he contends that the failure to inform a jury that a holdout vote (or hung jury) results in the automatic imposition of a life sentence violates the Eighth and Fourteenth Amendments to the United States Constitution. We rejected that claim in *Eldridge v. State*, 940 S.W.2d 646, 650

> (Tex. Crim. App. 1996). Point of error one is overruled.

Id. at 272; *see Trevino v. State*, 991 S.W. 2d 849, 855 (Tex. Crim. App. 1999)("In points nine through nineteen appellant challenges the constitutionality of the Texas death scheme on grounds which have been repeatedly rejected. We have reviewed his claims and find that they are without merit. Points of error nine through nineteen are overruled."); *Cathey v. State*, 992 S.W. 2d 460, 466 (Tex. Crim. App. 1999)("In his remaining complaints, points of error seven through thirteen, appellant attacks the constitutionality of Article 37.071 on various grounds indistinguishable from similar arguments which this Court has repeatedly heard and rejected."); *see Johnson v. State*, 68 S.W. 3d 644, 656 (Tex. Crim. App. 2002); *Ibarra v. State*, 11 S.W. 3d 189, 198 (Tex. Crim. App. 1999).

9. **Waiver**

a. One case suggests that a defendant can waive reliance upon and submission of the mitigation special issue, "and if he does, victim impact and character evidence would be irrelevant and hence inadmissible. Such a waiver must, however, be affirmative and express." *Mosley v. State*, 983 S.W. 2d 249, 264 (Tex. Crim. App. 1998).

b. In *Tong v. State*, 25 S.W. 3d 707 (Tex. Crim. App. 2000), which was decided after *Mosley*, appellant argued that he was entitled to a new punishment hearing so that he could make the choice the court had declared was available in *Mosley*. The court of criminal appeals declared this part of *Mosley* to have been mere "dicta." "It is true that the majority in *Mosley* suggested that a defendant could waive reliance upon and submission of the mitigation issue, thereby rendering victim impact and character evidence irrelevant and inadmissible. [citations omitted] However, this statement was made in connection with several points concerning victim impact evidence, and the holding under these points pertains to the admissibility of the victim impact evidence, not whether the special issue can be waived." *Id*. at 711-12.

c. Where appellant requests that the trial court not submit the mitigation special issue, he may not complain of this omission on appeal. *Ripkowksi v. State,* 61 S.W. 3d 378, 389 (Tex. Crim. App. 2001).

VI. THE 10-2 VERDICT: ARTICLE 37.071 §§ 2(d)(2) and 2(f)(2)

A. The Statutes

1. Article 37.071, § 2(d)(2) requires the court to charge the jury that:

> it may not answer any issue submitted under Subsection (b) of this article, "yes" unless it agrees unanimously and it may not answer any issue "no" unless 10 or more jurors agree;

TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(d)(2) (Vernon Supp. 2002).

2. Regarding the mitigation special issue, the court is required by article 37.071, § 2(f)(2) to charge the jury that it:

> may not answer the issue "no" unless it agrees unanimously and may not answer the issue "yes" unless 10 or mor jurors agree;

TEX. CODE CRIM. PROC. ANN. art. 37.071, §

2(f)(2) (Vernon Supp. 2002).

B. Case Law

1. In *Lawton v. State*, 913 S.W. 2d 542 (Tex. Crim. App. 1995), appellant contended that articles 37.071 § 2(d) & 37.071 § 2(f) are unconstitutional because they require that at least 10 jurors agree before a life sentence can be imposed. The court disagreed. "[W]hile it is true that the jury is instructed that they may not answer any of the special issues in a manner that would result in a life sentence unless ten jurors agree to that answer, this instruction follows the instruction that the jury may not answer any of the special issues in a manner resulting in capital punishment unless the verdict is unanimous. Under these facts, appellant's argument that jurors will be misled lacks merit; every juror knows that capital punishment cannot be imposed without the unanimous agreement of the jury on all three special issues. The jury is not informed of the consequences of a hung jury, but each juror will know that without his or her vote the death sentence cannot be imposed." *Id*. at 559; *accord Conner v. State*, 67 S.W. 3d 192, 202 (Tex. Crim. App. 2001); *Feldman v. State*, 71 S.W. 3d 738, 757 (Tex. Crim. App. 2002); *Wright v. State*, 28 S.W. 3d 526, 537 (Tex. Crim. App. 2000); *Tong v. State*, 25 S.W. 3d 707, 715 (Tex. Crim. App. 2000); *Hughes v. State*, 24 S.W. 3d 833, 843-44 (Tex. Crim. App. 2000); *Prystash v. State*, 3 S.W. 3d 522, 536-37 (Tex. Crim. App. 1999); *Ladd v. State*, 3 S.W. 3d 547, 574 (Tex. Crim. App. 1999); *see also Jackson v. State*, 17 S.W. 3d 664, 677 (Tex. Crim. App. 2000); *Chamberlain v. State*, 998 S.W. 2d 230, 238 (Tex. Crim. App. 1999); *Jackson v. State*, 992 S.W. 2d 469, 481 (Tex. Crim. App. 1999); *Cantu v. State*, 939 S.W. 2d 627, 644 (Tex. Crim. App. 1997); *Williams v. State*, 937 S.W. 2d 479, 490 (Tex. Crim. App. 1996).

2. As with the former statute, the court has rejected challenges to the

provision which instructs the jury that at least ten jurors must agree on the special issues answered in appellant's favor, and which prevent any one from telling the jury that a hung jury means a life sentence. *McFarland v. State*, 928 S.W. 2d 482, 519-520 (Tex. Crim. App. 1996). In *McFarland*, though, the trial court did give the following instruction: "In the event the jury is unable to agree upon an answer to Special issue No. [1, 2, or 3] under the conditions and instructions outlined above, the Foreman will not sign either form or answer to the Special Issue." *Id*. "Because the jury was instructed not to answer a special issue if a unanimous affirmative answer or a ten-juror negative answer could not be reached, the jury was given an avenue to accommodate the complained-of potential disagreements." *Id*.

VII. WHEN THE JURY CANNOT AGREE: ARTICLES 37.071(g) & 37.071 § 2(a)(1)

A. Article 37.071(g)

1. TEX. CODE CRIM. PROC. ANN. art. 37.071(g) (Vernon Supp. 2002) provides that, if the jury "is unable to answer any issue submitted [at punishment] . . . the court shall sentence the defendant to confinement in the institutional division of the Texas Department of Criminal Justice for life."

B. Article 37.071 § 2(a)

1. TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(a) (1)(Vernon Supp. 2002), provides, among other things, that "[t]he court, the attorney representing the state, the defendant, or the defendant's counsel may not inform a juror or a prospective juror of the effect of a failure of a jury to agree on issues submitted under Subsection (c) or (e) of this article."

C. Case Law

1. Article 37.071(g), which prohibits the parties and the court from informing the jury about the effect of a hung jury, is not unconstitutional. *Davis v. State*, 782 S.W.2d 211, 222 (Tex. Crim. App. 1989); *accord Moore v. State*, 935 S.W. 2d 124, 129 (Tex. Crim. App. 1996); *Cockrell v. State*, 933 S.W. 2d 73, 93 (Tex. Crim. App. 1996); *Lawton v. State*, 913 S.W. 2d 542, 558-59 (Tex. Crim. App. 1995).

2. In *Draughon v. State*, 831 S.W.2d 331, 337 (Tex. Crim. App. 1992), the court wrestled with article 37.071(g), calling it "uncommonly enigmatic." Nonetheless, the court rejected appellant's challenges since the instructions were not such that the jury would be misled into thinking that an affirmative answer should be given unless 10 or more jurors agree to give a negative one. *Id*. at 338; *see Moore v. State*, 999 S.W. 2d 385, 408 (Tex. Crim. App. 1999)*; Pondexter v. State*, 942 S.W. 2d 577, 586 (Tex. Crim. App. 1996)*; Eldridge v. State*, 940 S.W. 2d 646, 650 (Tex. Crim. App. 1996)*; Green v. State*, 912 S.W. 2d 189, 194 (Tex. Crim. App. 1995); *Emery v. State*, 881 S.W.2d 702, 711 (Tex. Crim. App. 1994); *Robertson v. State*, 871 S.W. 2d 701, 710 (Tex. Crim. App. 1993); *Arnold v. State*, 873 S.W. 2d 27, 38 (Tex. Crim. App. 1993); *Moreno v. State*, 858 S.W. 2d 453, 460-61 (Tex. Crim. App. 1993); *Beavers v. State*, 856 S.W. 2d 429,434 (Tex. Crim. App. 1993). *Nobles v. State*, 843 S.W.2d 503, 508-509 (Tex. Crim. App. 1992); *Cantu v. State*, 842 S.W.2d 667, 692-93 (Tex. Crim. App. 1992).

3. Article 37.071, §2(a)(1) is constitutional. *Cantu v. State*, 939 S.W. 2d 627, 644 (Tex. Crim. App. 1997)("same analysis applies to the new statute and appellant has given us no reason to revisit this issue"). *See Tong v. State*, 25 S.W. 3d 707, (Tex. Crim. App.

2000)*; Brooks v. State*, 990 S.W. 2d 278, 288 (Tex. Crim. App. 1999)*; Raby v. State*, 970 S.W. 2d 1, 6-7 (Tex. Crim. App. 1998); *Shannon v. State*, 942 S.W. 2d 591, 600 (Tex. Crim. App. 1996). *See also Morris v. State*, 940 S.W. 2d 610, 615 (Tex. Crim. App. 1996)(the same is true regarding article 37.0711(3)(i)).

4. In *Eldridge v. State*, 940 S.W. 2d 646, 650 (Tex. Crim. App. 1996), the court refused to address appellant's attack on this provision made under Article I, §§ 10, 13, and 19 of the Texas Constitution, because appellant cited the same authorities he did in his federal constitutional attack, without supplying any additional argument or authority under the state constitution.

5. The statutory "prohibition on informing the jury about the effects of their answers to the special issues regarding the death penalty only poses a constitutional problem when the jury is led to believe that they do not have ultimate responsibility for punishment." *Lagrone v. State*, 942 S.W. 2d 602, 620 (Tex. Crim. App. 1997)(constitutional validity of the statute has been "consistently affirmed" absent misrepresentations about punishment responsibility). *See also Prystash v. State*, 3 S.W. 3d 522, 536-37 (Tex. Crim. App. 1999).

6. In *Eldridge v. State*, 940 S.W. 2d 646 (Tex. Crim. App. 1996), the court held that, assuming a remark by the trial court had the improper effect of informing the jury that a hung jury would result in a life sentence, any error was rendered harmless by the jury instruction that a "yes" answer required a unanimous vote, and a "no" answer required at least ten votes. *Id*. at 650. In so holding, the court of criminal appeals acknowledged that "the alleged violation here would only hurt the State . . . [since] a 'no' holdout juror on the first special issue or a 'yes' holdout juror on the second special issue, knowing of the automatic life sentence in the absence of twelve 'yes' votes on the first special issue or ten 'no' votes on the second, would feel empowered to continue holding out for a life sentence." *Id*. at 650 n. 6.

7. Although it was error for the trial court to inform the jury in *voir dire* that a non-unanimous jury would result in a hung jury, this error was harmless under Rule 81(b)(2). The court refused to address the contention on appeal that the trial court had "misinformed" the jury (apparently because a non-unanimous verdict means a life sentence, not a mistrial) because this specific contention was not made at trial. *Sattiewhite v. State*, 786 S.W.2d 271, 278-79 (Tex. Crim. App. 1989); *see Rousseau v. State*, 855 S.W. 2d 666, 676 (Tex. Crim. App. 1993)(trial court did not err in quashing jury panel after panel was improperly instructed under article 37.071(g)); *see also Clark v. State*, 881 S.W. 2d 682, 691 (Tex. Crim. App. 1994)(prosecutor erred in informing the jury that a single no vote would prevent a death sentence, but the error was harmless).

8. "There is no option for the jury *not* to reach a verdict. While that may be an eventuality, it isn't a course for the jury to choose." *Moreno v. State*, 858 S.W. 2d 453, 460 (Tex. Crim. App. 1993).

9. The trial court is not required to give the jury a punishment verdict form reflecting an inability to agree. *Robertson v. State*, 871 S.W. 2d 701, 710 (Tex. Crim. App. 1993); *accord Soria v. State*, 933 S.W. 2d 46, 66 (Tex. Crim. App. 1996); *Chambers v. State*, 903 S.W. 2d 21, 34 (Tex. Crim. App. 1995). Nor is the court required to instruct the jury not to return a verdict on a special issue unless the jury is unanimous. *Brimage v. State*, 918 S.W. 2d 466, 505 (Tex. Crim. App. 1996).

10. "To inform the jury of the

effect of its answers to the special issues is to invite the jury to avoid its statutory duty. This interferes with the jury's fact finding function. Further, the information is a procedural matter, of no pertinence to the special issues, and not the subject of comment by either the trial court or the litigants." *Patrick v. State*, 906 S.W. 2d 481, 494 (Tex. Crim. App. 1995).

11. In *Andrade v. State*, 700 S.W. 2d 585 (Tex. Crim. App. 1985), the jury sent several notes indicating it was unable to reach a unanimous punishment verdict. The court overruled defendant's motion to discharge the jury and enter a life sentence. After about 12 hours of deliberation, the jury answered both questions "yes," and the death penalty was assessed. The court of criminal appeals held that it was not an abuse of discretion to keep the jury together this long. *Id*. at 588-89. *See Jackson v. State*, 17 S.W. 3d 664, 677 (Tex. Crim. App. 2000)*; Guidry v. State*, 9 S.W. 3d 133, 155 (Tex. Crim. App. 1999)*; Howard v. State*, 941 S.W.2d 102, 121 (Tex. Crim. App. 1996); *Bell v. State*, 938 S.W. 2d 35, 56 (Tex. Crim. App. 1996); *Green v. State*, 840 S.W. 2d 394, 407 (Tex. Crim. App. 1992); *Marquez v. State*, 725 S.W. 2d 217, 240-41 (Tex. Crim. App. 1987); *DeLuna v. State*, 711 S.W. 2d 44, 48 (Tex. Crim. App. 1986).

12. In *Muniz v. State*, 573 S.W. 2d 792 (Tex. Crim. App. 1978), when the jury first announced its verdict, it had not answered the second question. Over objection, the court sent the jury back for further deliberations, after which it answered the "yes." The court of criminal appeals found no abuse of discretion, rejecting the defendant's contention that a mistrial should have been declared. *Id*. at 793-94.

13. Before article 37.071(g) was amended in 1981, the defendant received a new trial if his jury deadlocked at punishment. This happened to the defendant in *Nichols v. State*, 754 S.W. 2d 185 (Tex. Crim. App. 1988). He was tried again, and this time the jury agreed and sentenced him to death. On appeal he sought the retroactive benefit of article 37.071(e), claiming that he was entitled to a life sentence. The court refused to give this statute retroactive effect. *Id*. at 204.

14. *Eads v. State*, 598 S.W. 2d 304 (Tex. Crim. App. 1980), was tried before article 37.071(g) was amended to its present form. At that time, if the jury failed to agree at punishment, the defendant was entitled to a mistrial. There the jury answered the third question "yes," but failed to answer the first two questions at all. The judge excused the jury and sentenced defendant to life imprisonment. The court of criminal appeals reversed the conviction, holding that the jury's verdict was incomplete, and that therefore, the judge had erred in substituting its judgment for that of the jury. *Id*. at 307-308.

VIII. WHAT EVIDENCE IS ADMISSIBLE AT THE PUNISHMENT PHASE?

A. Unadjudicated Offenses

1. Article 37.071 § 2(a)(1) provides, among other things, that at the punishment phase, "evidence may be presented by the state and the defendant or the defendant's counsel as to any matter that the court deems relevant to sentence, including evidence of the defendant's background or character or the circumstances of the offense that mitigates against the imposition of the death penalty." TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(a)(1) (Vernon Supp. 2002).

2. Unadjudicated extraneous offenses are admissible at the punishment phase of a capital trial, in the absence of surprise.

Gentry v. State, 770 S.W. 2d 780, 793 (Tex. Crim. App. 1988); *accord Tong v. State*, 25 S.W. 3d 707, 711 (Tex. Crim. App. 2000); *Jackson v. State*, 992 S.W. 2d 469, 479 (Tex. Crim. App. 1999); *Pondexter v. State*, 942 S.W. 2d 577, 587 (Tex. Crim. App. 1996); *Matchett v. State*, 941 S.W. 2d 922, 937-38 (Tex. Crim. App. 1996); *Cantu v. State*, 939 S.W. 2d 627, 648 (Tex. Crim. App. 1997); *Bell v. State*, 938 S.W. 2d 35, 55 n. 30 (Tex. Crim. App. 1996); *Cockrell v. State*, 933 S.W. 2d 73, 94 (Tex. Crim. App. 1996). To be admissible, it must be proven beyond a reasonable doubt that appellant committed the offense; the offense must be relevant to appellant's deathworthiness, and its prejudicial or inflammatory potential must not substantially outweigh its probative value. *Rachal v.State*, 917 S.W. 2d 799, 807 n. 4 (Tex. Crim. App. 1996); *see Lewis v. State*, 911 S.W. 2d 1, 5 (Tex. Crim. App. 1995); *Rumbaugh v. State*, 629 S.W.2d 747, 754 (Tex. Crim. App. 1982); *see also Lawton v. State*, 913 S.W. 2d 542, 560 (Tex. Crim. App. 1995)(article 37.071, not article 37.07, applies in capital cases); *McFarland v. State*, 928 S.W. 2d 482, 512 (Tex. Crim. App. 1996); *but see Autry v. Estelle*, 706 F.2d 394, 406 n.5 (5th Cir. 1983)(admission of extraneous offenses must be closely watched); *Davis v. State*, 597 S.W.2d 358, 361 (Tex. Crim. App. 1980)(Clinton, J., dissenting)(constitutional warning); *accord McManus v. State*, 591 S.W.2d 505, 532 (Tex. Crim. App. 1979)(Phillips, J., dissenting). *Cf. Sharp v Texas*, 488 U.S. 872, 872 (1988)(Marshall, J., dissenting)(admission of unadjudicated criminal conduct cannot be reconciled with the heightened need for reliability in criminal cases); *Williams v. Lynaugh*, 484 U.S. 935 (1987)(Marshall, J., joined by Brennan, J., dissenting from denial of certiorari)(dissenters contend that admission of extraneous offenses raises "serious constitutional issue"); *Unreliable and Prejudicial: The Use of Extraneous Unadjudicated Offenses in the Penalty Phases of Capital Trial*, 93 COLUM.L.REV. 1249 (1993). Before an extraneous offense is admissible, however, "the State must 'clearly prove' that an offense was committed and that the accused was its perpetrator." *Kemp v. State*, 846 S.W. 2d 289, 307 (Tex. Crim. App. 1992); *accord Burks v. State*, 876 S.W. 2d 877, 898-900 (Tex. Crim. App. 1994); *see Harris v. State*, 827 S.W.2d 949, 961 (Tex. Crim. App. 1992)(to be relevant, state must present evidence that, if believed, establishes that appellant himself committed the extraneous misconduct). Admission of such evidence, which might be inadmissible in a non-capital trial, does not violate equal protection or due process of law. *Felder v. State*, 848 S.W. 2d 85, 98 (Tex. Crim. App. 1992).

3. *Details* of extraneous offenses are admissible as well. *Green v. State*, 587 S.W.2d 167, 169 (Tex. Crim. App. 1979); *accord Jones v. State*, 843 S.W.2d 487, 500 (Tex. Crim. App. 1992).

4. The jury need not be instructed that it cannot consider unadjudicated extraneous offenses unless it believes they occurred beyond a reasonable doubt. It is sufficient if the charge merely instructs the jury that the state has to prove future dangerousness beyond a reasonable doubt. *Fuentes v. State*, 991 S.W. 2d 267, 280 (Tex. Crim. App. 1999). "The State has the burden of proof on punishment issues, and the evidence offered to support the special issues is subsumed within that burden. To the extent there are questions concerning whether Appellant actually committed the extraneous offenses, the jury can take such questions into account in deciding the special issues. The trial judge performs a limited gatekeeping function with respect to extraneous offenses before allowing the admission of such offenses into evidence (and hence their placement before the jury), the trial judge must determine that there is clear proof that the offenses were committed and that the defendant was the perpetrator." *Kutzner v. State*,

994 S.W. 2d 180, 188 (Tex. Crim. App. 1999)(not error to instruct the jury that it could not consider extraneous offenses unless it found by clear proof that appellant committed same). *See Garcia v. State*, 57 S.W. 3d 436, 442 (Tex. Crim. App. 2001); *Tong v. State*, 25 S.W. 3d 707, 711 (Tex. Crim. App. 2000).

5. The trial court need not instruct the jury that it may only consider unadjudicated offenses in determining future dangerousness. *Jackson v. State*, 992 S.W. 2d 469, 478 (Tex. Crim. App. 1999)(evidence also relevant to mitigation).

6. The trial court need not require the jury to identify the unadjudicated offenses it found appellant committed. Nor does the jury charge have to contain special verdict forms listing the elements of each unadjudicated offenses offered by the state, in the absence of a request for same at trial. *Cantu v. State*, 939 S.W. 2d 627, 642-43 (Tex. Crim. App. 1997); *See Matchett v. State*, 941 S.W. 2d 922, 937 (Tex. Crim. App. 1996)(special verdict forms listing the elements of alleged unadjudicated offenses are unnecessary even where the court instructs the jury not to consider them unless proved beyond a reasonable doubt). *Accord Prystash v. State*, 3 S.W. 3d 522, 534 (Tex. Crim. App. 1999); *Jackson v. State*, 992 S.W. 2d 469, 479 (Tex. Crim. App. 1999).

7. Appellant was not entitled to an instruction prohibiting the jury from considering his guilt of the primary offense in determining his guilt of the extraneous offenses offered at punishment. *Jackson v. State*, 992 S.W. 2d 469, 479 (Tex. Crim. App. 1999).

8. A capital defendant is not entitled to notice of the state's intent to offer extraneous offenses at the punishment phase under either article 37.07 or Rule 404(b), because neither of these provisions applies to the punishment phase of a capital trial. This phase, instead, is governed by article 37.071 and Rule 404(c), neither of which have a notice requirement. *Guidry v. State*, 9 S.W. 3d 133, 153 (Tex. Crim. App. 1999); *accord Hughes v. State*, 24 S.W. 3d 833, 842 (Tex. Crim. App. 2000). However, due process may be violated by a showing of unfair surprise. *See Spence v. State*, 795 S.W.2d 743, 759 (Tex. Crim. App. 1990)(conviction affirmed absent unfair surprise); *see also Matchett v. State*, 941 S.W. 2d 922, 931 (Tex. Crim. App. 1996)(appellant was not unfairly surprised where he was given full notice of the state's intent to prove prior misconduct together with the witness's written account of the incident).

9. In *Hughes v. State*, 24 S.W. 3d 833, 842 (Tex. Crim. App. 2000), appellant requested a charge that the jury be instructed to disregard an extraneous offense because the evidence was insufficient to prove appellant's guilt. The court assumed, for the sake of argument, that appellant would have been entitled to request such a charge in the proper case, but went on to find that the evidence was sufficient, and that therefore, the charge was not required.

B. Other Evidence Against The Defendant

1. Evidence of joking conversations and abortive burglary plans. *Sanne v. State*, 609 S.W.2d 762, 773 (Tex. Crim. App. 1980).

2. Non-corroborated accomplice witness testimony. *May v. State*, 618 S.W.2d 333, 342 (Tex. Crim. App. 1981). *But see Mitchell v. State*, 650 S.W.2d 801, 813 (Tex. Crim. App. 1983)(Clinton, J., dissenting).

3. Juvenile records. *East v. State*, 702 S.W.2d 606, 614 (Tex. Crim. App.

1985); *Goodman v. State*, 701 S.W. 2d 850, 867 (Tex. Crim. App. 1985); *see also Corwin v. State*, 870 S.W. 2d 23, 36 (Tex. Crim. App. 1993)(testimony of juvenile misconduct is admissible).

4. Extraneous rape charge that had been tried to a hung jury and thereafter dismissed. *Hogue v. State*, 711 S.W.2d 9, 29 (Tex. Crim. App. 1986).

5. TDC disciplinary records containing details of escape attempt. *Smith v. State*, 676 S.W.2d 379, 389 (Tex. Crim. App. 1984).

6. Notebook containing racially inflammatory writings. *Gholson v. State*, 542 S.W.2d 395, 398 (Tex. Crim. App. 1976).

7. Post-arrest assaults on prosecutor and journalist. *Herrera v. State*, 682 S.W.2d 313, 321 (Tex. Crim. App. 1984).

8. Videotape of midtrial assault on journalist. *Marquez v. State*, 725 S.W.2d 217, 231 (Tex. Crim. App. 1987).

9. Revocation of parole. *Brooks v. State*, 599 S.W.2d 312, 322 (Tex. Crim. App. 1979).

10. A lay witness is competent to express an opinion in a capital murder case that the defendant will likely be dangerous in the future when the record shows the witness has sufficient first-hand familiarity with the defendant's personal history. *East v. State*, 702 S.W. 2d 606, 613 (Tex. Crim. App. 1985); *accord Jackson v. State*, 822 S.W. 2d 18, 31 (Tex. Crim. App. 1990)(classification supervisor in jail who had sufficient firsthand familiarity with appellant's personal history over an extended period of time); *Fierro v. State*, 706 S.W. 2d 310, 317 (Tex. Crim. App. 1986)(probation officer and assistant jail administrator who knew appellant and were in a position to express the opinion they did); *Russell v. State*, 665 S.W. 2d 771, 779(Tex. Crim. App. 1983), *cert. denied*, 465 U.S. 1073 (1984)(police officers, an investigator, and a convicted felon were qualified where they knew appellant and were in a position to express the opinion they did); *Esquivel v. State*, 595 S.W. 2d 516, 528 (Tex. Crim. App.), *cert. denied*, 449 U.S. 986 (1980)(former assistant district attorney who had prosecuted appellant for other crimes was qualified to express lay opinion about future dangerousness); *Simmons v. State*, 594 S.W. 2d 760, 763 (Tex. Crim. App. 1980)(former county attorney); *Villegas v. State*, 791 S.W. 2d 226, 240 (Tex. App. -- Corpus Christi 1990, pet. ref'd). *But see Sanne v. State*, 609 S.W. 2d 762, 774 (Tex. Crim. App. 1980)(error for forensic pathologist to give opinion of future dangerousness where witness lacked both expert skill, and first hand familiarity with appellant's personality to express a lay opinion, although error harmless).

11. Psychiatric testimony from qualified witnesses. *Barefoot v. Estelle*, 463 U.S. 880, 906 (1983); *see McBride v. State*, 862 S.W. 2d 600, 608 (Tex. Crim. App. 1993)(Dr. Clay Griffith was qualified under Rule 702 of the Texas Rules of Criminal Evidence). This testimony can be in the form of hypothetical questions. *See Nethery v. State*, 692 S.W. 2d 686, 709 (Tex. Crim. App. 1985); *but cf. Garcia v. State*, 626 S.W.2d 46, 51 (Tex. Crim. App. 1981)(ludicrous testimony from psychologist who silently observed defendant for 30 minutes); *Holloway v. State*, 613 S.W.2d 497, 503 (Tex. Crim. App. 1981)(doctor's testimony must be based on factor within his personal knowledge or assumed from common or judicial knowledge, or established by evidence); *Sanne v. State*, 609 S.W.2d 762, 774 (Tex. Crim. App. 1980)(error in allowing unqualified forensic pathologist to testify was harmless under facts);

see also Fuller v. State, 829 S.W.2d 191, 195 (Tex. Crim. App. 1992)(court refuses to re-examine its rulings under the rules of evidence, "principally because the issue is neither well presented by the trial record . . . nor well joined in the appellate briefs"). "Although the hypothetical question must be based on facts in evidence, there is no requirement in the rules of criminal evidence that these facts have been proved beyond a reasonable doubt. This Court has long recognized that a trial court may admit, *for whatever value it may have to a jury*, psychiatric testimony concerning the defendant's future behavior at the punishment phase of a capital murder trial." *McBride v. State*, 862 S.W. 2d 600, 610 (Tex. Crim. App. 1993).

12. A conviction under the Federal Youth Corrections Act. *Richardson v. State*, 744 S.W. 2d 65, 82 (Tex. Crim. App. 1987).

13. Reputation testimony, regardless of its remoteness. *Barnard v. State*, 730 S.W. 2d 703, 722 (Tex. Crim. App. 1987) (noting that defendant's reputation during his "whole lifetime" is probative in a capital case, even though evidence this remote might not be admissible in a non-capital case).

14. Escape from city jail many years earlier. *Barnard v. State*, 730 S.W. 2d 703, 723 (Tex. Crim. App. 1987).

15. Possession of illicit, sawed-off shotgun found in the trunk of car owned by third party, where the evidence adequately showed defendant's connection to this vehicle. *Herrera v. State*, 682 S.W. 2d 313, 321 (Tex. Crim. App. 1984).

16. Evidence that appellant was affiliated with the Texas Syndicate prison gang is admissible because it shows his lawless nature and rejection of rehabilitation during prior incarceration. *Hernandez v. State*, 819 S.W.2d 806, 817 (Tex. Crim. App. 1991); *see Fuller v. State*, 829 S.W.2d 191, 196 (Tex. Crim. App. 1992)("membership in the Aryan Brotherhood is not a right of free association protected by the First Amendment"); *accord Mason v. State*, 905 S.W.2d 570, 577 (Tex. Crim. App. 1995); *Jones v. State*, 944 S.W. 2d 642, 652-53 (Tex. Crim. App. 1996)(gang membership admissible to prove appellant's character); *cf. Dawson v. Delaware*, 503 U.S. 159, 166-67 (1992)(mere proof of defendant's membership in the Aryan Brotherhood, without more, showed only his "abstract belief," and therefore violated his First Amendment right of association).

17. Evidence of conduct after commission of the offense. *Jackson v. State*, 819 S.W.2d 142, 156 (Tex. Crim. App. 1990)(possession of homemade knife).

18. The state may prove that appellant had planned other offenses. *Draughon v. State*, 831 S.W.2d 331, 335, 336 (Tex. Crim. App. 1992).

19. In *Farris v. State*, 819 S.W.2d 490, 497 (Tex. Crim. App. 1990), the court considered several items of evidence in finding the second special issue evidence sufficient, including that appellant once unlawfully shot a cow, and that he once wantonly shot and killed a buffalo.

20. Appellant's extensive criminal record was proven in *Cantu v. State*, 842 S.W. 2d 667, 674 (Tex. Crim. App. 1992), including a school official who "testified from her personal knowledge of two thefts committed by appellant when he was twelve-years old."

21. That appellant was a truancy problem in high school is probative of his propensity to commit future acts of violence.

Cooks v. State, 844 S.W. 2d 697, 735 (Tex. Crim. App. 1992).

22. A self-portrait showing a drawing made by appellant of a large green monster holding a bloody axe in one hand and a woman's scalp in another is relevant to the second special issue, and is not unreliable evidence of future dangerousness under *Booth v. Maryland*. *Corwin v. State*, 870 S.W. 2d 23, 35 (Tex. Crim. App. 1993).

23. "[U]ncharged misconduct, whether actually criminal or not." *Wilkerson v. State*, 881 S.W. 2d 321, 326 (Tex. Crim. App. 1994).

24. A pen packet containing a motion to revoke probation, an order issuing an arrest, and an arrest warrant. *Barnes v. State*, 876 S.W. 2d 316, 328-329 (Tex. Crim. App. 1994).

25. Evidence of an extraneous capital offense which had been "retired" without prosecution by the district attorney's office. *Burks v. State*, 876 S.W. 2d 877, 908 (Tex. Crim. App. 1994).

26. Evidence of an attempted murder charge for which appellant had previously been acquitted. *Powell v. State*, 898 S.W. 2d 821, 829-31(Tex. Crim. App. 1994).

27. Evidence concerning a homicide, even though appellant had been no-billed by a grand jury for this homicide. *Rachal v.State*, 917 S.W. 2d 799, 808 (Tex. Crim. App. 1996).

28. Evidence that appellant tattooed the word "Satan" on his wrist after the murder, and drew a picture of Jesus with horns was admissible at the punishment phase. *Banda v. State*, 890 S.W. 2d 42,61-62 (Tex. Crim. App. 1994); *see also Conner v. State*, 67 S.W. 3d 192, 201 (Tex. Crim. App. 2001)("testimony concerning the meaning behind appellant's tattoos was relevant to appellant's character and hence to punishment").

29. Expert testimony concerning the availability of drugs in prison was relevant where appellant had injected the issue of drug use into his trial, and since the term "society" includes "prison society," the availability of drugs in that society becomes relevant to the issue of future dangerousness. *Jenkins v. State*, 912 S.W. 2d 793, 818 (Tex. Crim. App. 1995).

30. In *Skinner v. State*, 956 S.W. 2d 532, 545 (Tex. Crim. App. 1997), the state was permitted to prove that appellant repeatedly wanted his former wife to engage in sodomy while they were married. "Assuming the admission of this testimony was irrelevant and, therefore, inadmissible, we hold it was harmless beyond a reasonable doubt."

31. Although evidence from a jail guard that he had seen other death row inmates suddenly snap and become unexpectedly violent after long periods of good behavior may not have been very probative, it was at least marginally relevant to appellant's future dangerousness. *Bell v. State*, 938 S.W. 2d 35, 49 (Tex. Crim. App. 1996).

32. The trial court did not abuse its discretion in admitting a letter in which appellant described himself as a "trigga happy nigga," since this evidence was probative of his future dangerousness. *Green v. State*, 934 S.W. 2d 92, 104 (Tex. Crim. App. 1996).

33. Where appellant had been convicted of raping and killing a seven year old girl, evidence that he had once patted a nine year old on her "butt" was relevant. *Nenno v.*

State, 970 S.W. 2d 549, 564 (Tex. Crim. App. 1998).

34. Possession of sexually explicit magazines found in the same locked drawer as the seven year old victim's clothes, were relevant to appellant's motive to commit the sexual offense. They were also a sign of appellant's sexual obsession and a jury could have believed that this sexual obsession was likely to lead to further violence. *Nenno v. State*, 970 S.W. 2d 549, 564-65 (Tex. Crim. App. 1998). Even if the viewing of these materials is protected by the First Amendment, this does not necessarily exclude their relevance to future dangerousness. *Id*. at 564 n.12.

35. "Victim impact and character evidence of which a defendant is aware at the time he commits the crime is necessarily relevant to his future dangerousness and moral culpability." *Mosley v. State*, 983 S.W. 2d 249, 261 n.16 (Tex. Crim. App. 1998).

36. In *Saldano v. State*, 70 S.W. 3d 873, 884-85 (Tex. Crim. App. 2002), the state put on evidence through doctor Quijano that one of the factors associated with a defendant's future dangerousness was his race or ethnicity (Argentinean/Hispanic). Trial counsel did not object. *Id*. at 886. This issue was not preserved for appellate review, because of counsel's failure to object. *Id*. at 890. Because the error was unpreserved, "a decision on the admissibility of evidence that there is a correlation between ethnicity and recidivism cannot be reached, and we express no view on that issue." *Id*. at 891. Judges Price and Johnson vigorously dissented. Judge Price believed that the error was reviewable under both Rule 103(d) of the Texas Rules of Evidence and *Marin v. State*, 851 S.W. 2d 275 (Tex. Crim. App. 1993). "I the right to a capital sentencing proceeding without the taint of racial prejudice is not a right that requires, *at least*, an affirmative waiver, *it ought to be*." *Saldano v. State*, 70 S.W. 3d at 893 (Price, J., dissenting)(emphasis in original). Judge Johnson wrote: "I do not think that race or ethnicity should ever ba a consideratiom, in any degree, in the assessment of punishment." *Saldano v. State*, 70 S.W. 3d at 893 (Johnson, J., dissenting).

C. Evidence For The Defendant

1. The trial court abuses its discretion in excluding expert testimony that a person is less likely to commit crimes the older he gets. *Matson v. State*, 819 S.W.2d 839, 848-854 (Tex. Crim. App. 1991).

2. The defendant is entitled to offer psychiatric evidence that he will not be dangerous in the future. *Robinson v. State*, 548 S.W.2d 63, 77 (Tex. Crim. App. 1977).

3. The defendant is entitled to offer evidence that he has been well behaved in jail. *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986); *but cf. Hovila v. State*, 562 S.W.2d 243, 249 (Tex. Crim. App. 1978).

4. The defendant is entitled to offer testimony of qualified lay witnesses that he will not be a danger. *Cass v. State*, 676 S.W.2d 589, 592 (Tex. Crim. App. 1984).

5. The trial court erred in excluding evidence that the defendant's mother had an unstable marriage and that the defendant himself had once worked in a hospital and a church. *Burns v. State*, 761 S.W. 2d 353, 358 (Tex. Crim. App. 1988).

D. Not Everything Is Admissible

1. Texas, unlike some states, excludes evidence seized in violation of the State and Federal Constitutions. TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(a)(Vernon Supp. 2002). This has also been construed to preclude evidence seized in violation of a *statutory* exclusionary rule. *See Zimmerman v. State*, 750 S.W. 2d 194, 205 (Tex. Crim. App. 1988)(letter obtained in violation of article 38.22 is inadmissible); *accord Rumbaugh v. State*, 589 S.W.2d 414, 418 (Tex. Crim. App. 1979).

2. Hearsay which lacks an indicia of reliability sufficient to insure the integrity of the fact finding process is not admissible at the punishment phase. *See Porter v. State*, 578 S.W.2d 742, 746 (Tex. Crim. App. 1979); *cf. Trevino v. State*, 815 S.W.2d 592, 598 (Tex. Crim. App. 1991). *Beltran v. State*, 728 S.W. 2d 382, 386-87 (Tex. Crim. App. 1987)(rap sheet, even though relevant, was not admissible where the manner in which the state sought to prove these facts denied defendant his right to confront and cross examine witnesses against him); *Cortez v. State*, 571 S.W.2d 308, 312 (Tex. Crim. App. 1978)(improperly authenticated court records were not admissible); *see also DeLuna v. State*, 711 S.W.2d 44, 47 (Tex. Crim. App. 1986)(offense report containing hearsay); *but cf. Jackson v. State*, 819 S.W.2d 142, 154 (Tex. Crim. App. 1990)(jail records which satisfy the business records exception are admissible).

3. In *West v. State*, 720 S.W. 2d 511 (Tex. Crim. App. 1986), defendant objected to a Florida pen packet because it did not contain a jury waiver, arguing that the existence of such a waiver could not be presumed from a silent record. The court found that this was a collateral attack on the Florida judgment, and that therefore, the defendant bore the burden of either introducing all the papers in that cause to prove that there was no waiver, or to prove that Florida law requires the judgment to reflect a jury waiver on its face. Since defendant failed to carry this burden, the contention was rejected. *Id*. at 518-19. *West* is also interesting because of the way it treated the state's fall back position (which, as it turned out, was not needed), that the Florida conviction would have been admissible in any event because of the liberal admissibility of unadjudicated offenses at the punishment phase. The court rejected this argument, because it "ignores the fact that, should the judgment reflected by them be shown to be void, the papers would offer no more than mere hearsay as to the commission of the acts constituting the offense; although the State may, by proper evidence, demonstrate that appellant did commit the offense, a void judgment would not constitute proper evidence." *Id*. at 519 n.10.

4. On original submission in *Turner v. State*, 685 S.W. 2d 38, 44 (Tex. Crim. App. 1985), the court of criminal appeals held that the trial court erred in admitting irrelevant evidence of an assault on a jail guard in the absence of proof that defendant was involved in the assault. The error was found harmless, however, since the guard's testimony made it clear that defendant was not involved. On rehearing, the court found additionally that defendant's objection was insufficient to preserve error because it did not specifically complain that the evidence was irrelevant. *Turner v. State*, 698 S.W. 2d 673, 675 (Tex. Crim. App. 1985).

5. The trial court abused its discretion in admitting the opinion testimony of Dr. Grigson where that testimony was based on "facts and circumstances gleaned by him from ex-parte statements of third persons, and not established by legal evidence before a jury trying the ultimate issue to which the opinion relates." The opinion should instead be based

on facts either within the personal knowledge of the witness, or assumed from common or judicial knowledge or established by the evidence. *Holloway v. State*, 613 S.W. 2d 497, 503 (Tex. Crim. App. 1981); *see also Sanne v. State*, 609 S.W. 2d 762, 773-774 (Tex. Crim. App. 1980)(trial court erred in permitting forensic pathologist to testify about future dangerousness in absence of qualifications to render expert opinion, and without a showing that he had sufficient firsthand familiarity with defendant, but error was harmless).

6. Although extraneous offenses are generally admissible at punishment, a defendant can establish a due process violation if he shows unfair surprise. *See Spence v. State*, 795 S.W.2d 743, 759 (Tex. Crim. App. 1990)(conviction affirmed absent unfair surprise); *see also Matchett v. State*, 941 S.W. 2d 922, 931 (Tex. Crim. App. 1996)(appellant was not unfairly surprised where he was given full notice of the state's intent to prove prior misconduct together with the witness's written account of the incident); *cf. Vuong v. State*, 830 S.W. 2d 929, 942 (Tex. Crim. App. 1992)(Rule 404(c), which applies at punishment, does not contain a notice provision); *accord Guidry v. State*, 9 S.W. 3d 133, 154 (Tex. Crim. App. 1999); *Rojas v. State*, 986 S.W. 2d 241, 251 (Tex. Crim. App. 1998); *Adanandus v. State*, 866 S.W. 2d 210, 233 (Tex. Crim. App. 1993).

7. Although the child victim outcry statute--article 38.072--does not apply to the punishment phase of a capital trial, hearsay was properly admitted to rebut a charge of recent fabrication. *Moody v. State*, 827 S.W.2d 875, 893 (Tex. Crim. App. 1992).

8. Self-serving hearsay that appellant was remorseful is not admissible. *Lewis v. State*, 815 S.W.2d 560, 567-68 (Tex. Crim. App. 1991).

9. "Society" includes not only free citizens but also inmates in the penitentiary. "Therefore, the length of time appellant remains incarcerated is not relevant to the issue of whether he will be a continuing threat to society." Accordingly, evidence about parole is not admissible at the punishment phase. *Jones v. State*, 843 S.W.2d 487, 495 (Tex. Crim. App. 1992). *But see* TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(e)(2) (Vernon Supp. 2002).

10. Although extraneous misconduct is ordinarily admissible at punishment, it must be "relevant," and it is not relevant "unless the state also presents evidence that, if believed, establishes that the defendant himself committed the extraneous misconduct." *Harris v. State*, 827 S.W.2d 949, 961 (Tex. Crim. App. 1992)(admissible).

11. The trial court does not err in refusing to permit appellant's relatives from testifying that they desire to see him live. *Fuller v. State*, 827 S.W. 2d 919, 936 (Tex. Crim. App. 1992); *accord Jackson v. State,* 33 S.W. 3d 828, 834 (Tex. Crim. App. 2000)(the trial court does not err in excluding evidence from the appellant's family and friends regarding their feelings on the prospect of a death sentence and the impact appellant's execution would have on them).

12. Because the state's evidence was legally inadequate to connect appellant with the Aryan Brotherhood in any meaningful way, abstract proof about that organization's beliefs and activities was irrelevant to future dangerousness. *Fuller v. State*, 829 S.W.2d 191 (Tex. Crim. App. 1992)(no error, though, absent motion to strike).
.

13. Although an expert may testify that appellant will or will not be dangerous in the future, he may not testify that appellant should receive a life or a death

sentence. Testimony as to the appropriate punishment is of no assistance to the jury, and would only tend to confuse. *Sattiewhite v. State*, 786 S.W. 2d 271, 291 (Tex. Crim. App. 1989).

14. The trial court did not err in refusing to admit testimony from Dr. James Marquart that predictions made by juries in answering the future dangerous special issue have proven to be generally inaccurate. Dr. Marquart had not examined appellant, and did not propose to give hypothetical testimony about appellant. Marquart's testimony addressed no characteristic peculiar to appellant, but instead attacked the validity of the Texas death penalty scheme. This is not a question for the jury. His testimony was both irrelevant under Rule 401, and too confusing, under Rule 403. *Rachal v.State*, 917 S.W. 2d 799, 816 (Tex. Crim. App. 1996).

IX. FOR CASES OCCURRING BEFORE SEPTEMBER 1, 1991

A. Article 37.0711

1. "This article applies to the sentencing procedure in a capital case for an offense that is committed before September 1, 1991, whether the sentencing procedure is part of the original trial of the offense, an award of a new trial for both the guilt or innocence stage and the punishment stage of the trial, or an award of a new trial only for the punishment stage of the trial. For the purposes of this section, an offense is committed before September 1, 1991, if. every element of the offense occurs before that date." TEX. CODE CRIM. PROC. ANN. art. 37.0711, § 1 (Vernon Supp. 2002).

2. Article 37.0711 is virtually identical to article 37.071, except for the special issues to be submitted. Article 37.0711, in addition to the mitigation special issue, requires the submission of the pre-1991 issues, namely deliberation, future dangerousness, and provocation. Submission is as follows:

> On conclusion of the presentation of the evidence, the court shall submit the following three issues to the jury:
>
> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

TEX. CODE CRIM. PROC. ANN. art. 37.0711, § 3(b) (Vernon Supp. 2002).

3. If the above issues are answered affirmatively, the jury must answer one more issue:

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and

> background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

TEX. CODE CRIM. PROC. ANN. art. 37.0711, § 3(e) (Vernon Supp. 2002).

B. Case Law

1. It can be seen that, except for the mitigation special issue, the other three special issues are identical to those submitted under the version of article 37.071 that was in effect until 1991. Case law interpreting this earlier version of article 37.071 should be consulted when interpreting present article 37.0711. Earlier versions of this paper may be consulted for that law.

2. In *Powell v. State*, 897 S.W. 2d 307 (Tex. Crim. App. 1994), the offense was committed before September 1, 1991, but tried long after that date. The trial court failed to submit the deliberateness issue, in accordance with the new law. This was error. The legislature left no room to doubt that the new special issues were to be given only for offenses which occurred on or after September 1, 1991. For earlier offenses, the old law would apply. The trial court erred in not submitting the deliberateness issue, and this is true even though appellant specifically requested that it not do so. Since the effective dates of statutes are absolute requirements, they are not waivable or forfeitable. Appellant cannot consent to a sentence of death unauthorized by law. *Id*. at 317; *accord Smith v. State*, 907 S.W. 2d 522, 534 (Tex. Crim. App. 1995). In *Prystash v. State*, 3 S.W. 3d 522, 529-32 (Tex. Crim. App. 1999), the court overruled *Powell*, holding that "[w]e should not have permitted Powell to raise as error an action that he procured."

3. The new statute is not unconstitutionally wanton or freakish because of the deletion of the deliberateness issue. *Sonnier v.State*, 913 S.W. 2d 511, 519-20 (Tex. Crim. App. 1995); *see also Cantu v. State*, 939 S.W. 2d 627, 643 (Tex. Crim. App. 1997)(appellant failed to show how deletion of the deliberateness issue caused the Texas statute to fail to narrow the class of death eligible persons).

4. Because deliberateness is a question of historical fact, it may be reviewed for factual sufficiency under the *Clewis* standard. *Wardrip v. State*, 56 S.W. 3d 588, 591 (Tex. Crim. App. 2001)(finding the evidence factually sufficient under *Clewis*).

5. In *Smith v. State*, ___ S.W. 3d ___ No. 71, 496 (Tex. Crim. App. May 8, 2002), the deliberateness special issue was not submitted at his second trial, and, as a result, the court reversed and remanded for a new punishment phase. On appeal, appellant made several assertions. First, appellant claimed that the court's failure to reverse and remand for an entirely new trial after the second trial violated the constitution, and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The court disagreed. Deliberateness is not an element of capital murder. Even if it were, deliberateness was answered by the jury and proved by the state beyond a reasonable doubt. And, *Apprendi* does not require the same jury to hear guilt and punishment. "rule. We may reverse and remand any capital case for a punishment hearing alone before a new jury." *Id*. at slip op. 22. Second, the state did not waive its right to submission of this special issue at the third trial, since it did

nothing to prevent its submission at the second trial. *Id*. at 23. Third, the doctrine of collateral estoppel does not prevent submission of the deliberateness issue at the third trial, because this issue was not determined at the second trial. *Id*. at 24.

C. Penry II

1. Following the reversal of his conviction by the Supreme Court, but before the enactment of article 37.0711, Mr. Penry was retried. The trial court once again unsuccessfully instructed the jury on mitigating evidence. "Any realistic assessment of the manner in which the supplemental instruction operated would therefore lead to the same conclusion we reached in *Penry I*: '[A] reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence.'" *Penry v. Johnson*, 121 S. Ct. 1910, 1924 (2001).

2. *Penry II* will clearly have very limited application. All cases tried after September 1, 1991 are governed by article 37.0711, which requires an instruction much different than that given by the trial court in *Penry II*. If your case was tried before that date, however, read *Penry II* to learn how not to instruct the jury on mitigating evidence.

3. *Penry II* makes reference to a "clearly drafted catchall instruction on mitigating evidence" as something that might comply with *Penry I*. Then it refers to the instruction currently mandated by article 37.071(2)(e)(1). While not explicitly holding that this instruction is constitutional, the Court does commend it for its "brevity and clarity." *Penry v. Johnson*, 121 S. Ct. 1910, 1924 (2001).

X. ESTELLE V. SMITH: PSYCHIATRIC EVIDENCE AND THE FIFTH AND SIXTH AMENDMENTS

A. Although Psychiatric Evidence Is Generally Admissible, Warnings And Notice Must Be Given

1. Qualified psychiatric testimony is admissible at the punishment phase of a capital murder trial on the question of future dangerousness. *Barefoot v. Estelle*, 463 U.S. 880, 906 (1983).

2. However, such testimony is ordinarily inadmissible if the psychiatrist who examines the defendant does not advise him that he had a right to remain silent, and that any statement he makes can be used against him at the punishment phase of the trial. Admission of this testimony violates the Fifth Amendment. *Estelle v. Smith*, 451 U.S. 454, 469 (1981). Additionally, where the defendant's right to counsel has attached, and counsel is not notified in advance of the psychiatric examination, the defendant's Sixth Amendment right is violated. *Id*. at 471.

3. *Smith* makes it clear that, in addition to the standard *Miranda*-type warning, the psychiatrist must specifically advise that statements made can be used against him at the punishment phase in a capital trial. *Hernandez v. State*, 805 S.W.2d 409, 411 (Tex. Crim. App. 1990); *accord Wilkens v. State*, 847 S.W.2d 547, 554 (Tex. Crim. App. 1992); *see also Powell v. Texas*, 492 U.S. 680, 681 (1989); *Estelle v. Smith*, 451 U.S. 454, 468 (1981).

B. Reversals For Smith Error

1. Appellant's Fifth Amendment right was violated when the examining doctors did not inform him that what he said could be used against him in court, and,

in particular, at the punishment phase. *Wilkens v. State*, 847 S.W.2d 547, 554 (Tex. Crim. App. 1992).

2. Defendant's Fifth Amendment right was violated when the examining psychiatrist did not advise him that he had a constitutional right not to answer questions put to him. That the defendant's attorneys had advised him not to speak to a psychiatrist or anyone else at some indefinite date before the interview does not change the result. "Advising a client not to talk is *not* the same as informing him at the beginning of interrogation that he has 'a constitutional right not to answer the questions put to him.'" *Ex parte Chambers*, 688 S.W.2d 483, 484-85 (Tex. Crim. App.1984). The concurring opinion by Judge Campbell, joined by five other judges, would also have found a Sixth Amendment violation, since counsel representing the defendant have a right to be made aware of a pending psychiatric evaluation and to advise and prepare their client prior to the evaluation. *Id*. at 485.

3. Appellant's Sixth Amendment right was violated where counsel was notified that psychiatrist Grigson would examine his client for competency and sanity, but was not notified that the examination would encompass the issue of future dangerousness or appellant's personality. "Thus, appellant was denied the assistance of counsel in making the significant decision of whether to submit to the examination and to what end Grigson's findings could be employed during the trial." *Mays v. State*, 653 S.W.2d 30, 35 (Tex. Crim. App. 1983).

4. Defendant's Fifth and Sixth Amendment rights were violated where he was not informed that he did not have to participate, that he could remain silent, that his statements could be used at the punishment phase of his trial, and where his attorneys were not notified in advance that the examination was being made to prepare the psychiatrist to testify on future dangerousness. *Ex parte English*, 642 S.W.2d 482, 482 (Tex. Crim. App. 1982)(habeas relief denied on rehearing after Governor commuted sentence to life).

5. Defendant's Fifth Amendment rights were violated where defendant was not told that his answers could be used to produce evidence against him at the punishment phase, even though the psychiatrist told him he did not have to answer any questions. *Ex parte Demouchette*, 633 S.W.2d 879, 880 (Tex. Crim. App. 1982).

6. Defendant's Fifth Amendment right was violated where the record does not reflect that he was advised of his right to remain silent and that any statement he made could be used against him at punishment. *Fields v. State*, 627 S.W.2d 714, 718 (Tex. Crim. App. 1982).

7. Defendant's Fifth and Sixth Amendment rights were violated where the record does not reflect that he was advised to remain silent, that any statement he made could be used against him at punishment, or that he was afforded a chance to consult with counsel prior to the examination. *Clark v. State*, 627 S.W.2d 693, 696-97 (Tex. Crim. App. 1982)(affirmed on rehearing after Governor commuted sentence to life).

8. *Thompson v. State*, 621 S.W.2d 624, 627 (Tex. Crim. App. 1981)(no notice to counsel).

9. Merely warning the defendant that he has a right to remain silent and that anything he says can be used against him does not satisfy *Smith*. "To apprise a capital defendant fully of his Fifth Amendment rights before subjecting him to a court-ordered

psychiatric examination, the defendant must be told that it will 'be used to gather evidence necessary to decide whether, if convicted, he should be sentenced to death.'" *Gardner v. Johnson*, 247 F.3d 551, 558 (5th Cir. 2001). This requirement is not met by warning the defendant that he is being evaluated for dangerousness, and to determine if he is a continuing threat to society.

C. No Error Under Smith

1. *Smith* error is not presented where the state's psychiatric witness testifies based on hypothetical questions rather than a personal interview. *E.g.*, *Vanderbilt v. State*, 629 S.W.2d 709, 720 (Tex. Crim. App. 1981).

2. In *Ex parte Woods*, 745 S.W. 2d 21 (Tex. Crim. App. 1988), the testifying psychiatrist had examined defendant. The bulk of his testimony was framed in terms of hypothetical questions, but on one occasion, the state did ask, "if that hypothetical situation applied to this defendant, knowing his mental background as you do, can you tell us whether it's more likely than not that this defendant would commit criminal acts of violence that would constitute a continuing threat to society?" That is, the question was not purely hypothetical. The court found no *Smith* error, since, in the context of the entire interrogation of the witness, it could not say "that the answers to the hypothetical question were influenced by and derived from the court-ordered pretrial psychiatric examination. [The witness] indicated in his responses he was basing his answers upon the hypothetical, not upon the interview with applicant or the applicant's answers to any questions." *Id*. at 26. *Cf. White v. Estelle*, 720 F. 2d 415 (5th Cir. 1983).

3. There was no Fifth Amendment violation under *Smith* where the psychiatrist's warnings "substantially complied" with *Miranda v. Arizona* and article 38.22 of the Code of Criminal Procedure. *Bennett v. State*, 766 S.W. 2d 227, 231 (Tex. Crim. App. 1989).

4. There was no error where defendant was warned that anything he said could be used *either* for *or* against him at punishment. *Gardner v. State*, 733 S.W. 2d 195, 202-203 (Tex. Crim. App. 1987).

5. There was no Sixth Amendment violation under *Smith* where counsel was notified that defendant was to be examined for sanity, competency and dangerousness, even though the exact time of the examination was not given. This gave counsel adequate notice of the examination and its scope, in order to properly consult with defendant. A defendant does not have the right to have counsel present during a psychiatric examination either under the Fifth or Sixth Amendment. *Bennett v. State*, 766 S.W. 2d 227, 231 (Tex. Crim. App. 1989). *See Gardner v. State*, 733 S.W. 2d 195, 201-202 (Tex. Crim. App. 1987)("informal discussions" were adequate notice).

6. The state's psychiatrist did not have to give the *Miranda* warnings where the defense attorneys sought out the psychiatrist and requested a competency and sanity evaluation, and were present when such examination occurred. Defendant's responses during these interviews were not compelled. *Granviel v. State*, 723 S.W. 2d 141, 148 (Tex. Crim. App. 1986).

7. There was no error under *Smith* where the interviews were not compelled, but were at defendant's insistence, while he was a prison inmate. *Tompkins v. State*, 774 S.W.2d 195, 214-15 (Tex. Crim. App. 1987).

8. *Smith* is inapplicable where the statements in question were given while

appellant was incarcerated as a juvenile at TYC on another unrelated case. The Fifth Amendment is not implicated because appellant was not confronted by someone acting essentially as an agent of the state whose function it was to gather evidence in connection with the crime of incarceration. The Sixth Amendment right to counsel had not yet attached. *Nelson v. State*, 848 S.W. 2d 126, 135 (Tex. Crim. App. 1992); *see Jenkins v. State*, 912 S.W. 2d 793, 811 (Tex. Crim. App. 1995)(no *Smith* error where interviews occurred more than four years prior to the instant offense and were not in connection with future dangerousness).

9. In *Purtell v. State*, 761 S.W. 2d 360 (Tex. Crim. App. 1988), *cert. denied*, 490 U.S. 1059 (1989), appellant complained that the psychologist had not specifically warned him that the interview could be used during the punishment phase. The court of criminal appeals rejected this claim, holding that *"Miranda* does not require an interrogating officer, or anyone else, to inform a defendant of the possible manner in which a statement can be used against him." *Id*. at 375. This holding seems to directly conflict with *Estelle v. Smith*, 451 U.S. 454, 469 (1981), which says that psychologists must warn the defendant that his statements can be used against him at the punishment phase. *Accord Powell v. Texas*, 492 U.S. 680, 681 (1989); *Wilkens v. State*, 847 S.W.2d 547, 554 (Tex. Crim. App. 1992); *Hernandez v. State*, 805 S.W.2d 409, 411 (Tex. Crim. App. 1990); *See Gardner v. Johnson*, 247 F.3d 551, 558 (5th Cir. 2001).

10. In *Hughes v. State*, 897 S.W. 2d 285 (Tex. Crim. App. 1994), the psychiatrist interviewed appellant twice. The first interview was illegal under *Smith*, and the second was legal. Because his testimony was based only on the second, legal, interview, there was no *Smith* error. *Id*. at 304.

11. A psychiatrist's testimony as a rebuttal witness in the guilt/innocence phase of the trial was not the result of a court-ordered examination, nor did it relate to appellant's future dangerousness. "It appears to us that the testimony of a psychiatrist or other mental health professional stemming from routine treatment provided to a prisoner while incarcerated is inherently different from the testimony of such professionals when they are appointed by the court for the specific purpose of evaluating a defendant's competency to stand trial." *Moore v. State*, 999 S.W. 2d 385, 403 (Tex. Crim. App. 1999).

D. Waiver

1. The court found *Smith* inapplicable in *Rumbaugh v. State*, 629 S.W. 2d 747 (Tex. Crim. App. 1982), where the state's psychiatrists testified, in rebuttal to defense psychiatrists on the question of sanity, that defendant was not insane, but had an antisocial personality. The state's psychiatrists did not testify that defendant would be a continuing threat to society, but in response to a question by the *defense* attorney, the doctor answered that the defendant should be killed. *Id*. at 755-56.

2. *Smith* error does not occur where the defendant offers psychiatric testimony at the punishment phase and the state rebuts this with psychiatric testimony. *Griffin v. State*, 665 S.W.2d 762, 769 (Tex. Crim. App. 1983).

3. *Smith* error is waived where the defendant raises the affirmative defense of insanity at the first phase of the trial, then asks the jury to reconsider the insanity evidence at the punishment phase. *Penry v. State*, 691 S.W.2d 636, 652 (Tex. Crim. App. 1985); *see Buchanan v. Kentucky*, 483 U.S. 402, 424-25 (1987)(neither Fifth nor Sixth Amendment violated when prosecution rebuts defendant's psychological evidence with reports from an

examination requested by the defendant); *see also Ripkowksi v. State,* 61 S.W. 3d 378, 387 (Tex. Crim. App. 2001)(appellant loses under the Fifth Amendment where he contacted the jail mental health experts asking for help, and the state called these witnesses to rebut expert testimony put on by appellant; appellant relinquished his right to counsel under the Sixth Amendment when he sought out mental health treatment on his own).

4. Calling this a case of first impression, the court held that *Smith* error is waived where the defendant introduces psychiatric testimony on the issue of insanity at the guilt-innocence phase of the trial. *Powell v. State*, 742 S.W. 2d 353, 357-58 (Tex. Crim. App. 1987), *vacated and remanded*, 487 U.S. 1230 (1988), *aff'd on remand*, 767 S.W. 2d 759 (1989), *rev'd*, 492 U.S. 680 (1989). The court also noted that the defendant waived any *Smith* error by asking the jury to consider this evidence in answering the special issues. *Id*. at 358-59. Finally, the court found error, if any, to be harmless. *Id*. at 359-60. Powell again went to the Supreme Court, and the Court again reversed the court of criminal appeals. The Court found that a defendant clearly does not waive his *Sixth Amendment* right--notice to counsel--by putting on a sanity defense. *Powell v. Texas*, 492 U.S. 680, 686 (1989). The Court also noted that "[n]othing in *Smith*, or any other decision of this Court, suggests that a defendant opens the door to the admission of psychiatric evidence on future dangerousness by raising an insanity defense at the guilt stage of the trial." *Id*. at 685 n.3. *But see Mays v. State*, 653 S.W. 2d 30, 31- 35 (Tex. Crim. App. 1983)(reversing for *Smith* error where defendant had injected competency and sanity issues *prior to* the psychiatric interview, but where no such evidence was presented at trial).

5. Waiver of the Fifth Amendment privilege at the guilt innocence phase of the trial by putting on an insanity defense does *not* waive objection to unwarned psychiatric testimony at the punishment phase. *Wilkens v. State*, 847 S.W.2d 547, 553 (Tex. Crim. App. 1992).

6. In *Clark v. State*, 627 S.W. 2d 693 (Tex. Crim. App. 1982), defendant did not initiate the evaluation by the state's expert, nor did he raise competency or sanity during the first phase of the trial. At the punishment phase, the state was the first to put on psychiatric testimony to support future dangerousness. Only after the state's witness testified did the defendant call his own witness who testified as to the first two special issues. The court held that defendant did not waive his *Smith* claim by calling his own expert, since "the introduction of evidence seeking to meet, destroy or explain erroneously admitted evidence does not waive the error or render the error harmless." *Id*. at 696.

7. There was no error under *Smith* where the interviews were not compelled, but were at defendant's insistence, while he was a prison inmate. *Tompkins v. State*, 774 S.W.2d 195, 214-15 (Tex. Crim. App. 1987).

8. Appellant "opened the door" to unwarned testimony by introducing psychiatric records and soliciting the psychiatrist's opinion about those records, thereby leaving the jury with the false impression that appellant was paranoid schizophrenic rather than anti-social. *Hernandez v. State*, 805 S.W.2d 409, 412 (Tex. Crim. App. 1990).

9. There was no *Smith* error where the state rebutted appellant's guilt/innocence evidence of retardation with the testimony of a psychiatrist. *Penry v. State*, 903 S.W. 2d 715, 758-59 (Tex. Crim. App. 1995). Nor is *Smith* implicated when the psychiatrist does not base his opinion on his examination of

appellant. Finally, *Smith* does not control where the psychiatric interview in question occurred several years before the instant crime. *Id*.

10. The appellate court need not address a *Smith* claim where counsel does not object at trial. *Collier v. State*, 959 S.W. 2d 621, 626 (Tex. Crim. App. 1997).

E. Harmless Or Harmful?

1. The Texas Court of Criminal Appeals has held that *Smith* error can be harmless. *See Satterwhite v. State*, 726 S.W.2d 81, 93 (Tex. Crim. App. 1986), *rev'd*, 486 U.S. 249 (1988).

a. Certiorari was granted in *Satterwhite*, and the Supreme Court reversed. Although the Court agreed that *Smith* error can be harmless, it was not harmless here, since the state did not prove beyond a reasonable doubt that the psychiatric testimony concerning future dangerousness did not influence the jury. *Satterwhite v. Texas*, 486 U.S. 249, 260 (1988); *accord Wilkens v. State*, 847 S.W.2d 547, 554 (Tex. Crim. App. 1992).

b. *Smith* error was found not to be harmless where the state's only witness was the tainted psychiatrist, and it could not be said, in light of the circumstances of the offense, that the psychiatrist's testimony did not contribute to the punishment verdict. *Clark v. State*, 627 S.W. 2d 693, 698 (Tex. Crim. App. 1982).

c. *Smith* error is not harmless on facts strikingly similar to *Satterwhite*. *Cook v. State*, 821 S.W.2d 600, 605 (Tex. Crim. App. 1991).

d. *Smith* error was harmless in *Ex parte Barber*, 879 S.W. 2d 889, 891 (Tex. Crim. App. 1994), where the state introduced evidence of other murders, and de-emphasized the psychiatric testimony in its argument.

F. Commutation

1. In *Ex parte English*, 642 S.W. 2d 482 (Tex. Crim. App. 1982), the court granted habeas relief for *Smith* error. After its opinion was rendered, the Governor commuted English's sentence to life imprisonment. The court then granted the state's motion for rehearing, and denied habeas relief, holding that "any error in light of *Estelle v. Smith* . . . no longer exists." *Id*. at 483; *accord Clark v. State*, 627 S.W. 2d 693, 704 (Tex. Crim. App. 1982); *Rodriguez v. State*, 626 S.W. 2d 35, 36 (Tex. Crim. App. 1982); *Wilder v. State*, 623 S.W. 2d 650, 651 (Tex. Crim. App. 1981); *Simmons v. State*, 623 S.W. 2d 416, 417 (Tex. Crim. App. 1981).

G. The Contemporaneous Objection Rule

1. Generally a contemporaneous objection is necessary to preserve *Smith* error. And, the objection at trial must be quite specific and must comport with the objection on appeal. *Gardner v. State*, 733 S.W. 2d 195, 201, 203 (Tex. Crim. App. 1987); *see Tompkins v. State*, 774 S.W.2d 185, 214 (Tex. Crim. App. 1987)(*Miranda* objection does not specifically invoke *Smith*).

2. *Smith* error was unpreserved where counsel's trial objection was only that the psychiatrist's name had not appeared on the state's witness list. *Spence v. State*, 795 S.W.2d 743, 760-62 (Tex. Crim. App. 1990)(nor will motion in limine preserve error).

3. Failure to object may not constitute a default if the case was tried before the *Smith* decision was rendered. *Ex parte*

Chambers, 688 S.W. 2d 483, 484 (Tex. Crim. App. 1984). "[W]here a defect of constitutional magnitude has not been established at the time of the trial, the failure of counsel to object does not constitute waiver." *Cook v. State*, 741 S.W. 2d 928, 944 (Tex. Crim. App. 1987); *see Ex parte Demouchette*, 633 S.W. 2d 879, 881 n.1 (Tex. Crim. App. 1982); *cf. Granviel v. State*, 723 S.W. 2d 141, 149 (Tex. Crim. App. 1986)(failure to object waives error in case tried after *Smith*).

4. A Sixth Amendment claim is waived where trial counsel failed to specifically articulate this claim as distinct from his Fifth Amendment claim. *Ripkowksi v. State,* 61 S.W. 3d 378, 386 (Tex. Crim. App. 2001).

H. Retroactivity

1. *Estelle v. Smith* is retroactive. *Ex parte Woods*, 745 S.W. 2d 21, 25 (Tex. Crim. App. 1988).

I. Other Issues Relating To Psychiatric Evidence

1. "[T]he law does not permit the State to have a psychiatrist appointed for the purpose of examining the defendant for evidence relating solely to his future dangerousness." *McKay v. State*, 707 S.W. 2d 23, 38 (Tex. Crim. App. 1985).

2. Although an expert may give his opinion based solely upon hypothetical facts, without examining the defendant personally, the assumptions of the hypotheticals must be based on facts either in the record or which can be reasonably assumed from the record. *Pyles v. State*, 755 S.W. 2d 98, 118 (Tex. Crim. App. 1988). Reversible error will not occur, however, if the erroneous assumptions could not have adversely influenced the expert's opinion. *Id*. at 118-122. And, an objection must be made to preserve error. *Id*. at 122. *Cf*. *Cook v. State*, 858 S.W.2d 467, 474 (Tex. Crim. App. 1993)(hypotheticals ambiguous but supported by the record).

3. "Although the hypothetical question must be based on facts in evidence, there is no requirement in the rules of criminal evidence that these facts have been proved beyond a reasonable doubt. This Court has long recognized that a trial court may admit, *for whatever value it may have to a jury*, psychiatric testimony concerning the defendant's future behavior at the punishment phase of a capital murder trial." *McBride v. State*, 862 S.W. 2d 600, 610 (Tex. Crim. App. 1993).

4. The state violates defendant's Fifth Amendment right to remain silent by proving that defendant and his attorneys refused to allow defendant to meet with the state's psychiatrist. Preservation of this error, however, requires a specific objection, based on the Fifth Amendment. An objection based on hearsay is insufficient. *Pyles v. State*, 755 S.W. 2d 98, 122 (Tex. Crim. App. 1988).

5. The state's psychiatrist testified that he was unable to evaluate appellant because he refused to cooperate. The trial court then disallowed one of appellant's experts from testifying at the punishment phase. This was not error. "Limiting the testimony of the defendant's rebuttal expert to the same extent that the State's expert was limited due to the defendant's failure to cooperate is a fair and reasonable sanction. Just as the defendant's Fifth Amendment rights no longer protect him from being ordered to submit to an examination in these circumstances, neither do they protect him from the trial court's ability to enforce such order." *Soria v. State*, 933 S.W. 2d 46, 59 (Tex. Crim. App. 1996). The court in *Soria* refused to follow a plurality decision in *Bradford v. State*, 873 S.W. 2d 15 (Tex. Crim. App. 1993).

Bradford was overruled in *Lagrone v. State*, 942 S.W. 2d 602, 610 (Tex. Crim. App. 1997), where the court held that if the defense introduces or demonstrates the intent to put on expert testimony concerning future dangerousness, the trial court may order the defendant to submit to an independent, state-sponsored psychiatric exam prior to the actual presentation of the defense's expert testimony. *Id*. "The essential principles as work in *Lagrone* and *Soria* are waiver and parity. . . ." *Chamberlain v. State*, 998 S.W. 2d 230, 234 (Tex. Crim. App. 1999). In *Chamberlain*, the trial court entered a pre-trial order that appellant submit to psychiatric examination by the state if he intended to introduce psychiatric testimony based on an examination by a defense expert. At the punishment phase, the state called an expert who testified hypothetically, based on the facts of the case, rather than an examination of appellant. Afterwards, the defense announced its intent to rebut the state's expert with its own expert, who had interviewed appellant. The trial court barred any testimony based on an interview unless appellant submitted to an interview with the state's witness. This decision was affirmed on appeal. It is immaterial that appellant sought to introduce his testimony in rebuttal to the state's evidence. "Appellant cannot claim a fifth amendment privilege in refusing to submit to the State's psychiatric examinations and then introduce evidence gained through his participation in his own psychiatric examination." *Id*. at 233-34.

6. Although the state should notify the defense of its punishment witnesses prior to trial, reversal is not required where appellant should have reasonably anticipated the use of a psychiatrist, in light of the wide-spread use of such evidence in capital cases. *Martinez v. State*, 867 S.W.2d 30, 39 (Tex. Crim. App. 1993).

7. The trial court does not abuse its discretion in permitting the state's psychiatrist to observe the testimony of two defense witnesses at the punishment phase. *Martinez v. State*, 867 S.W.2d 30, 40 (Tex. Crim. App. 1993); *but cf. Moore v. State*, 882 S.W.2d 844, 848 (Tex. Crim. App. 1994)(trial court erred in permitting state's expert to hear testimony of defense witness, but error was harmless).

8. In *Penry v. State*, 903 S.W. 2d 715 (Tex. Crim. App. 1995), a search warrant was issued under article 18.02 of the Texas Code of Criminal Procedure to provide the state with a neurological examination of appellant. Since appellant raised his mental status in both phases of the trial, it was permissible for the trial court to order him tested, under *Estelle v. Smith*. Accordingly, it is not necessary to consider the applicability of article 18.02. *Id*. at 744.

9. The defendant does not possess the right to have counsel present during a psychiatric examination under either the Fifth or Sixth Amendments. *Lagrone v. State*, 942 S.W. 2d 602, 612 (Tex. Crim. App. 1997).

J. Dr. Grigson

1. Judge Baird's concurring and dissenting opinion in *Fuller v. State*, 829 S.W.2d 191, 214 (Tex. Crim. App. 1992), suggests that a possible challenge to Dr. Grigson's testimony is that he lacks a sufficient basis for his opinion, in violation of Rule 705(c) of the Texas Rules of Criminal Evidence.

2. In *Clark v. State*, 881 S.W. 2d 682 (Tex. Crim. App. 1994), the court held that the trial court had erred under Rule 612(a) in not permitting appellant to impeach Dr. Grigson with prior inconsistent testimony about how many people he had examined and testified about over the years. *Id*. at 695. The error was

harmless, though. *Id*. at 697.

3. A report concerning subsequent criminal acts by ten convicts, some of whom Dr. Grigson had testified about, which was written by the Dallas County District Attorney's Office, and possessed by that office and by Dr. Grigson, might be *Brady* material. *Moody v. Johnson*, 139 F. 3d 477, 483 n. 3 (5th Cir. 1998).

XI. THE LAW OF PARTIES AT THE PUNISHMENT PHASE

A. Enmund And Tison In General

1. In *Enmund v. Florida*, 458 U.S. 782 (1982), the Supreme Court held that it was constitutionally disproportionate and therefore impermissible to execute a defendant who neither kills, attempts to kill, nor intends to kill. *Id*. at 797; *see Rector v. State*, 738 S.W.2d 235, 244 (Tex. Crim. App. 1986).

2. In *Tison v. Arizona*, 481 U.S. 137 (1987), that standard was modified. Now we know that the death penalty is not disproportionate for a defendant whose participation in a felony murder is major and whose mental state is one of reckless indifference. *Id*. at 158.

B. The Effect Of Enmund And Tison In Texas

1. *Tison's* impact on Texas law will at most be indirect, since our statutes generally require that the defendant kill intentionally or knowingly to be guilty of capital murder. *See Lane v. State*, 743 S.W.2d 617, 627 (Tex. Crim. App.1987).

2. The court of criminal appeals has held that the "*Enmund* . . . and *Tison* have no affect on the Texas capital sentencing scheme." *Cuevas v. State*, 742 S.W.2d 331, 343 (Tex. Crim. App. 1987).

> The Supreme Court opinions addressed the issue of whether the eighth amendment prohibits a state from authorizing the death penalty for certain felony murders. Texas has a modified type of felony murder doctrine. *See* V.T.C.A., Penal Code Sec. 19.02(a)(3). However, felony murder in Texas is not a capital offense; it is a felony of the first degree. To be convicted of a capital felony in Texas, a defendant must intentionally or knowingly cause the death of an individual in certain enumerated circumstances. *See* V.T.C.A., Penal Code Sec. 19.03. Of course, application of the law of parties at the guilt phase means it is possible for a non-trigger-man, such as appellant, to be convicted of a capital offense. However, a capital defendant will be assessed the death penalty only if the jury answers the special issues of Art. 37.071(b) in the affirmative. Special issue number one requires the jury to determine "whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result." Because the law of parties may not be applied in answering this issue, an affirmative verdict is possible only when the jury finds that the defendant's own conduct satisfies both parts of special issue number one. *Therefore,* the *first special issue of Art. 37.071(b) includes the Enmund and Tison findings*. The Supreme Court opinions in *Enmund* . . . and *Tison* have placed no additional burden on the Texas capital sentencing scheme.

Id. (emphasis in original). *See Tucker v. State*,

771 S.W. 2d 523, 529-530 (Tex. Crim. App. 1988); *accord McFarland v. State*, 928 S.W. 2d 482, 517 (Tex. Crim. App. 1996).

3. In *Lawton v. State*, 913 S.W. 2d 542 (Tex. Crim. App. 1995), appellant complained that article 37.071 § 2(b)(2) violated the principles set forth in *Tison* and *Enmund* because it permits a death penalty upon the mere finding that appellant anticipated that a human life would be taken. The court disagreed, noting that appellant could not even have been convicted of capital murder unless the jury had already found that he harbored the specific intent to promote or assist the commission of intentional murder. "In short, that the jury may have found that appellant only anticipated that death would result under Article 37.071 is inconsequential to *Enmund* and *Tison* concerns; the jury had already found that appellant intended to at least promote or assist in the commission of *an intentional murder*." *Id*. at 555.

XII. VICTIM IMPACT EVIDENCE

A. *Booth* And *Payne*

1. At issue in *Booth v. Maryland*, 482 U.S. 496 (1987), was the admissibility of a written "victim impact statement" at the punishment phase of a capital murder trial. This statement was based on interviews with the family of the victims of the crime Booth had been convicted of. It emphasized the outstanding personal qualities of the victims, the emotional impact of the crimes on the family, and the family members's opinions and characterizations of the crimes and the defendant. *Id*. at 502. The Supreme Court held that such evidence is "irrelevant to a capital sentencing decision, and that its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." *Id*. at 502-503. The evidence was objectionable because it focused on the character and reputation of the victims and their family and not on the individual defendant, his record, and the circumstances of the crime, in violation of the Eighth Amendment.

2. *Booth* was at least partially overruled in *Payne v. Tennessee*, 501 U.S. 808 (1991), where the Court held that a jury is entitled to have before it evidence of the specific harm caused by the defendant. "A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." *Id*. at 827. The *Payne* Court did not pass upon, and thus did not overrule, that part of *Booth* which precluded evidence "of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence." *Id*. at 830 n.2.

3. *Payne* simply holds that the Eighth Amendment does not forbid victim impact testimony. It does not, of course, require the admission of such evidence. Admissibility of victim impact evidence is governed by state law. *Goff v. State*, 931 S.W. 2d 537, 554-55 (Tex. Crim. App. 1996).

B. The Criteria For Admissibility Of Victim Impact Testimony In Texas

1. Recognizing that its victim impact\character jurisprudence has been sometimes inconsistent and confusing, the court announced the following rule to be applied in the future:

> Both victim impact and victim character evidence are admissible, in the context of the mitigation special issue, to show the uniqueness of the victim, the harm

caused by the defendant, and as rebuttal to the defendant's mitigating evidence. Rule 403 limits the admissibility of such evidence when the evidence predominantly encourages comparisons based upon the greater or lesser worth or morality of the victim. When the focus of the evidence shifts from humanizing the victim and illustrating the harm caused by the defendant to measuring the worth of the victim compared to other members of society then the State exceeds the bounds of permissible testimony. We recognize that this standard does not draw a bright and easy line for determining when evidence concerning the victim is admissible and when it is not. Trial judges should exercise their sound discretion in permitting some evidence about the victim's character and the impact on others' lives while limiting the amount and scope of such testimony. Considerations in determining whether testimony should be excluded under Rule 403 should include the nature of the testimony, the relationship between the witness and the victim, the amount of testimony to be introduced, and the availability of other testimony relating to victim impact and character. And, mitigating evidence introduced by the defendant may also be considered in evaluating whether the State may subsequently offer victim- related testimony.

Mosley v. State, 983 S.W. 2d 249, 262 (Tex. Crim. App. 1998); *accord Jackson v. State*, 992 S.W. 2d 469, 480 (Tex. Crim. App. 1999).

2. In *Mosley v. State*, 983 S.W. 2d 249, 262 (Tex. Crim. App. 1998), the court held that the witnesses do not absolutely have to be related to the victim. "More distantly related family members, close friends, or coworkers, may, in a given case, provide legitimate testimony. That will depend on the closeness of the personal relationship involved, the nature of the testimony, and the availability of other witnesses to provide victim-related testimony. We do note that victim impact and character testimony from strangers, including those who learned about the case in the media and those who did so as participants in a criminal investigation, will rarely, if ever, be admissible under Rule 403."

3. The court "caution[ed] that victim impact and character evidence may become unfairly prejudicial through sheer volume. Even if not technically cumulative, an undue amount of this type of evidence can result in unfair prejudice under Rule 403. Hence, we encourage trial courts to place appropriate limits upon the amount, kind, and source of victim impact and character evidence." *Mosley v. State*, 983 S.W. 2d 249, 263 (Tex. Crim. App. 1998).

4. Victim impact and character is relevant only to the mitigation issue. It is "patently irrelevant" to future dangerousness. *Mosley v. State*, 983 S.W. 2d 263-64 (Tex. Crim. App. 1998). Thus, this evidence "would be wholly irrelevant if appellant affirmatively waived submission and reliance upon the mitigation special issue." *Id.* In *Jackson v. State,* 33 S.W. 3d 828, 833-34 (Tex. Crim. App. 2000), the court relied on a footnote in *Mosley* to hold that victim impact evidence of which the defendant was aware of at the time he committed the crime is "necessarily relevant" to the defendant's future dangerousness. In a concurring opinion, Judge Meyers observed that "[t]he majority quietly creates new law today, elevating to a holding dicta previously contained in a footnote." *Jackson v. State,* 33 S.W. 3d 828, 834 (Tex. Crim. App. 2000)(Meyers, J., concurring).

5. "Victim impact evidence is not subject to a burden of proof because it is relevant to the mitigation special issue instead of to a statutory aggravator found in the definitions of capital murder." *Prystash v.*

State, 3 S.W. 3d 522, 536 (Tex. Crim. App. 1999).

6. The Eighth Amendment does not erect a "*per se* bar to victim character/impact evidence." *Tong v. State*, 25 S.W. 3d 707, 711 (Tex. Crim. App. 2000).

C. Held Admissible

1. The complainant's sister was properly allowed to testify that it was very important to her and her family to get her sister's remains back for proper burial, and that she was fearful of going out at night alone. "These effects arising from such a murder are certainly foreseeable and to commit such a murder in disregard of these effects on survivors seems to go to the perpetrator's moral culpability for such acts." *McDuff v. State*, 939 S.W. 2d 607, 620 (Tex. Crim. App. 1997).Testimony about how the "sister's marriage broke up after the disappearance and missing the decedent's love and not being able to talk to her, seems to be more tenuously tied to appellant's moral culpability." Nonetheless, the court was within its discretion in admitting this evidence. *Id*.

2. "[A] capital sentencing jury is permitted to hear and consider evidence relating to the victim's personal characteristics and the emotional impact of the murder on the victim's family." *Banda v. State*, 890 S.W. 2d 42, 63 (Tex. Crim. App. 1994).

3. In *Ford v. State*, 919 S.W. 2d 107 (Tex. Crim. App. 1996), a bare majority of the court rejected appellant's contention that victim impact testimony is not relevant to the special issues. "[A]ppellant's moral blameworthiness and culpability was definitely at issue at punishment." *Id*. at 115. The court was unable to conclude that the trial court abused its discretion in admitting the particular victim impact testimony given in *Ford*. *Id*. at 115-16.

4. Evidence that relates to some degree to victim character evidence, but which is heavily intertwined with the survivors's losses, and which appears to humanize the victims rather than to draw unwarranted comparisons between them and other members of society does not violate Rule 403. *Mosley v. State*, 983 S.W. 2d 249, 265 (Tex. Crim. App. 1998).

5. The trial court did not abuse its discretion under *Mosley* in admitting evidence from the victim's brother about the impact his sister's death had had on their family. "Specifically, the witness testified to the relationship the victim had with him and his family. He told the jury that his sister had been the planner and coordinator for all of the holidays the family celebrated. He also related how their father had been diagnosed with cancer before the victim's death, how the victim had helped to take care of him, and how their father quit fighting the disease after the victim was killed." *Griffith v. State*, 983 S.W. 2d 282, 289 (Tex. Crim. App. 1998).

6. Witnesses properly "testified that the victim had many fine, endearing qualities and that her death had shattered the lives of her family." *Ladd v. State*, 3 S.W. 3d 547, 571 (Tex. Crim. App. 1999).

7. *Payne* discourages comparing the worth of the victim with other members of society. It does not, apparently, forbid the prosecutor from comparing the *defendant's* worth with the victims. *Jackson v. State,* 33 S.W. 3d 828, 834 (Tex. Crim. App. 2000).

8. Testimony at the guilt/innocence phase of the trial by the

complainant's widow that they had been married 25 years, had five children and that he was alone at home on the night of the murder, and her identification of a picture of him with friends was not victim impact testimony. *Matchett v. State*, 941 S.W. 2d 922, 931 (Tex. Crim. App. 1996).

9. Photographs of the victim and his family are relevant to humanize both and to impress upon the jury that real people were harmed by the defendant's crime. *Solomon v. State*, 49 S.W. 3d 356, 366 (Tex. Crim. App. 2001).

10. Evidence from a treating nurse focusing solely on the medical procedures involved in the care of a person shot by the appellant, but not named in the indictment was not victim impact evidence. *Mathis v. State*, 67 S.W. 3d 918, 928 (Tex. Crim. App. 2002).

D. Held Inadmissible

1. "Victim," in the phrase "victim impact evidence," means the victim of the crime for which appellant is indicted and tried. The trial court erred in permitting the state to elicit victim impact evidence from the mother of Ms. Pena, when the indictment named only Ms. Ertman as the complainant. *Payne* does not contemplate admission of evidence concerning a person who is not the victim for whose death appellant has been indicted and tried. This evidence is irrelevant under Rule 401 and article 37.071, and the danger of unfair prejudice from "extraneous victim impact evidence" is unacceptably high. Nonetheless, the evidence here was harmless beyond a reasonable doubt. *Cantu v. State*, 939 S.W. 2d 627, 635-38 (Tex. Crim. App. 1997). *See Tong v. State*, 25 S.W. 3d 707, 713 (Tex. Crim. App. 2000)(impact testimony from victims of an extraneous offense is not contemplated by *Mosley* and *Payne*).

2. The trial court erred in permitting Judge Ted Poe, who had prosecuted appellant's co-defendants, to testify how the case had effected him, and that he kept a photograph of one of the deceased's on his desk. This evidence was clearly beyond the scope of rebuttal, and had no relevance to any issue at trial. Still, the evidence was harmless under Rule 81(b)(2). *Janecka v. State*, 937 S.W. 2d 456, 473-74 (Tex. Crim. App. 1996).

3. The court referred to *Smith v. State*, 919 S.W. 2d 96 (Tex. Crim. App. 1996), as a case of first impression. There witnesses testified that the complainant had been a very dedicated, hard working special education teacher whose students had been very affected by her death, and that she had been very artistic and musically inclined, and that she was an animal lover, well educated and a member of the National Guard Reserves. *Id*. at

97. A plurality of the court found that this evidence was irrelevant to the special issues and therefore inadmissible, to the extent it was not directly related to the circumstances of the offense or necessary for rebuttal. *Id*. at 102. The court went on to find, however, that the error was harmless. *Id*. at 103. Five judges concurred in the result.

4. It appears that witnesses will not be allowed to give their opinions about appellant, the alleged crime, or the appropriate sentence. *See Penry v. State*, 903 S.W. 2d 715, 752 (Tex. Crim. App. 1995). *See Tong v. State*, 25 S.W. 3d 707, 714 (Tex. Crim. App. 2000)(it might be objectionable for victims to express their opinions of appellant and their wish that he receive the death penalty).

E. Reverse Victim Impact Testimony

1. In *Goff v. State*, 931 S.W. 2d 537 (Tex. Crim. App. 1996), appellant wanted to offer "reciprocal victim impact evidence," concerning the complainant's homosexuality. The court of criminal appeals disallowed this. First, the complainant's homosexuality is not relevant to any of the special issues submitted in this case, because appellant was not aware of his homosexuality at the time of the offense, nor was it related to the offense in any way. Nor was the complainant's homosexuality relevant to the individualized assessment of the appropriateness of the death penalty under *Penry*. *Id*. at 555-56. "Furthermore, we do not believe that *Payne* contemplates the instant type of 'reciprocal-victim impact' evidence." *Id*. at 556. *See also Alvarado v. State*, 912 S.W. 2d 199, 227 n.17 (Tex. Crim. App. 1995)(*Payne* does "not hold or suggest that the Eighth Amendment grants a defendant the right to present evidence of the victim's bad character").

F. Waiver

1. Appellant waives his right to complain on appeal absent proper objection. *Bell v. State*, 938 S.W. 2d 35, 56 (Tex. Crim. App. 1996). *See Thompson v. Lynaugh*, 821 F. 2d 1080, 1081 (5th Cir. 1987)(waiver on federal habeas corpus review); *see also James v. State*, 772 S.W. 2d 84, 101 (Tex. Crim. App. 1989)(contemporaneous objection rule applies even though this case was tried before *Booth* was decided, since it did not create a previously unrecognized right); *Paster v. Lynaugh*, 876 F.2d 1184, 1188 (5th Cir. 1989).

G. Curing The Error

1. In light of the strength of the state's case, and the fact that the trial court instructed the jury to disregard, the admission of one sentence indicating that the victim's mother was upset "did not 'inflame the minds of the jury' or influence the jury's verdict." *Hinojosa v. State*, 4 S.W. 3d 240, 253 (Tex. Crim. App. 1999).

H. The Failure To Designate Victim Impact Witnesses

1. The state's failure to designate its victim impact witnesses in advance of trial was not error where the appellant neglected to specify which of his state or federal constitutional rights were violated, and where appellant conceded that he was not harmed. *Ladd v. State*, 3 S.W. 3d 547, 571 (Tex. Crim. App. 1999).

XIII. THE LAW OF PAROLE AT THE PUNISHMENT PHASE

A. The Statutes

1 "An inmate under sentence of death is not eligible for release on parole." TEX. GOV'T CODE ANN. § 508.145(a) (Vernon Supp. 2002).

2. "An inmate serving a life sentence for a capital felony is not eligible for release on parole until the actual calendar time the inmate has served, without consideration of good conduct time, equals 40 calendar years." TEX. GOV'T CODE ANN. § 508.145(b) (Vernon Supp. 2002).

B. The Statutory Instruction On Parole, Effective September 1, 1999

1. Effective September 1, 1999, "[t]he court, on the written request of the attorney representing the defendant, shall . . . charge the jury in writing as follows:

> Under the law applicable in this case, if the defendant is sentenced to imprisonment in the institutional division of the Texas Department of Criminal Justice for life, the defendant will become eligible for release on parole, but not until the actual time served by the defendant equals 40 years, without consideration of any good conduct time. It cannot accurately be predicted how the parole laws might be applied to this defendant if the defendant is sentenced to a term of imprisonment for life because the application of those laws will depend on decisions made by prison and parole authorities, but eligibility for parole does not guarantee that parole will be granted.

TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(e)(2) (Vernon Supp. 2002).

2. This statute took effect on September 1, 1999 and applies only to offenses committed on or after this date. Offenses committed before the effective date of this statute are covered by the law in effect when the offense was committed. *See Johnson v. State*, 68 S.W. 3d 644, 656 (Tex. Crim. App. 2002).

3. The discussion that follows concerning parole is in the paper because there will be a number of cases for years to come which, because of the effective date of the statute, will be controlled by the prior law. Assuming, of course, that the Supreme Court does not declare this prior law unconstitutional. Which it should.

C. The General Rule, For Offenses Committed Prior To September 1, 1999

1. Prior to the passage of article 37.071 § 2(e)(2), the Texas Court of Criminal Appeals consistently held that the defendant was not entitled to an instruction advising the jury that the defendant, if assessed a life term, would have to serve a minimum number of years imprisonment before becoming eligible for parole. *E.g.*, *O'Bryan v. State*, 591 S.W.2d 464, 478 (Tex. Crim. App. 1979); *see Willingham v. State*, 897 S.W.2d 351, 359 (Tex. Crim. App. 1995); *Hughes v. State*, 897 S.W. 2d 285, 301 (Tex. Crim. App. April 13, 1994), slip op. 24; *Boyd v. State*, 811 S.W.2d 105, 121 (Tex. Crim. App. 1991); *Andrade v. State*, 700 S.W.2d 585, 588 (Tex. Crim. App. 1985); *Franklin v. State*, 693 S.W.2d 420, 430 (Tex. Crim. App. 1985). "[T]he matter of parole or a defendant's release thereon is not a proper matter for jury consideration at punishment." *Washington v. State*, 771 S.W. 2d 537, 548 (Tex. Crim. App. 1989).

2. The United States Court of Appeals for the Fifth Circuit agreed. *Andrade v. McCotter*, 805 F. 2d 1190, 1192-93 (5th Cir. 1986); *O'Bryan v. Estelle*, 714 F. 2d 365, 388 (5th Cir. 1983). In *King v. Lynaugh*, 850 F.2d 1056 (5th Cir. 1988), the United States Court of Appeals for the Fifth Circuit, sitting *en banc*, held that the trial court did not err in denying the defendant the right to voir dire the jury on the

Texas parole laws. The court expressly did not decide whether the jury should have been instructed on the law of parole, since defendant did not make this objection at trial, thereby procedurally defaulting. *Id*. at 1056 n.1.

3. The court of criminal appeals believed that an instruction on the law of parole in a capital case would violate article 4, § 11 of the Texas Constitution. *Elliott v. State*, 858 S.W. 2d 478, 489 n.7 (Tex. Crim. App. 1993); *accord Garcia v. State*, 887 S.W. 2d 846, 860 (Tex. Crim. App. 1994). It does not violate the equal protection clause not to instruct the jury on the law of parole in capital cases. *Curry v. State*, 910 S.W. 2d 490, 497(Tex. Crim. App. 1995). Interestingly, in *Curry*, the court found it important to note that appellant did not make a challenge under the Due Process Clause. *Id*.

4. In *Knox v. State*, 744 S.W. 2d 53 (Tex. Crim. App. 1987), the defendant urged the court to "revisit *Andrade v. State*," which it refused to do, stating that "it is . . . clear that jurors in capital cases *should focus solely on the special issues* submitted to them during the punishment phase." *Id*. at 63-64(emphasis supplied). *Penry v. Lynaugh*, of course, refutes this interpretation of the law.

D. *Simmons v. South Carolina*

1. In *Simmons v. South Carolina*, 512 U.S. 154, 156 (1994), the Supreme Court held "that where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible."

E. *Simmons* In Texas, Before September 1, 1999

1. In *Penry v. State*, 903 S.W. 2d 715, 763-64 (Tex. Crim. App. 1995), appellant executed a document at trial purporting to waive his right to parole for the rest of his life. He then unsuccessfully sought an instruction that the jury should presume he would have to remain incarcerated for the rest of his life. The court of appeals held that the matter of parole is not a proper consideration for the jury in a capital case. Oddly, after making this bold pronouncement, the court made this citation: *"but see Simmons v. South Carolina*, ___ U.S. ___, 114 S.Ct. 2187 (1994)." Beyond this obscure reference, the court made no effort whatsoever to distinguish *Simmons*. What does this mean? Is this an acknowledgment that contrary Supreme Court authority exists, but that the court of criminal appeals is somehow not bound by it?

2. Two weeks after *Penry*, the court made a stab, at least, at distinguishing *Simmons*. In *Smith v. State*, 898 S.W. 2d 838 (Tex. Crim. App. 1995), the court overruled a host of state and federal constitutional challenges to the trial court's refusal to instruct on the law of parole. The court seemed to distinguish *Simmons* by reasoning that that case "on its face seems to be limited to states which have life without parole and not to states which have life with parole eligibility." *Smith v. State*, 898 S.W. 2d at 850; *accord Johnson v. State*, 68 S.W. 3d 644, 656 (Tex. Crim. App. 2002); *Feldman v. State*, 71 S.W. 3d 738, 757 (Tex. Crim. App. 2002); *Salazar v. State*, 38 S.W. 3d 141, 146 (Tex. Crim. App. 2001)*; Hughes v. State*, 24 S.W. 3d 833, 843 (Tex. Crim. App. 2000)*; Wilson v. State*, 7 S.W. 3d 136, 148 (Tex. Crim. App. 1999)*; Dewberry v. State*, 4 S.W. 3d 735, 756-57 (Tex. Crim. App. 1999)*; Ladd v. State*, 3 S.W. 3d 547, 570 (Tex. Crim. App. 1999)*; Chamberlain v. State*, 998 S.W. 2d 230,

235 (Tex. Crim. App. 1999); *Kutzner v. State*, 994 S.W. 2d 180, 188 (Tex. Crim. App. 1999); *Jackson v. State*, 992 S.W. 2d 469, 477 (Tex. Crim. App. 1999); *Busby v. State*, 990 S.W. 2d 263, 271 (Tex. Crim. App. 1999); *Griffith v. State*, 983 S.W. 2d 282, 289 (Tex. Crim. App. 1998); *Whitaker v. State*, 977 S.W. 2d 595, 599 (Tex. Crim. App. 1998); *Raby v. State*, 970 S.W. 2d 1, 6 (Tex. Crim. App. 1998); *Colburn v. State*, 966 S.W. 2d 511, 516 (Tex. Crim. App. 1998); *McGinn v. State*, 961 S.W. 2d 161, 166 (Tex. Crim. App. 1998); *Green v. State*, 934 S.W. 2d 92, 105 (Tex. Crim. App. 1996); *Morris v. State*, 940 S.W. 2d 610, 613 (Tex. Crim. App. 1996); *Williams v. State*, 937 S.W. 2d 479, 489 (Tex. Crim. App. 1996); *Martinez v. State*, 924 S.W. 2d 693, 698 (Tex. Crim. App. 1996); *McFarland v. State*, 928 S.W. 2d 482, 523 (Tex. Crim. App. 1996); *Rhoades v. State*, 934 S.W. 2d 113, 120 (Tex. Crim. App. 1996); *Wolfe v. State*, 917 S.W. 2d 270, 278 (Tex. Crim. App. 1996); *Curry v. State*, 910 S.W. 2d 490, 498 (Tex. Crim. App. 1995); *Lawton v. State*, 913 S.W. 2d 542, 556 (Tex. Crim. App. 1995); *Sonnier v. State*, 913 S.W. 2d 511, 521 (Tex. Crim. App. 1995); *Broxton v. State*, 909 S.W. 2d 912, 919 (Tex. Crim. App. 1995); *Green v. State*, 912 S.W. 2d 189, 194 (Tex. Crim. App. 1995). The court of criminal appeals further distinguished *Simmons* by noting that Texas, unlike South Carolina, has a number of safeguards to ensure that the law of parole is not discussed by the jury.

3. In a similar vein, it is not error both to prevent the appellant from inquiring about parole on voir dire, and from putting on evidence concerning parole eligibility before the jury. *Cantu v. State*, 939 S.W. 2d 627, 632 (Tex. Crim. App. 1997); *accord Wright v. State*, 28 S.W. 3d 526, 537 (Tex. Crim. App. 2000). It was not error for the trial court to bar appellant from putting on evidence about parole eligibility, where the trial court instructed the jury that he would have to serve at least 35 years before becoming eligible. *McDuff v. State*, 939 S.W. 2d 607, 620 (Tex. Crim. App. 1997). *See Shannon v. State*, 942 S.W. 2d 591, 594 (Tex. Crim. App. 1996)(no error to refuse to instruct on parole at voir dire).

4. The Supreme Court denied certiorari in *Brown v. Texas*, 522 U.S. 940 (1997). Four Justices -- Stevens, Souter, Ginsburg and Breyer -- wrote "respecting the denial of the petition for a writ of certiorari." These Justices found "obvious tension between [the Texas rule] and our basic holding in *Simmons v. South Carolina* . . . ." *Id* at 940:

> The situation in Texas is especially troubling. In Texas, the jury determines the sentence to be imposed after conviction in a significant number of noncapital felony cases. In those noncapital cases, Texas law *requires* that the jury be given an instruction explaining when the defendant will become eligible for parole. Thus, the Texas Legislature has recognized that, without such an instruction, Texas jurors may not full understand the range of sentencing options available to them. Perversely, however, in capital cases, Texas law *prohibits* the judge from letting the jury know when the defendant will become eligible for parole if he is not sentenced to death. The Texas rule unquestionably tips the scales in favor of a death sentence that a fully informed jury might not impose.

Id. The Justices "primary purpose in writing" was not to comments on the merits of the claim, but to reiterate that a denial of certiorari "does not constitute either a decision on the merits of the question presented . . . or an appraisal of their importance." *Id*.

5. Judge Mansfield, concurring

in *Whitaker v. State*, 977 S.W. 2d 595 (Tex. Crim. App. 1998)(Mansfield, J., concurring), stated that: "It does seem somewhat incongruous that juries in noncapital cases are instructed as to applicable parole law whereas in capital cases juries are not to be so instructed. Depending on the life expectancy of an individual sentenced to life imprisonment upon conviction of capital murder, the forty calendar years he must serve before becoming eligible for parole may be, effectively, a life sentence without possibility of parole." Judge Mansfield found the *Brown* opinion to be "interesting," but also noted that, given the fact that the legislature has clearly expressed its intent that capital juries are not to be instructed on parole, "we are not free to substitute our own judgment on this matter, absent clear direction from the United States Supreme Court that we must do so." *Id*. at 601.

6. Judge Price had the following to say about *Brown* in his concurring opinion in *Whitaker*:

> Although Justice Stevens's opinion is merely a comment on the court's denial of certiorari, rather than a decision on the merits, it is unquestionably an important criticism of our death penalty procedure and may well be indicative as to how the Supreme Court might resolve this issue in the future. However, despite my disagreement with my brethren on this issue, I am mindful that my views are in the minority. I am also aware of my responsibility to observe principles of the doctrine of *stare decisis*. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854-855, 112 S. Ct. 2791, 2808-2809, 120 L. Ed.2d 674 (1992). Therefore, until a majority of this court indicates a willingness to reconsider this issue, I will observe precedent. With these comments, I join the opinion of the court.

Whitaker v. State, 977 S.W. 2d 595, 601-602 (Tex. Crim. App. 1998)(Price, J., concurring). Judges Baird and Overstreet wrote dissenting opinions in *Whitaker* expressing the same reservations about the Texas approach.

7. In a pre-statute case, the court held that the trial court does not err in instructing the jury that the defendant will not be eligible for parole until 40 years, but that it cannot consider how long a defendant might have to serve any sentence imposed. This does not instruct the jury to ignore the 40 year eligibility, but only that it cannot speculate on how long a defendant sentenced to life will have to serve. Additionally, because this trial pre-dates the statute, the defendant is not entitled to an instruction on parole eligibility. *Johnson v. State*, 68 S.W. 3d 644, 656 (Tex. Crim. App. 2002).

F. Evidence Of Lack Of Future Danger In Combination With Parole Eligibility

1. Some members of the court have noted that minimum parole eligibility *might* be constitutionally mitigating, if the defense can demonstrate relevance towards the issue of future dangerousness. *Willingham v. State*, 897 S.W.2d 351, 360 (Tex. Crim. App. 1995)(Overstreet, J. concurring). Justice Clinton suggested that if the defendant presents evidence to show that "for the duration of his lengthy incarceration he will pose no threat to the prison population or that by the time he is eligible for parole he will not pose a threat to any facet of society," then information about minimum parole eligibility is "indisputably relevant" to the second issue, and therefore, admissible. *Id*. at 359; *but see Broxton v. State*, 909 S.W. 2d 912, 919 (Tex. Crim. App. 1995)(reasons for rejecting parole information

apply equally well to the exclusion of parole testimony). In *Eldridge v. State*, 940 S.W. 2d 646, 651 (Tex. Crim. App. 1996), the court referred to *Willingham* as stating the "most charitable view" under which parole information would only be required if there was some evidence, in combination with parole eligibility, which showed a lack of future dangerousness. There being no such evidence in *Eldridge*, there was no need for an instruction on parole. In *Shannon v. State*, 942 S.W. 2d 591, 594 (Tex. Crim. App. 1996), the court described its treatment of *Simmons* in *Smith* as "comprehensive." The court noted that it had distinguished *Simmons* on the grounds that paroleis traditionally not a matter for jury discussion in Texas, and because *Simmons* had not been extended to parole eligible defendants. *Id*. at 594. The court also noted that appellant in *Shannon* gave the court no "distinguishing evidence in the record" such as evidence of his ability to live peaceably in prison, or expert testimony relating to a probable decline in his propensity for violence. *Id*.

2. The court of criminal appeals expressly did not decide in *King v. State*, 631 S.W. 2d 486, 490 n.8 (Tex. Crim. App. 1982), whether capital juries would be aided by *evidence* concerning the operation of parole in Texas. In *Jones v. State*, 843 S.W.2d 487, 495 (Tex. Crim. App. 1992), the court expressly rejected appellant's contention that he was entitled to present expert testimony regarding parole. *Accord Stoker v. State*, 788 S.W.2d 1, 16 (Tex. Crim. App. 1989), *cert. denied*, 111 S.Ct. 371 (1990).

3. The trial court does not err in refusing to appoint an expert on the law of parole in Texas, "[s]ince this was an impermissible area of inquiry for the jury." *Stoker v. State*, 788 S.W.2d 1, 16 (Tex. Crim. App. 1989).

G. A Parole Instruction Is "Permissible"

1. In *Ford v. State*, 919 S.W. 2d 107, 116 (Tex. Crim. App. 1996), the court acknowledged that it "is permissible" for the trial court to instruct the jury that appellant would have to serve at least 35 years before becoming eligible for parole. *Accord Santellan v. State*, 939 S.W. 2d 155, 171 (Tex. Crim. App. 1997)(especially where appellant's counsel approved the jury charge on parole and where he made the motion to voir dire the jury on parole); *Cockrell v. State*, 933 S.W. 2d 73, 91 (Tex. Crim. App. 1996)(appellant waived error when he "acquiesced" in parole instructions given during voir dire and at end of case). **"**Texas trial judges have the discretion to instruct capital juries on the issue of parole and may find such instruction an effective means of charging the jury on the law applicable to the case." *Walbey v. State*, 926 S.W.2d 307, 314 n.8 (Tex. Crim. App. 1996).

2. The court disapproves of the trial court explaining to a venireperson that one convicted of capital murder must serve at least 20 years before becoming eligible for parole. This does not require excusal of the venireperson, however, if he states that he can follow the law and not consider parole. *Jackson v. State*, 819 S.W.2d 142, 151 (Tex. Crim. App. 1991).

H. The Texas Constitution

1. In *Morris v. State*, 940 S.W. 2d 610, 613 (Tex. Crim. App. 1996), appellant argued that he was entitled under the Texas Constitution to ask proper questions of the venire concerning parole. The court held that parole ineligibility is not an issue applicable to the case, and is not therefore a proper question. "The Texas Constitution thus does not give an accused the right to ask prospective jurors in a capital murder trial questions regarding parole

ineligibility." *Id*. *See Rhoades v. State*, 934 S.W. 2d 113, 119 (Tex. Crim. App. 1996); *Green v. State*, 934 S.W. 2d 92, 106 (Tex. Crim. App. 1996); *McFarland v. State*, 928 S.W. 2d 482, 505 (Tex. Crim. App. 1996); *see also Williams v. State*, 937 S.W. 2d 479, 489 n.9 (Tex. Crim. App. 1996)(overruling appellant's contention under the state constitution because he did "not explain how the protection offered by the state constitution differs from that of the federal constitution").

I. Opening The Door

1. In *Anderson v. State*, 932 S.W. 2d 502 (Tex. Crim. App. 1996), the prosecutor improperly suggested to the jury that it consider parole during summation. The court disagreed with appellant's argument that this improper summation entitled him to an instruction concerning parole. "An accused should not become entitled, because of argument error, to additional written jury instructions unless traditional remedies for argument error are constitutionally inadequate." *Id*. at 507. Here, appellant should have objected, and, requested an instruction to disregard. The more "drastic" remedy of an instruction would only be required where "the prosecutor conveys incomplete or inaccurate information about how parole is computed." *Id*. *See Rhoades v. State*, 934 S.W. 2d 113, 128 (Tex. Crim. App. 1996)(that the state suggested appellant would be eligible for emergency furlough did not require the court to give an instruction on parole eligibility).

2. Is there a double standard? The *defendant* may "open the door" to improper remarks by the state, thus negating any error regarding the discussion of parole. *Franklin v. State*, 693 S.W. 2d 420, 429 (Tex. Crim. App. 1985)(assertion that defendant will remain in prison until the experts deem him non-threatening); *De La Rosa v. State*, 658 S.W. 2d 162, 168 (Tex. Crim. App. 1983)(suggestion that "life" means the defendant will spend the rest of his life in prison).

3. The defense may invite the prosecutor to argue that the parole laws may change by eliciting testimony that parole laws had become tougher on inmates throughout the years, by eliciting testimony concerning the procedures of the Parole Board and the factors taken into account in determining whether to release someone, or by arguing that appellant would never be released on parole. *Ripkowksi v. State,* 61 S.W. 3d 378, 394 (Tex. Crim. App. 2001).

J. Miscellaneous Issues Relating To Parole

1. In *Campbell v. State*, 910 S.W. 2d 475 (Tex. Crim. App. 1995), appellant argued that the increased time that appellant must now serve before becoming parole-eligible should be considered by the court in its sufficiency review concerning future dangerousness. The court disagreed. Because parole is not a proper consideration for the jury, it should not be considered on appeal when determining the sufficiency of the evidence to support the issue. *Id*. at 480.

2. In *Jones v. State*, 843 S.W. 2d 487 (Tex. Crim. App. 1992), appellant argued that he was entitled to voir dire the jury on the law of parole applicable to the lesser included offense of murder. The court did not reach this question. "Because the jury found appellant guilty of capital murder and no charge was given on parole law, any error was harm-less." *Id*. at 498.

3. It is not error for the trial court to instruct the jury not to consider or discuss any possible action by the Board of Pardons or Paroles. *Ramirez v. State*, 815

S.W.2d 636, 653 (Tex. Crim. App. 1991).

XIV. MISCELLANEOUS ISSUES RELATING TO THE PUNISHMENT PHASE

A. *Caldwell v. Mississippi*: Shifting The Jury's Responsibility To The Appellate Court

1. In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the defense attorney told the jury that it had an awesome responsibility as the judge of the defendant's fate, and implored the jury to reject the death penalty. The state countered, telling the jury in its summation that any decision it made was automatically reviewable by the appellate courts. The Supreme Court set aside the death sentence holding that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."" *Id*. at 328-29.

> This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its "truly awesome responsibility." In this case, the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.

Id. at 341.

2. The state may properly remind the jury that it is their job to answer the special issues. "What happens to him after that, you will never see him." This is a correct description of the jury's role at the sentencing phase. *Modden v. State*, 721 S.W. 2d 859, 861-62 (Tex. Crim. App. 1986).

3. *Caldwell* error was not committed when the state's witness, also under sentence of death, testified that he hoped his own case would be reversed on appeal, since this does not suggest that responsibility for determining the appropriateness of the death sentence rests with the appellate court rather than the jury. Nor was defense counsel ineffective for eliciting this testimony. *Washington v. State*, 771 S.W. 2d 537, 542-43 (Tex. Crim. App. 1989).

4. The Texas Court of Criminal Appeals has specifically declined to apply the holding in *Caldwell* to "voir dire remarks," as contrasted with jury argument. *Sattiewhite v. State*, 786 S.W.2d 271, 282 (Tex. Crim. App. 1989).

5. The defense does not invite *Caldwell* error by seeking to impress upon the jury the gravity of their responsibility. *Wheat v. Thigpen*, 793 F. 2d 621, 628 (5th Cir. 1986).

6. *Caldwell* error can be cured by an instruction to disregard from the trial court. *Jones v. Butler*, 864 F. 2d 348, 360 (5th Cir. 1988); *Bell v. Lynaugh*, 828 F. 2d 1085, 1095 (5th Cir. 1987).

7. Sitting *en banc*, the Fifth Circuit has distilled the following standard: "We conclude that the inquiry is whether under all facts and circumstances, including the entire trial record, the state has misled the jury regarding its role under state law to believe that the responsibility for determining the appropriateness of defendant's death rests elsewhere." *Sawyer v. Butler*, 881 F.2d 1273-286 (5th Cir. 1989), *aff'd*, *sub*. *nom*. *Sawyer v. Smith*,

497 U.S. 227 (1990).

8. *Caldwell* announced a "new rule" under *Teague v. Lane*. Accordingly, a defendant whose conviction was final before *Caldwell* was rendered may not rely on *Caldwell* to challenge his conviction in a federal habeas corpus action. *Sawyer v. Smith*,497 U.S. 227, 245 (1990).

9. On its face, *Caldwell* prevents the state from shifting responsibility from the sentencing jury to the appellate court. The basis of this decision, however is the broader concept of reliability guaranteed by the Eighth Amendment. Some lawyers have relied on *Caldwell* when arguing against other prosecutorial practices which also diminish sentencing reliability. *See Landry v. Lynaugh*, 844 F. 2d 1122, 1124 (5th Cir. 1988)(rejecting claim, on procedural grounds, that prosecutor's improper voir dire hypotheticals unconstitutionally lowered the state's burden of proof).

10. *Caldwell* error is not committed when the state urges the jury to impose the death penalty because an earlier jury had also done so. *Hughes v. State*, 897 S.W. 2d 285, 304 n.6 (Tex. Crim. App. 1994).

11. A prosecutor's argument that death by lethal gas will be "instantaneous" is a *Caldwell* violation. In reality, the process of death could last 10 minutes or more. Such an argument unconstitutionally diminishes the jury's since of responsibility for imposing the death penalty. *Antwine v. Delo*, 54 F. 3d 1357, 1361 (8th Cir. 1995), *cert. denied, Bowersox v. Antwine*, 516 U.S. 1067 (1996).

B. Waiver Of Error By The Testifying Defendant

1. By testifying at the punishment phase and admitting his guilt of the crime for which he has been convicted, a defendant can waive the right to complain on appeal about errors that arose at the first phase of the trial. "The law as it presently exists is clear that such a defendant not only waives a challenge to the sufficiency of the evidence, but he also waives *any* error that might have occurred during the guilt stage of the trial." *DeGarmo v. State*, 691 S.W. 2d 657, 661 (Tex. Crim. App. 1985)(emphasis supplied).

a. This "common-sense rule of procedure" does not deny defendant due process. *Bodde v. State*, 568 S.W. 2d 344, 348 (Tex. Crim. App. 1978).

b. Is the *DeGarmo* doctrine still alive and well?

i. In *McGlothlin v. State*, 896 S.W. 2d 183 (Tex. Crim. App. 1995), various extraneous offenses were admitted at the guilt/innocence phase, over appellant's objection. Appellant did not testify at the first phase of the trial, but he did at punishment, at which time he admitted both the instant offense, as well as the extraneous offenses. On direct appeal appellant contended that the extraneous offenses were erroneously admitted. McGlothlin's case purports to re-examine the *DeGarmo* doctrine, and, after doing so, to reaffirm its validity. "After the complainant testified and the jury found appellant guilty, appellant testified at the punishment phase in support for his application for probation. Had appellant chosen to not testify, he would not be faced with the issue of waiver. However, when appellant admitted the charged offense the *DeGarmo* doctrine controlled and he waived all error committed during the guilt/innocence phase of his trial." *Id*. at 189 (citations omitted).

ii. In *LeDay v.*

State, 983 S.W. 2d 713, 725-26 (Tex. Crim. App. 1998), the court of appeals held that, under *DeGarmo*, appellant waived his right to complain of the legality of the search and seizure on appeal because he admitted his guilt before the jury. The court of criminal appeals disagreed, and, in the process left considerable doubt about the continued validity of the *DeGarmo* rule. *Id*. at 720-26.

c. In *Munoz v. State*, 853 S.W. 2d 558, 560 (Tex. Crim. App. 1993), the court refused to consider punishment phase evidence to determine whether the evidence was sufficient to sustain a verdict of guilt. "In order to determine the sufficiency of the evidence to support a conviction, an appellate court is only authorized to view the punishment phase of the trial to determine whether a defendant has, by admitting elements of the offense, waived his right to complain of error during the guilt-innocence phase. Absent a judicial confession by the defendant, evidence from the punishment phase of a trial will not be considered in determining the sufficiency of the evidence to support a conviction. Because appellant did not testify during the punishment phase, *DeGarmo* is not controlling." *Id*.

2. A capital defendant has no right to testify at punishment for the limited purpose of rebutting evidence of an extraneous offense. *Cantu v. State*, 738 S.W. 2d 249, 255 (Tex. Crim. App. 1987); *see Felder v. State*, 848 S.W. 2d 85, 99 (Tex. Crim. App. 1992)(appellant has no right to prevent prosecutor from asking him at punishment whether he committed the capital murder for which he was tried).

C. The Anti-Sympathy Charge

1. In *Wheatfall v. State*, 882 S.W. 2d 829 (Tex. Crim. App. 1994), the court instructed the jury "not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling in considering all the evidence before you and in answering the special issues." *Id*. at 841. Appellant's complaint that this violated *Penry* was rejected. The court of criminal appeals held that the court's instruction was sufficient to meet *Penry'*s commands concerning mitigating evidence. "Where a jury charge is sufficient to meet the commands of *Penry*, it does not violate the Eighth or Fourteenth Amendments of the United States Constitution to instruct the jury 'not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling in considering' the evidence and answering the special issues." *Id*. at 842; *accord Fuentes v. State*, 991 S.W. 2d 267, 277 (Tex. Crim. App. 1999); *Green v. State*, 912 S.W. 2d 189,195 (Tex. Crim. App. 1995); *see Jackson v. State*, 992 S.W. 2d 469, 481 (Tex. Crim. App. 1999); *Penry v. State*, 903 S.W. 2d 715, 766 (Tex. Crim. App. 1995); *See also California v. Brown*, 479 U.S. 538, 543 (1987)("An instruction prohibiting juries from basing their sentencing decisions on factors not presented at the trial, and irrelevant to the issues at the trial, does not violate the United States Constitution").

2. The anti-sympathy charge is also appropriate under the new statute and does not violate the separation of powers provisions of the constitution. *McFarland v. State*, 928 S.W. 2d 481, 522 (Tex. Crim. App. 1996). Indeed, the Supreme Court has intimated that this instruction is not only permissible, but perhaps mandatory. *Id*.

3. The anti-sympathy charge does not "unconstitutionally contradict

mitigation instructions" and is appropriate because it "properly focus[es] the jury's attention on those factors relating to the moral culpability of the defendant." *Tong v. State*, 25 S.W. 3d 707, 711 (Tex. Crim. App. 2000).

D. Callins v. Collins

1. In *Callins v. Collins*, 510 U.S. 1141 (1994), Justice Blackmun dissented from a denial of certiorari, believing that it was impossible to achieve both fairness and rationality in the administration of the death penalty.

> From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored--indeed, I have struggled--along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question--does the system accurately and consistently determine which defendants "deserve" to die?--cannot be answered in the affirmative.

Id.

2. The court of criminal appeals refused to adopt Justice Blackmun's dissenting opinion, preferring instead "the more authoritative holdings of *Gregg*, . . . *Jurek*, . . . and . . . *Tuilaepa*. . . ." *Lawton v. State*, 913 S.W. 2d 542, 558 (Tex. Crim. App. 1995); *accord Ladd v. State*, 3 S.W. 3d 547, 575 (Tex. Crim. App. 1999)*; Raby v. State*, 970 S.W. 2d 1, 7 (Tex. Crim. App. 1998); *Moore v. State*, 935 S.W. 2d 124, 128 (Tex. Crim. App. 1996); *see also Cannady v. State*, 11 S.W. 3d 205, 214 (Tex. Crim. App. 2000); *Chamberlain v. State*, 998 S.W. 2d 230, 284 (Tex. Crim. App. 1999)*; Jones v. State*, 944 S.W. 2d 642, 656 (Tex. Crim. App. 1996)*; Matchett v. State*, 941 S.W. 2d 922, 938 (Tex. Crim. App. 1996)*; Williams v. State*, 937 S.W. 2d 479, 492 (Tex. Crim. App. 1996); *Bell v. State*, 938 S.W. 2d 35, 54 (Tex. Crim. App. 1996); *Janecka v. State*, 937 S.W. 2d 456, 475 (Tex. Crim. App. 1996).

3. According to the court of criminal appeals, reliance on Justice Blackmun's dissent is unfounded. "[T]he Supreme Court recently held that, once the jury finds that the defendant falls within the legislatively defined category of persons *eligible* for the death penalty, the sentencer may be given 'unbridled discretion' in determining whether the death penalty should be imposed." *Cantu v. State*, 939 S.W. 2d 627, 645 (Tex. Crim. App. 1997)(citing *Tuilaepa v. California*, 512 U.S. 967, 979-80 (1994)); *accord Hughes v. State*, 24 S.W. 3d 833, 844 (Tex. Crim. App. 2000)*; Shannon v. State*, 942 S.W. 2d 591, 600 (Tex. Crim. App. 1996).

4. "This Court does not follow dissenting opinions of United States Supreme Court Justices on federal constitutional issues." *Cockrell v. State*, 933 S.W. 2d 73, 92 (Tex. Crim. App. 1996).

E. The Accomplice Witness Rule Is Inapplicable At Punishment

1. In *Jones v. State*, 982 S.W.

2d 386 (Tex. Crim. App. 1998), appellant complained that the trial court erred in not giving a limiting instruction concerning accomplice testimony *at the punishment phase*. The court of criminal appeals disagreed. "The accomplice witness rule embodied in Article 38.14 does not apply to testimony offered to prove extraneous offenses at the punishment stage of a capital murder trial." *Id*. at 395.

F. Miscellaneous Miscellany

1. No application charge is required in the punishment phase of a capital trial. *Sonnier v. State*, 913 S.W. 2d 511, 522 (Tex. Crim. App. 1995). The court did not foreclose the possibility that a situation would arise which required an application paragraph, however. *Id*.

2. The court of criminal appeals believes that "once the sentencer has found that the defendant is a member of the class made eligible for the death penalty, it may be given "unbridled discretion" in determining whether the death penalty should be imposed." *Cantu v. State*, 939 S.W. 2d 627, 643 n. 12 (Tex. Crim. App. 1997)(citing *Tuilaepa v. California*, 512 U.S. 967, 979-80 (1994).

3. In *Janecka v. State*, 937 S.W. 2d 456, 476 (Tex. Crim. App. 1996), appellant asserted that it would be cruel and unusual to execute him after 15 years of confinement, spent under "relentless and severe psychological stress, anxiety, and depression." The court of criminal appeals held that there was no evidence in the record to support this contention. The court also noted that case law in other jurisdictions was against appellant. *Accord Smith v. State*, ___ S.W. 3d ___, ___ No. 71, 496 (Tex. Crim. App. May 8, 2002), slip op. 26 ("approximate thirteen years the appellant has spent challenging his conviction and sentence is not a fortiori unconstitutionally cruel and unusual"); *Bell v. State*, 938 S.W. 2d 35, 53 (Tex. Crim. App. 1996)(declining "to hold that, because of appellant's years spent awaiting his execution, his execution would violate the Eighth Amendment's ban against cruel and unusual punishment").

5. An argument that appellant was a sociopath, in the absence of evidence that he was, was improper, but it was cured by a prompt instruction to disregard. *Shannon v. State*, 942 S.W. 2d 591, 597-98 (Tex. Crim. App. 1996).

6. In *Matchett v. State*, 941 S.W. 2d 922, 932 (Tex. Crim. App. 1996), appellant complained that the trial court violated the separation of powers doctrine when it gave four "extra-statutory" jury instructions at the punishment phase of the trial. The court disagreed, since the instructions given "neither changed the definition of a capital murder punishable by death nor violated, in word or spirit, any procedure mandated by Article 37.071." *Id*. at 933.