

CAPITAL MURDER OVERVIEW

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I. SCOPE OF ARTICLE

The purpose of this article is to discuss issues which commonly arise in Texas capital cases, and to provide citations to the applicable case law and statutes. Emphasis is placed on issues that arise at trial. Appellate procedure is discussed only briefly, to the extent it varies from appellate procedure in non-capital cases. Post-conviction remedies are beyond the scope of this article.

II. BAIL

A. Denial Of Bail When Proof Is Evident

1. The Texas Constitution permits denial of bail to persons charged with capital crimes "when proof is evident." Tex. Const. art. I, § 11.

2. "The term 'proof is evident'. . . means evidence clear and strong, leading a well guarded judgment to the conclusion that an offense was committed, that the accused is the guilty agent and that he would probably be punished by the death penalty if the law is administered." *Beck v. State*, 648 S.W.2d 7, 9 (Tex. Crim. App. 1983); accord, *Ex parte Alexander*, 608 S.W.2d 928, 930 (Tex. Crim. App. 1980); *Ex parte Davis*, 542 S.W.2d 192, 197 (Tex. Crim. App. 1976); *Ex parte Derese*, 540 S.W.2d 332, 333 (Tex. Crim. App. 1976); *Ex parte Wilson*, 527 S.W.2d 310, 311 (Tex. Crim. App. 1975).

3. The burden of proof is on the state to establish that proof is evident. *E.g.*, *Beck v. State*, 648 S.W.2d at 9; *Ex parte Alexander*, 608 S.W.2d at 930; *Ex parte Davis*, 542 S.W.2d at 192. The standard under Article I, § 11 is probably a "substantial showing," the same as it is under Article I, § 11a. *Cf. Lee v. State*, 683 S.W.2d 8, 9 (Tex. Crim. App. 1985).

4. In *Roy v. State*, 854 S.W. 2d 931 (Tex. App. -- Houston [14th Dist.] 1993, pet. ref'd), the court of appeals affirmed the judgment of the trial court setting bail in the amount of \$500,000.00, where appellant made no showing of an effort to furnish bail in the set amount. "In the absence of some evidence that appellant has unsuccessfully attempted to secure a bond in the amount set by the court, no issue is presented for our review." *Id.* at 931-32.

B. Proof Must Be Evident Both That Defendant Is Guilty And That The Special Issues Will Be Answered Affirmatively

1. The trial court abuses its discretion by denying bail where the state fails to show proof evident of capital murder. *Ex parte Woodward*, 601 S.W.2d 378, 380 (Tex. Crim. App. 1980)(insufficient evidence that murder was committed in the course of a burglary); *Ex parte Mitchell*, 601 S.W.2d 376, 377 (Tex. Crim. App. 1980)(uncorroborated accomplice testimony is not "proof evident"); *Ex parte Cevallos*, 537 S.W.2d 744, 745 (Tex. Crim. App. 1976)(indictment alone is not proof evident); *Ex parte Stearnes*, 752 S.W.2d 621, 625 (Tex. App.--Amarillo 1988, no pet.)(proof not evident where there is at least a question whether the witness is an accomplice); see *Ex parte Collum*, 841 S.W. 2d 960, 963 (Tex. App. -- Fort Worth 1992, no pet.)(proof evident in light of circumstances of crime and adjudicated extraneous offenses); *cf. Ex parte Ott*, 565 S.W.2d 540, 542 (Tex. Crim. App. 1978)(proof evident where defensive issues were not sufficiently raised as to require submission to the jury).

2. The trial court abuses its discretion by denying bail where the state fails to show proof evident that each special issue will be answered affirmatively. *Ex parte Maxwell*, 556 S.W.2d 810, 811 (Tex. Crim. App. 1977)(proof not evident as to any special issue); *Ex parte Green*, 553 S.W.2d 382, 392 (Tex. Crim. App. 1977)(insufficient proof); *Ex parte Derese*, 540 S.W.2d 332, 334 (Tex. Crim. App. 1976)(insufficient proof as to second issue); *Ex parte Hammond*, 540 S.W.2d 328, 331 (Tex. Crim. App. 1976)(punishment proof insufficient, with special emphasis given to third question); *Ex parte Wilson*, 527 S.W.2d 310, 312 (Tex. Crim. App. 1975) (insufficient); *Ex parte Sierra*, 514 S.W.2d 760, 761 (Tex. Crim. App. 1974)(insufficient to prove first special issue). Conversely, denial of bail is proper where proof is evident. *Ex parte Alexander*, 608 S.W.2d 928, 930-931 (Tex. Crim. App. 1980); *Ex parte Ott*, 565 S.W.2d 540, 543 (Tex. Crim. App. 1978); *Ex parte Lackey*, 559 S.W.2d 823, 824 (Tex. Crim. App. 1977); *Ex parte Davis*, 542 S.W.2d 192, 198 (Tex. Crim. App. 1976).

C. What Amount Is Reasonable?

1. In *Ludwig v. State*, 812 S.W. 2d 323, 325 (Tex. Crim. App. 1991), the court held that bail in the amount of \$2,000,000.00 was excessive, and reduced it to \$50,000.00.

2. See *Ex parte Vasquez*, 558 S.W. 2d 477, 480 (Tex. Crim. App. 1977)(bail reduced from \$100,000.00 to \$20,000.00); *Ex parte Green*, 553 S.W.2d 382, 392 (Tex. Crim. App. 1977)(bail set at \$25,000.00); *Ex parte Cevallos*, 537 S.W.2d 744, 745 (Tex. Crim. App. 1976)(bail reduced from \$100,000.00 to \$25,000.00); *Ex parte Wilson*, 527 S.W.2d 310, 312 (Tex. Crim. App. 1975)(bail set at \$40,000.00 and \$20,000.00); *Ex parte Sierra*, 514 S.W.2d 760, 761 (Tex. Crim. App. 1974)(\$50,000.00); *Ex parte McDonald*, 852 S.W. 2d 730, 736 (Tex. App. -- San Antonio 1993, no pet.)(bail reduced from \$1,000,000.00 to \$75,000.00); *Ex parte Delk*, 750 S.W. 2d 816, 817 (Tex. App. -- Tyler 1988, no pet.)(bail reduced from \$100,000.00 to \$35,000.00); *Ex parte Goosby*, 685 S.W. 2d 440, 442 (Tex. App. -- Houston [1st Dist.] 1985, no pet.)(reduced from \$250,000.00 to \$100,000.00); *Ex parte Clark*, 635 S.W. 2d 202, 204 (Tex. App. -- San Antonio 1982, no pet.)(reduced from \$150,000.00 to \$50,000.00).

D. Jurisdiction Of The District Court

1. The district court lacked jurisdiction to order defendant held without bond on the oral motion of the state where there was no indictment yet, and the magistrate had set bond in the amount of \$50,000.00. Jurisdiction was still in the justice court. *Ex parte Mapula*, 538 S.W. 2d 794, 794-95 (Tex. Crim. App. 1976).

E. Statutory Entitlement To Bail Where State Receives Continuances

1. Tex. Code Crim. Proc. Ann. art. 29.12 (Vernon 1989) provides:

If a defendant in a capital case demands a trial, and it appears that more than one continuance has been granted to the State, and that the defendant has not before applied for a continuance, he shall be entitled to be admitted to bail, unless it be made to appear to the satisfaction of the court that a material witness of the State had been prevented from attendance by the procurement of the defendant or some person acting in his behalf.

2. Where appellant was indicted for capital murder in both Travis and Hidalgo counties, he was entitled to bail in Hidalgo County after the state was granted two continuances in Travis County. *Walker v. State*, 629 S.W.2d 199, 201 (Tex. App.--Corpus Christi 1982, pet. ref'd).

F. Article 17.151 In Capital Cases

1. One court of appeals has held that article 17.151 of the Code of Criminal Procedure, which requires release on bond if the state is not ready in 90 days, is not applicable in capital cases where proof is evident. *Ex parte Jackson*, 807 S.W.2d 384, 386 (Tex. App.--Houston [1st Dist.] 1991, no pet.).

G. Appeal From Denial Of Bail

1. Appeal from an order denying bail for a capital offense is to the court of appeals. *Beck v. State*, 648 S.W.2d 7, 10 (Tex. Crim. App. 1983). The court of criminal appeals lacks jurisdiction. *Primrose v. State*, 725 S.W.2d 254, 256 (Tex. Crim. App. 1987).

H. Collateral Estoppel

1. The state is not collaterally estopped from seeking the death penalty after a court has found that proof is not evident in a bail context. *Ex parte Lane*, 806 S.W.2d 336, 340 (Tex. App.--Fort Worth 1991, no pet.).

I. Application For Writ of Habeas Corpus

1. Lawyers representing capital defendants held without bond should file an application for writ of habeas corpus seeking reasonable bail, alleging that proof is not evident to show either guilt or that the special issues will be answered affirmatively. A defendant free on bond has a tremendous advantage over one in custody. And, even if the court does not ultimately set a bond which the defendant can make, the bond hearing is a wonderful discovery device, since the state bears the burden of producing substantial evidence both that the defendant is guilty and that the special issues should be answered affirmatively.

III. EFFECTIVE ASSISTANCE OF COUNSEL

A. Ex parte Duffy: Reasonably Effective Assistance Of Counsel

1. Once upon a time, the courts took seriously the constitutional right to effective assistance of counsel. In *Ex parte Duffy*, 607 S.W. 2d 507 (Tex. Crim. App. 1980), the defendant was convicted of capital murder and received the death penalty. Trial counsel had solicited the case from defendant's parents, representing himself as an expert in capital cases. Prior to trial, counsel visited his client for only a few minutes, and otherwise conducted no real pretrial investigation. He filed no meaningful pretrial motions, he participated only minimally in selection of the jury, and he failed to raise the only defense available--insanity. Additionally, not only did counsel fail to affirmatively aid his client, he did him positive damage by putting on a witness who testified against his client on the question of punishment. The court of criminal appeals reversed the conviction, finding that the lawyer

had not rendered "reasonably effective assistance of counsel." *Id.* at 516. This remained the standard in Texas until 1984.

B. Strickland v. Washington: Performance And Prejudice

1. That year, the Supreme Court decided *Strickland v. Washington*, 466 U.S. 668 (1984), and replaced the "reasonably effective assistance" test with a two-prong test for determining when counsel has been so ineffective as to necessitate a new trial:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687.

2. At issue in *Strickland* was the duty to investigate potentially mitigating evidence at the sentencing phase of a capital trial. *Id.* at 690. Specifically, counsel failed to seek out character witnesses or psychiatric evidence. Employing the newly fashioned two-prong standard, the Court rejected Washington's contention as "a double failure." *Id.* at 700. The Court found that counsel made a strategic choice to argue the mitigating circumstance of extreme emotional disturbance and to rely on defendant's acceptance of responsibility. "Counsel's strategy choice was well within the range of professionally reasonable judgments, and the decision not to seek more character or psychological evidence than was already in hand was likewise reasonable." *Id.* at 699. Furthermore, the Court found that there was no reasonable probability that the evidence that Washington claimed his counsel should have presented would have altered the sentencing decision. *Id.* at 700. *See also Burger v. Kemp*, 483 U.S. 776, 794 (1987)("counsel's decision not to mount an all-out investigation into petitioner's background in search of mitigating circumstances was supported by reasonable professional justification"); *Darden v. Wainwright*, 447 U.S. 168, 186-187 (1986)(failure to present any mitigating evidence was sound strategy).

C. Ineffective Assistance In Non-Capital Trials

1. The two-prong *Strickland* test has been specifically adopted in Texas for application to the guilt-innocence phase of a non-capital trial. *See Hernandez v. State*, 726 S.W.2d 53, 56 (Tex. Crim. App. 1986).

2. The two-prong *Strickland* standard does not apply to a claim that counsel was ineffective at the *punishment* phase of a *non-capital trial*. *Ex parte Cruz*, 739 S.W.2d 53, 58 (Tex. Crim. App. 1987); *accord, Ex parte Walker*, 777 S.W.2d 427, 431 (Tex. Crim. App. 1989)(reversing non-capital case for "remarkable display of incompetence"). The more lenient *Duffy* standard--whether counsel rendered reasonably effective assistance--applies then.

D. Ineffective Assistance In Capital Trials

1. "The *Strickland* test is the proper standard to gauge the effectiveness of counsel at the guilt/innocence phase of a non-capital trial *and at the guilt/innocence and punishment phases of a capital trial.*" *Craig v. State*, 825 S.W.2d 128, 129 (Tex. Crim. App. 1992)(emphasis supplied). See *Garcia v. State*, 887 S.W. 2d 862, 880 (Tex. Crim. App. 1994); *McFarland v. State*, 845 S.W. 2d 824, 842 n.12 (Tex. Crim. App. 1993); *Rosales v. State*, 841 S.W.2d 368, 375 (Tex. Crim. App. 1992); *Black v. State*, 816 S.W.2d 350, 356 (Tex. Crim. App. 1991); *Boyd v. State*, 811 S.W.2d 105, 109 (Tex. Crim. App. 1991).

2. *Strickland* makes it difficult to establish that counsel was ineffective. *E.g.*, *Chambers v. State*, 903 S.W. 2d 21, 33 (Tex. Crim. App. 1995); *Rodriguez v. State*, 899 S.W. 2d 658, 668 (Tex. Crim. App. 1995); *Butler v. State*, 872 S.W.2d 227, 241 (Tex. Crim. App. 1994); *Ex parte Kunkle*, 852 S.W. 2d 499, 506 (Tex. Crim. App. 1993); *Muniz v. State*, 851 S.W. 2d 238, 258-59 (Tex. Crim. App. 1993); *Hathorn v. State*, 848 S.W. 2d 101, 120-21 (Tex. Crim. App. 1992); *McFarland v. State*, 845 S.W. 2d 824, 842-848 (Tex. Crim. App. 1993); *Miniel v. State*, 831 S.W. 2d 310, 323 (Tex. Crim. App. 1992); *Gosch v. State*, 829 S.W. 2d 775, 784 (Tex. Crim. App. 1991); *Motley v. State*, 773 S.W. 2d 283 (Tex. Crim. App. 1989); *Derrick v. State*, 773 S.W. 2d 271, 272-75 (Tex. Crim. App. 1989); *Holland v. State*, 761 S.W. 2d 307, 320 (Tex. Crim. App. 1988); *Bridge v. State*, 726 S.W. 2d 558, 571 (Tex. Crim. App. 1986).

3. *Patrick v. State*, 906 S.W. 2d 481 (Tex. Crim. App. 1995), provides some insight into just how difficult it is to make out such a claim under *Strickland*. "A strategic choice made after thorough investigation is practically unassailable. A strategic choice made after less than thorough investigation is reasonable to the extent reasonable professional judgment supports the limitation." *Id.* at 495.

a. Counsel is not ineffective for failing to put on mitigating evidence of child abuse where appellant testified at trial, outside the presence of the jury, that he did not want such evidence put on. *McFarland v. State*, 845 S.W. 2d 824, 848 (Tex. Crim. App. 1993).

b. In *Ex parte Davis*, 866 S.W. 2d 234 (Tex. Crim. App. 1993), the court of criminal appeals agreed that the guilt/innocence phase of the trial "was essentially a formality." Counsel only minimally cross-examined witnesses, and his summation took up less than a page in the statement of facts. Counsel was not ineffective for concentrating his efforts in the punishment phase of the trial. *Id.* at 237. At voir dire, and later in argument, counsel allowed the prosecutor to say that youth is irrelevant to punishment. Although this may well have been deficient performance, reversal was not required, because there was no prejudice. The court appears to say that, in light of applicant's extensive record for violent offenses, he would have received the death penalty without regard to his youth. *Id.* at 237-240. Nor was counsel ineffective for permitting the state to argue that "intentional" and "deliberate" are synonymous, since, at the time of applicant's trial, this was unsettled in Texas. *Id.* at 240-41.

c. In *McFarland v. State*, ___ S.W. 2d ___ No. 71,557 (Tex. Crim. App. February 21, 1996), the fact that one of appellant's attorneys customarily took a short nap during the afternoon portions of the trial did not deprive appellant of the effective assistance of counsel since he had a second chair. *Id.* at slip op. 24. The court also recognized that this might have been a

strategic move on the part of the lawyer who did not sleep, hoping that the jury might have sympathy for appellant. *Id.* at slip op. 25 n. 20.

4. *Ex parte Guzman*, 730 S.W. 2d 724 (Tex. Crim. App. 1987), was a death penalty case. In its original decision, the court conducted a detailed review of the performance of counsel and the resulting prejudice to defendant, as required by *Strickland*. Counsel was condemned as deficient for referring to his client as a "wetback," for improperly using an interpreter, for failing to communicate with his client, for insufficiently preparing his case at the punishment phase, and for adducing harmful evidence at the punishment phase. *Id.* at 733-34. The court also found that, absent this deficient performance of counsel, there was a reasonable probability that the defendant would have received a life sentence. Significant was that the state's evidence as to future dangerousness was extremely weak. *Id.* at 735. Accordingly, initially, the court granted defendant relief on his application for writ of habeas corpus and remanded for a new trial. The state then filed a motion for rehearing, and during the pendency of this motion, the Governor commuted the sentence to life imprisonment. The court held that this action rendered the matter moot, and granted the state's motion for rehearing. *Id.* at 737. Although the precedential value of this decision may be questionable in light of the ultimate holding of the court, *Guzmon* is of interest as the only capital case in which the court has found counsel ineffective under both prongs of *Strickland*.

E. Denial of Counsel Is Presumptively Prejudicial

1. There is a third standard--besides *Strickland* and *Duffy*--for reviewing error when counsel has been completely denied. In *United States v. Cronin*, 466 U.S. 660, 659 (1984), the Supreme Court recognized that, where counsel is completely denied, prejudice is presumed, avoiding the need to apply *Strickland's* second prong. Complete denial of counsel may either be actual or constructive. Constructive denial occurs where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing . . ." *Id.* "*Cronin's* presumption of prejudice applies to only a very narrow spectrum of cases where the circumstances leading to counsel's ineffectiveness are so egregious that the defendant was in effect denied *any meaningful, assistance at all.*" *Martin v. McCotter*, 796 F.2d 813, 820 (5th Cir. 1986); see *Lombard v. Lynaugh*, 868 F.2d 1475, 1481 (5th Cir. 1989)(petitioner not required to prove *Strickland* prejudice where appellate lawyer "afforded almost no appellate representation whatever").

2. In *Ex parte Burdine*, 901 S.W. 2d 456 (Tex. Crim. App. 1995)(Maloney, J., dissenting), the trial court found as a matter of fact and law that counsel slept during portions of applicant's capital murder trial. The trial court went on to find that counsel was therefore absent, and that this constituted a *per se* denial of the right to effective assistance of counsel. *Id.* at 457. The court of criminal appeals denied applicant's application for writ of habeas corpus. Judge Maloney, joined by Judges Overstreet and Baird, dissented. "The issue presented in this case has never been addressed by the United States Supreme Court nor by this Court. At least one federal circuit court has recognized that in circumstances similar to those in this case, a Sixth Amendment violation occurred. Accordingly, this Court has a duty to at least file and set this case so that we can consider the issue." *Id.* at 458.

F. Prejudice Is Presumed From Conflict of Interest

1. Finally, prejudice is presumed when counsel actively represents conflicting

interests. *United States v. Cronin*, 466 U.S. at 661 n.28.

2. In *Ex parte McCormick*, 645 S.W. 2d 801 (Tex. Crim. App. 1983), the court reversed the convictions for capital murder because the lawyers jointly representing the two co-defendants had an actual conflict of interest which affected the adequacy of their representation. *Id.* at 806. Although not then adopting a rule that multiple representation is *per se* unconstitutional in a capital case, the court left that possibility open in the future, noting that an attorney "cannot simultaneously argue with any semblance of effectiveness that each defendant is most deserving of the lesser penalty." *Id.* at 806 n.18.

3. In *Burger v. Kemp*, 483 U.S. 766, 785 (1987), the Court found no actual conflict of interest where partners represented co-defendants who were tried separately. Also, the Court found that the defendant was not harmed.

4. *Cf. Ex parte Prejean*, 625 S.W. 2d 731, 733 (Tex. Crim. App. 1981)(trial court erred in disqualifying counsel because of conflict of interest in capital case, because defendant may waive conflict).

G. Ineffective Assistance On Appeal

1. Due process of law guarantees a criminal defendant effective assistance of counsel on his first appeal as of right. *Evitts v. Lucey*, 469 U.S. 387, 397 (1985).

2. In *Banda v. State*, 768 S.W. 2d 294 (Tex. Crim. App. 1989), counsel raised only one ground of error in a six page brief. The court noted that it perceived other, colorable claims that could have been raised, and debated whether to consider these in the interest of justice. Ultimately, the court decided not to, both in order not to "bushwhack[]" the state, and so as not to "prospectively sabotage appellant's chances to establish the prejudice element of any claim of ineffective assistance of appellate counsel he may choose to make in post conviction collateral attack." *Id.* at 296 n.2.

3. The trial court did not err in appointing appellate counsel even though appellant clearly expressed the desire to represent himself on appeal. Appellant had the best of both worlds, since the court allowed hybrid representation. *Faretta* is not violated so long as an appellant is allowed to view the record and file a brief on appeal, unless there is an inherent conflict between the arguments presented by him and appointed counsel. *Hathorn v. State*, 848 S.W. 2d 101, 123-24 (Tex. Crim. App. 1992).

4. Appellant had no right to represent himself on appeal where he first sought to do so after his lawyers had filed their brief. "Allowing applicant untimely to assert his right of self-representation after nearly three years and only after he had read his appellate counsel's briefs would unduly hamper the administration of justice." *Ex parte Thomas*, 906 S.W. 2d 23, 24 (Tex. Crim. App. 1995).

H. Motion For New Trial

1. The grounds for new trial listed in Rule 30(a) are illustrative, not exhaustive, and the trial judge has discretion to grant a new trial for a reason not listed in Rule 30(a), including that

trial counsel was ineffective. *Reyes v. State*, 849 S.W. 2d 812, 815 (Tex. Crim. App. 1993).

I. Post-Conviction Assistance

1. The Constitution does not require appointment of counsel to death row inmates for the purpose of pursuing collateral attacks on their sentences. *Murray v. Giarratano*, 109 S.Ct. 2765, 2771 (1989); *DeLuna v. Lynaugh*, 873 F.2d 757, 760 (5th Cir. 1989).

2. The Supreme Court interpreted Title 21 U.S.C. 848(q)(4)(B) to require appointment of qualified legal representation for capital defendants in federal habeas corpus proceedings. *McFarland v. Scott*, 114 S.Ct. 2568, 2572 (1994). This right adheres prior to the filing of a formal, legally sufficient habeas corpus petition. Additionally, appointed counsel shall, upon a proper ex parte showing, be entitled to investigative, expert, or other services reasonably necessary for the representation of the defendant. *Id.*

3. Where counsel was appointed prior to the effective date of article 11.071, § 2(d), and where the appointment remains in effect, this appointment encompasses the filing of the initial application for writ of habeas corpus. Therefore, there is no need to appoint new counsel under article 11.071. *Ex parte Cruz*, ___ S.W. 2d ___, ___ No. 29,545-01 (Tex. Crim.App. April 24, 1996), slip op. 1.

J. One Lawyer, Or Two?

1. The trial court does not err in refusing to appoint additional counsel, in the absence of proof that defendant was harmed by having only one lawyer. *Sanne v. State*, 609 S.W. 2d 762, 777 (Tex. Crim. App. 1980).

2. "[A] trial court should carefully exercise its discretion in acting upon an accused's request for additional counsel in a capital murder case." *Gardner v. State*, 733 S.W. 2d 195, 206-207 (Tex. Crim. App. 1987)(still, error exists only if defendant did not receive the effective assistance of counsel).

K. Time To Prepare

1. The trial court did not err in denying a motion for continuance where counsel had only 22 days to prepare for a capital murder trial, absent a showing of how defendant was prejudiced. *Sanne v. State*, 609 S.W. 2d 762, 776 (Tex. Crim. App. 1980); *see also Heiselbetz v. State*, 906 S.W. 2d 500, 511-12 (Tex. Crim. App. 1995)(no specific prejudice established where counsel had only 43 days to prepare before voir dire began); *Hernandez v. State*, 643 S.W. 2d 397, 399-400 (Tex. Crim. App. 1982)(no specific prejudice shown).

L. Self-Representation

1. The trial court does not necessarily err in permitting a capital defendant to represent himself at trial. *Dunn v. State*, 819 S.W.2d 510, 522-23 (Tex. Crim. App. 1991).

2. In *Daniels v. State*, ___ S.W. 2d ___ No. 01-94-00943-CR (Tex. App.--Houston

[1st Dist.] March 28, 1996), the trial court denied appellant's motion for continuance which was based on the unavailability of one of his lawyers. The trial court then gave appellant the option of proceeding with his lawyer who was available (but who had filed a motion to withdraw) or proceeding *pro se*, and appellant chose the later. This was not error. "[I]t is not unfair for a trial court to require a defendant to choose between going to trial with appointed counsel or proceeding *pro se*." *Id.* at slip op. 6. This was a capital case, but unlike *Dunn*, it was not one in which the state sought the death penalty.

M. Delay In Appointment

1. Appellant must show he was harmed by the trial court's failure to appoint counsel until several months after his arrest. *Sterling v. State*, 830 S.W.2d 114, 121 (Tex. Crim. App. 1992).

N. When Should Ineffectiveness Be Raised?

1. Ineffective assistance of counsel can be raised on direct appeal or collaterally, by writ of habeas corpus. One problem with raising such issues on direct appeal is that the record is not adequately developed to make out such a claim. In *Rodriguez v. State*, 899 S.W. 2d 658, 668 (Tex. Crim. App. 1995), Judge Baird concurred with this note: "Appellate counsel would be well advised and appellants would be better served, if claims of ineffective assistance of counsel were not raised on direct appeal but rather in applications seeking habeas corpus relief." *See also Chambers v. State*, 903 S.W. 2d 21, 35-36 (Tex. Crim. App. 1995)("This is so because a hearing on a writ application develops a record on the conduct of counsel. With such a record, we can better gauge the effectiveness of counsel's representation.")(Baird, J., concurring).

IV. THE DUTY OF THE STATE TO PAY FOR EXPERT ASSISTANCE REQUIRED BY INDIGENT CAPITAL DEFENDANTS

A. Article 26.05(a)

1. Formerly, trial courts could pay no more than \$500.00 toward "expenses incurred for purposes of investigation and expert testimony. . . ." Tex. Code Crim. Proc. Ann. art. 26.05 § 1(d)(Vernon 1987)(amended). Such an amount, of course, is rarely adequate to cover the real cost of investigation and expert witnesses in a serious case. The constitutionality of this limitation was raised frequently and, invariably, the court sidestepped the merits by holding that the appellant had "failed to show a specific need, how the appellant was harmed, or that expenses had in fact been denied." *Castillo v. State*, 739 S.W. 2d 280, 294 (Tex. Crim. App. 1987); *see e.g., Stoker v. State*, 788 S.W.2d 1,17 (Tex. Crim. App. 1989), (motion filed too late; no proof of costs; no showing of harm); *Jordan v. State*, 707 S.W. 2d 641, 645 (Tex. Crim. App. 1986)(motion for medical examination failed to reflect extent of injury, when injury occurred, the effect of the injury, the availability of the expert, the cost of the expert, or when the examination could be made); *Phillips v. State*, 701 S.W. 2d 875, 895 (Tex. Crim. App. 1985)(mere general request for funds does not show harm); *Barney v. State*, 698 S.W. 2d 114, 128 n.6 (Tex. Crim. App. 1985)(failure to show harm); *Green v. State*, 682 S.W. 2d 271, 291 (Tex. Crim. App. 1984)(no proof of either indigency or harm); *Lackey v. State*, 638 S.W. 2d 439, 441-442 (Tex. Crim. App. 1982)(no proof why amount granted was not sufficient, no proof of harm, and late motion); *Hammett v. State*, 578 S.W. 2d 699, 707 (Tex.

Crim. App. 1979)(motion too late); *Freeman v. State*, 556 S.W. 2d 287, 308 (Tex. Crim. App. 1977)(no harm).

2. In 1987, the statute was amended to remove the \$500.00 ceiling. Accordingly, appointed counsel "shall be reimbursed for reasonable expenses incurred with prior court approval for purposes of investigation and expert testimony" Tex. Code Crim. Proc. Ann. art. 26.05(a)(Vernon 1989).

B. The Holding In Ake v. Oklahoma

1. In *Ake v. Oklahoma*, 470 U.S. 68, 74 (1985), the Court held that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one." Mr. Ake's sanity was a "significant factor" both because his sole defense was insanity, and because, under Oklahoma law, future dangerousness was an aggravating factor at punishment. *Id.* at 86.

C. The Implications Of Ake

1. Several things should be emphasized about *Ake*:

a. Although *Ake* itself was concerned with psychiatric assistance, there is no reason it does not have broader application to requests for other experts. Due process requires "the opportunity to participate meaningfully in a judicial proceeding," *Id.* at 76, "access to the raw materials integral to the building of an effective defense," *Id.* at 77, "basic tools of an adequate defense," *Id.*, and "assistance . . . crucial to the defendant's ability to marshal his defense," *Id.* at 80. Logically, then, any investigational or expert assistance necessary to provide these basic tools to an adequate defense should be made available. In *McBride v. State*, 838 S.W.2d 248, 252 (Tex. Crim. App. 1992), the court held that due process required the appointment of a chemist to inspect the alleged cocaine. See *Rey v. State*, 897 S.W. 2d 333, 338-39 (Tex. Crim. App. 1995)(holding that, under the facts of this case, appellant was entitled to appointment of a forensic pathologist).

b. The *Ake* case guarantees access to *competent* assistance. *Id.* at 83. If you are provided with an incompetent expert, demand a competent one.

c. *Ake* does not necessarily guarantee the right to choose your own expert, or to receive funds to hire your own expert. Rather, the state must provide *access* to a competent expert. *Id.* at 83.

d. *Ake* permits the defendant to "make an *ex parte* threshold showing to the trial court" as to his need for an expert. Proceeding *ex parte* may be a very valuable right, necessary to avoid exposing your defensive theories prematurely. Insist upon this right under *Ake* and the Due Process Clause, even though it is not explicitly a part of article 26.05(a).

e. *Ake* is not limited to capital cases. *DeFreece v. State*, 848 S.W.2d 150, 156 n.5 (Tex. Crim. App. 1993)(murder); see also *McBride v. State*, 838 S.W. 2d 248, 249 (Tex. Crim. App. 1992)(possession of cocaine).

f. *Ake* makes it clear that the defendant bears the "threshold" burden of showing his need for assistance. The Texas Court of Criminal Appeals has always placed hyper-technical demands on the defendant to prove his entitlement to expert assistance. Expect the court to be just as rigorous post-*Ake*, and make your record carefully. Otherwise, be prepared for the court to tell you later that you did not preserve the issue for appeal. In *Rey v. State*, 897 S.W. 2d 333, 343 (Tex. Crim. App. 1995), appellant explained his defensive theory and how it could effect the outcome of the case, and he supported this explanation with the affidavit of his expert, who seriously questioned the findings of the state's expert. Additionally, appellant's expert set forth his own opinion as to the mechanism of death which was consistent with appellant's defensive theory. This clearly established the mechanism of death was to be a significant factor at trial, and was therefore sufficient to meet appellant's threshold burden.

D. The Disinterested Expert In Texas

1. Texas law provides that the trial court shall appoint a disinterested mental health expert to examine the defendant who files notice of intention to raise the insanity defense. This expert must file a written report with the court, who then furnishes copies to the defense counsel and prosecution. Tex. Code Crim. Proc. Ann. art. 46.03 § 3(a) (Vernon Supp. 1995). *Ake* held that an indigent defendant is entitled to an expert to "assist in evaluation, preparation, and presentation of the defense." 470 U.S. at 83. Does the Texas "disinterested" expert comport with *Ake*?

2. In *DeFreece v. State*, 848 S.W.2d 150 (Tex. Crim. App. 1993), the Texas Court of Criminal Appeals held that, where the indigent defendant shows that insanity will be a significant factor at trial, due process requires more than just examination by a neutral psychiatrist. "It also means the appointment of a psychiatrist to provide technical assistance to the accused, to help evaluate the strength of his defense, to offer his own expert diagnosis at trial if it is favorable to that defense, and to identify the weaknesses in the State's case, if any, by testifying himself and/or preparing counsel to cross-examine opposing experts." *Id.* at 159; *see also McBride v. State*, 838 S.W. 2d 248, 252 (Tex. Crim. App. 1992)(appellant was entitled to appointment of expert chemist to examine alleged cocaine).

3. "[O]nce he established that cause of death was likely to be a significant factor at trial, appellant was entitled to more than an expert to testify on his behalf--he was also entitled to 'technical assistance . . . to help evaluate the strength of [that] defense, . . . and to identify the weaknesses in the State's case, if any, by . . . preparing counsel to cross-examine opposing experts.'" In *Rey v. State*, 897 S.W. 2d 333, 343 (Tex. Crim. App. 1995).

4. The court refused to consider appellant's argument that he was entitled to the appointment of a psychiatrist to assist him at voir dire, since appellant presented no authority, argument, or evidence to show his entitlement. *Teague v. State*, 864 S.W. 2d 505, 509 (Tex. Crim. App. 1993).

E. Ake Error Cannot Be Harmless

1. The denial of the appointment of an expert under *Ake* "amounts to structural error which cannot be evaluated for harm." *Rey v. State*, 897 S.W. 2d 333, 344-46 (Tex. Crim. App. 1995).

V. MOTION TO SET ASIDE INDICTMENT**A. In General**

Indictments are subject to being quashed upon timely motion for a variety of reasons. The two grounds most often raised in capital cases are that the capital murder statutes are unconstitutional, or that the indictment fails to give adequate notice of the offense charged.

B. Unconstitutionality Of The Statute

1. An indictment based on an unconstitutional statute should be quashed. See *White v. State*, 440 S.W. 2d 660, 667 (Tex. Crim. App. 1969). Scores of such constitutional challenges have been brought in capital cases, and, to date, the Texas Court of Criminal Appeals has uniformly rejected them all. The following is a sample of these challenges:

a. The multiple murder statute, § 19.03 (a)(6) of the Texas Penal Code, is not vague or over broad as applied to *this appellant*, and does not fail to narrow the class of death eligible persons. *Vuong v. State*, 830 S.W. 2d 929, 941 (Tex. Crim. App. 1992); see *Johnson v. State*, 853 S.W. 2d 527, 534 (Tex. Crim. App. 1992)(statute not vague in this case for failure to define "same criminal transaction").

b. The statute is not vague and over broad for failure to define deliberately, probability, criminal acts of violence and continuing threat to society. *Garcia v. State*, 887 S.W. 2d 846, 859 (Tex. Crim. App. 1994).

c. The statute is not unconstitutional for permitting the execution of persons 17 years and older at the time of their offenses. *Jackson v. State*, 819 S.W.2d 142, 146 (Tex. Crim. App. 1990).

d. Article 37.071 is not unconstitutional for failure to provide a carefully detailed instruction on consideration of mitigating evidence, or because that statute prohibits the individualized consideration of mitigating circumstances, or because of capriciousness stemming from the impossibility of predicting future behavior, or because the terms used in the second special issue are vague. *Lackey v. State*, 819 S.W. 2d 111, 135, (Tex. Crim. App. 1989); see *Johnson v. State*, 691 S.W. 2d 619, 624 (Tex. Crim. App. 1984); but see *Penry v. Lynaugh*, 109 S. Ct. 2934 (1989).

e. Article 37.071(b)(1) is not unconstitutional because it does not permit the defendant to introduce mitigating evidence when the state relies on the theory of parties. *Ransom v. State*, 789 S.W. 2d 572, 589 (Tex. Crim. App. 1989).

f. The trial court did not err in overruling a motion to quash based on the unconstitutional and arbitrary selectivity given to prosecutors in deciding whether to indict for capital murder, in the absence of evidence of purposeful discrimination. *County v. State*, 812 S.W. 2d 303, 308 (Tex. Crim. App. 1989); see also *Gregg v. Georgia*, 428 U.S. 153, 199 (1976); *Patrick v. State*, 906 S.W. 2d 481, 495 (Tex. Crim. App. 1995); *Newton v. State*, __S.W.2d __, __ No. 70,770 (Tex. Crim. App. June 17, 1992), slip op. 34; *Cantu v. State*, 842 S.W.2d 667, 692 (Tex. Crim. App. 1992); *Barefield v. State*, 784 S.W.2d 38, 46 (Tex. Crim. App. 1989); *Fearance v. State*, 620 S.W. 2d 577, 581 (Tex. Crim. App. 1980).

g. Article 37.071(b)(2) is not unconstitutional for imposing on the jury the standard of "probability" on the theory that this is less stringent than proof beyond a reasonable doubt. *Sosa v. State*, 769 S.W. 2d 989, 916-917 (Tex. Crim. App. 1989); accord, *Lewis v. State*, 911 S.W. 2d 1, 7 (Tex. Crim. App. 1995); *Jones v. State*, 843 S.W.2d 487, 496 (Tex. Crim. App. 1992).

h. The Texas death penalty statutes are not unconstitutional for allowing the

arbitrary and capricious infliction of the death penalty. *Barrientes v. State*, 752 S.W. 2d 524, 528 (Tex. Crim. App. 1987).

i. The Texas scheme is not unconstitutional because it allows a person to be convicted of capital murder as a party. *Andrews v. State*, 744 S.W. 2d 40, 51-52 (Tex. Crim. App. 1987).

j. Article 37.071 does not deny the defendant due process and equal protection of the law by permitting introduction at the punishment phase of "any matter that the court deems relevant to sentence." *Aranda v. State*, 736 S.W. 2d 702, 708 (Tex. Crim. App. 1987); *see Butler v. State*, 872 S.W. 2d 227, 238 (Tex. Crim. App. 1994).

k. Article 37.071(b)(1) properly narrows the class of persons eligible for the death penalty. *Marquez v. State*, 725 S.W. 2d 217, 243-44 (Tex. Crim. App. 1987).

l. Article 37.071 is not unconstitutional because it is not based on a uniform national standard. *Johnson v. State*, 691 S.W. 2d 619 (Tex. Crim. App. 1984).

m. Article 37.071 is not unconstitutional because it does not allow a proportionality review to determine whether the penalty is proportionate to other similar crimes. *Johnson v. State*, 691 S.W. 2d 619, 624 (Tex. Crim. App. 1984).

n. Article 37.071(d)(2) is not unconstitutional because it requires ten votes to answer an issue "no." *Johnson v. State*, 691 S.W. 2d 619, 624 (Tex. Crim. App. 1984); *see Hughes v. State*, 897 S.W. 2d 285, 300 (Tex. Crim. App. 1994).

o. The statute is not facially unconstitutional because it forbids individual jurors from giving individual effect to their desire to return a life sentence, by requiring 10 "no" votes. *Rousseau v. State*, 855 S.W.2d 666, 687 (Tex. Crim. App. 1993); *accord, Emery v. State*, 881 S.W.2d 702, 711 (Tex. Crim. App. 1994).

p. Execution by lethal injection is not cruel and unusual punishment, or otherwise unconstitutional. *Ex parte Granviel*, 561 S.W. 2d 503, 508-516 (Tex. Crim. App. 1978).

q. Article 37.071(g) is not unconstitutional for prohibiting the judge and the parties from informing the jury that a hung jury at punishment will result in a life sentence. *Davis v. State*, 782 S.W.2d 211, 222 (Tex. Crim. App. 1989); *accord, Hughes v. State*, 897 S.W. 2d 285, 301 (Tex. Crim. App. 1994); *Garcia v. State*, 887 S.W. 2d 846, 861 (Tex. Crim. App. 1994); *Felder v. State*, 848 S.W. 2d 85, 101 (Tex. Crim. App. 1992); *Newton v. State*, ___ S.W.2d ___, ___ No. 70,770 (Tex. Crim. App. June 17, 1992), slip op. 34; *Sterling v. State*, 830 S.W.2d 114, 122 (Tex. Crim. App. 1992); *cf. Draughon v. State*, 831 S.W.2d 331, 337 (Tex. Crim. App. 1992)(Texas procedure is "uncommonly enigmatic"); *Hathorn v. State*, 848 S.W. 2d 101, 125 (Tex. Crim. App. 1992).

r. Putting a woman to death for capital murder is no more or less cruel and unusual than is putting a man to death for the same crime. *Newton v. State*, ___ S.W.2d ___, ___ No. 70,770 (Tex. Crim. App. June 17, 1992), slip op. 33.

s. The multiple murder aggravating circumstance adequately channels the jury's discretion. *Narvaiz v. State*, 840 S.W. 2d 415, 432 (Tex. Crim. App. 1992).

t. There is no eighth amendment violation because the trial judge only submitted the deliberate question with regard to the first of appellant's multiple victims. *Narvaiz v. State*, 840 S.W. 2d 415, 433 (Tex. Crim. App. 1992).

u. In *Satterwhite v. State*, 858 S.W. 2d 412 (Tex. Crim. App. 1993), appellant contended the statute was unconstitutional because it chilled his ability to present all mitigating evidence to the jury. "Such an argument *might be appropriate* in a pre-*Penry* case. However, the present case was tried in July 1989, a month after *Penry* was handed down." *Id.* at 428(emphasis supplied).

v. The special issues are not unconstitutional for not providing a mechanism for the jury to give mitigating effect to appellant's non-triggerman status. *Robinson v. State*, 851 S.W. 2d 216, 235, 236 (Tex. Crim. App. 1993).

w. The serial murder statute is not unconstitutionally indefinite or vague for not defining the phrase "same scheme or course of conduct," and for not specifying that the different transactions must occur over a definite time period or in a definite location. *Corwin v. State*, 870 S.W. 2d 23, 28 (Tex. Crim. App. 1993)(recognizing, however, that in some other, "hypothetical cases, as the time and distance between murders committed during different transactions increases, and as the actor's motive or *modus operandi* vary, it will become more difficult for putative defendants and law enforcement agencies to say with certainty that the murders occurred 'pursuant to the same . . . course of conduct'").

x. "The Texas Capital Murder Statute is not unconstitutional for failing to provide an optional death penalty of 'life-without-parole.'" *Arnold v. State*, 873 S.W. 2d 27, 39 (Tex. Crim. App. 1993).

y. The statute does not violate federal equal protection by permitting introduction of prior unadjudicated extraneous offenses at the punishment phase. *Emery v. State*, 881 S.W.2d 702, 712 (Tex. Crim. App. 1994).

z. The multiple murder statute is not unconstitutional because it does not require that the second murder be committed intentionally or knowingly. *Dinkins v. State*, 894 S.W. 2d 330, 340 (Tex. Crim. App. 1995).

aa. The statute is not unconstitutional to the extent that it requires a finding of deliberateness only as to one victim in a multiple murder prosecution. *Norris v. State*, 902 S.W. 2d 428, 448 (Tex. Crim. App. 1995).

bb. Article 37.071 is not unconstitutional because there are no appellate standards for determining the sufficiency of the evidence to support the jury's answers to the special issues. *Patrick v. State*, 906 S.W. 2d 481, 494 (Tex. Crim. App. 1995).

cc. "[T]he deletion of the 'deliberateness' special issue does not render Texas' death penalty scheme unconstitutional, and Texas' death penalty scheme does allow for consideration of 'offense-specific criteria' in a 'meaningful manner.'" *Green v. State*, 912 S.W. 2d 189, 195 (Tex. Crim. App. 1995).

dd. The Texas capital scheme does not violate the Equal Protection Clause because Texas currently has more than one capital sentencing procedure in effect. "Because those committing the same offense on the same day are subject to the same statutory scheme, similarly situated defendants are similarly treated for purposes of the fourteenth amendment." *Lawton v. State*, 913 S.W. 2d 542, 560 (Tex. Crim. App. 1995).

ee. Article 37.071 is not unconstitutional because it gives the jury unfettered discretion in determining what circumstances are mitigating. *Curry v. State*, 910 S.W. 2d 490, 496 (Tex. Crim. App. 1995); *McFarland v. State*, ___ S.W. 2d ___, ___ No. 71,557 (Tex. Crim. App. February 21, 1996), slip op. 35.

ff. The statute is not unconstitutional because considerations required by *Penry* contradict the "structured discretion" mandated by *Furman*. *McFarland v. State*, ___ S.W. 2d ___, ___ No. 71,557 (Tex. Crim. App. February 21, 1996), slip op. 53-56.

C. Lack of Notice

1. An indictment may also be quashed if it fails to give the defendant notice sufficient to prepare a defense. *Adams v. State*, 707 S.W. 2d 900, 903 (Tex. Crim. App. 1986); see Tex. Code Crim. Proc. Ann. art. 21.11 (Vernon 1989); see also Tex. Code Crim. Proc. Ann. art. 1.14(b)(Vernon Supp. 1995)(objection must be made prior to trial).

a. In the past, a formal defect in an indictment, such as the failure to specify the name of the victim of the underlying offense, generally meant automatic reversible error in the face of a motion to quash. *E.g.*, *Silguero v. State*, 608 S.W. 2d 619, 620 (Tex. Crim. App. 1980); *Evans v. State*, 601 S.W. 2d 943, 947 (Tex. Crim. App. 1980); *Brasfield v. State*, 600 S.W. 2d 288, 295 (Tex. Crim. App. 1980); *King v. State*, 594 S.W. 2d 425, 427 (Tex. Crim. App. 1980); *but cf.*, *Pinkerton v. State*, 660 S.W. 2d 58, 63 (Tex. Crim. App. 1983)(specification not required where indictment is not susceptible to an interpretation that the victim was a person other than person named

in indictment). Reversal is no longer automatic. Now, in addition to showing that the defendant was deprived of notice, he must show that the defective indictment prejudiced substantial rights. *See Burks v. State*, 876 S.W. 2d 877, 888 (Tex. Crim. App. 1994)(failure to name robbery victim was not error and, even if it was erroneous, it did not adversely impact on appellant's defense); *Rougeau v. State*, 738 S.W. 2d 651, 656 (Tex. Crim. App. 1987)(error in not naming victim of robbery had no substantial impact on defense); *but cf. Janecka v. State*, 823 S.W.2d 232, 238 (Tex. Crim. App. 1990)(reversal required in murder for hire case where proof shows that failure to name the remunerator impacted upon the ability of the defense to attempt to prove variance and its ability to mitigate punishment).

b. An indictment need not allege the constituent elements of the underlying offense. *E.g.*, *Alba v. State*, 905 S.W. 2d 581, 585 (Tex. Crim. App. 1995)(murder/burglary); *Dinkins v. State*, 894 S.W. 2d 330, 338 (Tex. Crim. App. 1995)(multiple murder); *Barnes v. State*, 876 S.W. 2d 316, 323 (Tex. Crim. App. 1994)(murder/burglary); *Hathorn v. State*, 848 S.W. 2d 101, 108-109 (Tex. Crim. App. 1992)(murder/burglary); *Ramirez v. State*, 815 S.W. 2d 636, 642 (Tex. Crim. App. 1991)(murder/burglary); *Andrade v. State*, 700 S.W. 2d 585, 589 (Tex. Crim. App. 1985)(murder/attempted aggravated sexual assault); *Beathard v. State*, 767 S.W. 2d 423, 431 (Tex. Crim. App. 1989)(murder/ burglary); *Marquez v. State*, 725 S.W. 2d 217, 236 (Tex. Crim. App. 1987)(murder/aggravated sexual assault); *Hogue v. State*, 711 S.W.2d 9, 14 (Tex. Crim. App. 1986)(murder/arson); *Hammett v. State*, 578 S.W. 2d 699, 708 (Tex. Crim. App. 1979)(murder/robbery); *Smith v. State*, 540 S.W. 2d 693, 697 (Tex. Crim. App. 1976)(murder/robbery).

c. An indictment need not allege the special issues. *Rosales v. State*, 748 S.W. 2d 451, 458 (Tex. Crim. App. 1987); *Castillo v. State*, 739 S.W. 2d 280, 298-99 (Tex. Crim. App. 1987); *Sharp v. State*, 707 S.W. 2d 611, 624-625 (Tex. Crim. App. 1986); *Vigneault v. State*, 600 S.W. 2d 318, 330 (Tex. Crim. App. 1980).

d. An indictment is not duplicitous for alleging a single incident of capital murder in multiple counts, necessary to meet variations in the proof. *Jurek v. State*, 522 S.W. 2d 934, 941 (Tex. Crim. App. 1975), *aff'd on other grounds*, 422 U.S. 262 (1976).

e. An indictment is not subject to being quashed because it alleges both that the defendant *intentionally and knowingly* caused the death of another and that he *intentionally* caused this death in the course of committing robbery. *Richardson v. State*, 744 S.W. 2d 65, 83-84 (Tex. Crim. App. 1987).

f. A murder/robbery indictment is not quashable for alleging that the defendant acted intentionally and knowingly, even though the statute proscribes only intentional conduct. *Wyle v. State*, 777 S.W.2d 709, 717 (Tex. Crim. App. 1989); *Castillo v. State*, 739 S.W. 2d 280, 299 (Tex. Crim. App. 1987); *East v. State*, 702 S.W. 2d 606, 616 (Tex. Crim. App. 1985); *Wilder v. State*, 583 S.W. 2d 349, 361 (Tex. Crim. App. 1979).

g. Since there is no "double intent" requirement in the capital murder statute, the trial court did not err in overruling a motion to quash for failure to allege both an intentional murder and an intentional robbery. *Demouchette v. State*, 731 S.W. 2d 75, 80 (Tex. Crim. App. 1986).

h. An indictment for the capital murder of a peace officer is not quashable for failure to allege the facts upon which the state would rely to prove the victim was in the lawful discharge of duties when killed. *Moreno v. State*, 721 S.W. 2d 295, 299-300 (Tex. Crim. App. 1986).

I. An indictment for capital murder is not fundamentally defective for alleging murder in the course of *aggravated robbery*, even though the statute specifies *robbery*. *Bonham v. State*, 680 S.W. 2d 815, 820 (Tex. Crim. App. 1984).

j. The trial court did not err in overruling a motion to quash where the indictment alleged in a single count murder in the course of burglary and murder in the course of robbery, where these allegations alleged multiple ways of committing the offense of capital murder. *Jernigan v. State*, 661 S.W. 2d 936, 943 (Tex. Crim. App. 1983).

k. Assuming his indictment was defective for not alleging the manner and means of strangulation, the appellant still failed to show reversible error under *Adams v. State*, since he could not show the requested information had a deleterious effect on his ability to prepare a defense. Appellant had access to his several confessions in which he had admitted strangling the victim with his hands, and to the medical examiner's report which corroborated these confessions. *Chambers v. State*, 866 S.W.2d 9, 17-18 (Tex. Crim. App. 1993).

l. Appellant was indicted for murder during the course of burglary of a vehicle and robbery. On appeal he complained that committing murder during the course of burglary of a vehicle is not capital murder. The court found any error harmless, since the jury properly convicted appellant of murder during the course of robbery. "Under these facts, that the trial court potentially erred in failing to quash the indictment because it contained an allegedly erroneous alternative theory of the offense has no practical effect on the outcome of the case. In providing appellant with notice of the robbery theory under which he was actually convicted, the indictment fulfilled its function of providing appellant with notice of the charges against him." *Lawton v. State*, 913 S.W. 2d 542, 551 (Tex. Crim. App. 1995).

D. Violation of Agreement Not To Prosecute

1. The trial court has the authority to quash an indictment based on the state's violation of an enforceable agreement not to prosecute. *County v. State*, 812 S.W.2d 303, 317 (Tex. Crim. App. 1989).

E. Today's Frivolous Issue Is Tomorrow's Reversible Error

1. Lawyers should not be deterred from moving to quash indictments on grounds that have been previously rejected on appeal. For example, the decision by the Supreme Court in *Penry v. Lynaugh*, 492 U.S. 302 (1989), proves that the Supreme Court has a very different attitude about the constitutionality of article 37.071 than did the Texas Court of Criminal Appeals. Failure to raise even a constitutional challenge today could result in a finding of procedural default later.

VI. RACIAL DISCRIMINATION IN THE SELECTION OF THE GRAND JURY

A. Castaneda v. Partida

1. It has long been recognized that it is a denial of equal protection to try a person under an indictment returned by a grand jury from which persons of his race or color have been excluded. *Hernandez v. Texas*, 347 U.S. 475 (1954).

2. Similarly, equal protection is violated by a showing that members of one's race are substantially underrepresented, if underrepresentation results from purposeful discrimination. *Castaneda v. Partida*, 430 U.S. 482, 493 (1977). In order to prove an equal protection violation, "the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs." *Id.* at 494.

3. *Castaneda* reiterated the three prong test for proving a prima facie case of discriminatory purpose:

The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied. Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time. This method of proof, sometimes called the "rule of exclusion," has been held to be available as a method of proving discrimination in jury selection against a delineated class. Finally, as noted above, a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing. Once the defendant has shown substantial underrepresentation of his group, he has made out a prima facie case of discriminatory purpose, and the burden then shifts to the State to rebut that case.

Id. at 494.

4. A 40% disparity between Hispanics in the population and those summoned for grand jury service, over an 11 year period, as shown by the census, is sufficient to make a prima facie case of discrimination. *Id.* at 495-96; *Flores v. State*, 783 S.W. 2d 793, 795 (Tex. App.--El Paso 1990, no pet.)(sufficient disparity); *cf. Cantu v. State*, 842 S.W.2d 667, 678 (Tex. Crim. App. 1992)(insufficient disparity).

5. Once the burden has shifted to the state, it must dispel the inference of purposeful discrimination. An equal protection violation will be found when the state fails to rebut this prima facie case. *Castaneda v. Partida*, 430 U.S. at 501(proof that Hispanics constitute the "governing majority" in the county is insufficient to rebut a prima facie case); *Flores v. State*, 783 S.W. 2d 793, 796 (Tex. App.--El Paso 1990, no pet.)(state "totally failed" to rebut prima facie case); *Cerda v. State*, 644 S.W. 2d 875, 879 (Tex. App.--Amarillo 1982, no pet.)(state failed to rebut); *cf. Session v. State*, 676 S.W. 2d 364, 368 (Tex. Crim. App. 1984)(state rebutted prima facie case by calling grand jury commissioners who chose recent grand juries).

6. *Partida* permits proof of underrepresentation over some substantial period of time. Historic underrepresentation only becomes relevant, however, if the defendant can show that the class to which he belongs was underrepresented on the grand jury which indicted him.

If the class to which a defendant belongs is fully represented on the indicting grand jury the defendant suffers no injury and exclusion of members of the class from earlier grand juries is irrelevant to his case. Only if the defendant's class is substantially underrepresented on the indicting grand jury does the makeup of prior grand juries become relevant to explain whether this underrepresentation on the indicting grand jury

is a statistical accident or the result of purposeful discrimination.

Espinoza v. State, 604 S.W. 2d 908, 909-910 (Tex. Crim. App. 1980)(defendant failed to make a prima facie case where he did not prove the composition of the grand jury which indicted him); *accord*, *Evans v. State*, 656 S.W. 2d 65, 66 (Tex. Crim. App. 1983); *but see* *Session v. State*, 676 S.W. 2d 364, 367 (Tex. Crim. App. 1984)(state's argument that prior composition of grand juries was irrelevant because the court examined the composition of the indicting grand jury "is clearly wrong").

B. Cross-Racial Standing

1. In order to show a violation of *equal protection* the defendant must show that members of his own race were underrepresented. Thus, an Anglo-American cannot succeed on an equal protection complaint about underrepresentation of Hispanic grand jurors. *Bird v. State*, 692 S.W. 2d 65, 78 (Tex. Crim. App. 1985); *accord*, *Cantu v. State*, 842 S.W.2d 667, 678 n.6 (Tex. Crim. App. 1992).

2. Although one does not have cross-racial standing to bring equal protection challenges, such challenges may be made under the *Due Process Clause*. *See Peters v. Kiff*, 407 U.S. 493, 504 (1972)("whatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law").

C. Article 19.27

1. Tex. Code Crim. Proc. Ann. art. 19.27 (Vernon 1977) provides:

Before the grand jury has been impaneled, any person may challenge the array of jurors or any person presented as a grand juror. In no other way shall objections to the qualifications and legality of the grand jury be heard. Any person confined in jail in the county shall upon his request be brought into court to make such challenge.

2. In *Muniz v. State*, 573 S.W. 2d 792, 796 (Tex. Crim. App. 1978), the court of criminal appeals held that article 19.27 applies to *Partida*-type challenges, and found that defendant waived the challenge by not making it prior to impanelment of the grand jury. *Accord*, *Bird v. State*, 692 S.W. 2d 65, 76 (Tex. Crim. App. 1985); *Rodriguez v. State*, 597 S.W. 2d 917, 919 (Tex. Crim. App. 1980). Post-impanelment challenge is *not* barred, however, where defendant is unrepresented by counsel when the grand jury is empaneled. *Muniz v. State*, 672 S.W. 2d 804, 808 (Tex. Crim. App. 1984); *Burks v. State*, 583 S.W. 2d 389, 391 n.1 (Tex. Crim. App. 1979). Nor is post-impanelment challenge barred where the grand jury is empaneled before the crime is committed. *See Muniz v. State*, 573 S.W. 2d 792, 796 (Tex. Crim. App. 1978).

D. "Key Man" Versus "Jury Wheel"

1. After *Partida*, the Texas legislature amended the law to permit courts to employ either the "key man" system used in *Partida*, or the "jury wheel" method. Tex. Code Crim. Proc. Ann. art. 19.01 (Vernon Supp. 1995). "Even when the voter registration list may not on its face represent a proportionate cross section of the community, the jury wheel method has been upheld." *De*

La Garza v. State, 650 S.W. 2d 870, 874 (Tex. App.-- San Antonio 1983, pet. ref'd). When the jury wheel method is used, proof of the composition of previous grand juries, chosen by the key man system, is irrelevant. *Id.* at 875.

E. Cognizable Classes

1. Blacks and Hispanics are cognizable classes under *Partida*; young people are not. *See Franklin v. State*, 606 S.W. 2d 818, 827 (Tex. Crim. App. 1979); *see also Burks v. State*, 583 S.W. 2d 389, 391 (Tex. Crim. App. 1979).

2. Women are a cognizable class as far as petit jury composition goes. *Taylor v. Louisiana*, 419 U.S. 522, 531 (1974). Certainly the same analysis would apply to a *Partida*-type analysis of grand jury composition. *See Stanley v. State*, 664 S.W. 2d 746, 755 (Tex. App.--San Antonio 1983, pet. ref'd)(finding that, although defendant's evidence showed invidious discrimination against females in prior grand juries, there was no showing that underrepresentation occurred on the indicting grand jury). Judges Clinton and Miller dissented from a refusal to grant review in *Stanley*, arguing that the issue was whether a white male has standing to protest the exclusion of women from grand juries under due process. *Stanley v. State*, 678 S.W. 2d 80, 81 (Tex. Crim. App. 1984).

F. Foreperson Discrimination

1. *Partida* concerned the composition of the grand jury as a whole. Later cases have suggested that a defendant might prevail by showing that cognizable groups have been excluded from service as forepersons. In *Rose v. Mitchell*, 443 U.S. 545, 565-574 (1979), the Supreme Court applied the three part *Partida* test to determine foreperson discrimination, and found that defendant failed to make a prima facie case of discrimination in violation of the Equal Protection Clause.

2. In *Hobby v. United States*, 468 U.S. 339 (1984), the Supreme Court acknowledged its holding in *Rose*, but denied defendant's due process challenge, finding that forepersons of *federal* grand juries have merely ministerial powers. Accordingly, the Court refused to reverse the conviction. *Id.* at 348-350.

3. A majority of the court of criminal appeals applied the *Rose* analysis in *Pannell v. State*, 666 S.W. 2d 96, 100 (Tex. Crim. App. 1984) and found that defendant failed to make a prima facie case of discrimination, in the absence of positive testimony that no Black had ever served as a grand jury foreman. Judge Clinton disagreed in dissent, believing that "[a] majority of the Court simply will not come to grips with appellant's challenge to selection of grand jury foremen." *Id.* at 100-102.

4. The court rejected such a claim in *Rousseau v. State*, 855 S.W. 2d 666, 688 (Tex. Crim. App. 1993). "So long as there has been no purposeful exclusion from the grand jury as a whole, the race of the grand jury foreman is of no consequence. The foreman's duties are ministerial in nature and do not affect the outcome of the grand jury's verdict." *Id.*

G. Not Harmless Error

1. The state has argued that any error in the composition of the grand jury is rendered

harmless when the petit jury subsequently finds the defendant guilty. The Supreme Court has rejected this position, finding that harm is irrelevant "[b]ecause discrimination on the basis of race in the selection of members of a grand jury thus strikes at the fundamental values of our judicial system and our society as a whole. . . ." *Rose v. Mitchell*, 443 U.S. 545, 556 (1979).

VII. MOTION FOR CHANGE OF VENUE

A. Substance

1. *Substantively*, it seems virtually impossible for the trial court to err in refusing to change venue.

The test to be applied in determining whether a venue motion should be granted is whether outside influences affecting the community climate of opinion as to a defendant are inherently suspect. Absent a showing by the defendant that there exists such prejudice in the community that the likelihood of obtaining a fair trial by an impartial jury is doubtful, however, the discretion of the trial court to deny such a motion will not be disturbed on appeal.

Within this context, the question whether to grant a defendant's request for a change of venue because of inflammatory or prejudicial publicity is one of constitutional dimension. A change of venue is the remedy to jury prejudice resulting from widespread inflammatory news coverage and is available to assure an accused a fair trial when extensive news coverage has raised substantial doubts about obtaining an impartial jury. However, an applicant seeking a change of venue bears a heavy burden to prove the existence of such prejudice in the community that the likelihood of obtaining a fair and impartial trial is doubtful. When one seeks to have venue changed on the ground of adverse pretrial publicity, he must ordinarily demonstrate an actual, identifiable prejudice attributable to that publicity on the part of members of his jury.

Moreover, simply because a particular criminal case or offense is publicized in the media does not give rise to a prima facie claim of prejudice so that a defendant is entitled to a change of venue. As this Court has stated, "Clearly, . . . [the] standard does not require that jurors be totally ignorant of the facts and issues." Rather, the publicity about the case must be pervasive, prejudicial and inflammatory.

Beets v. State, 767 S.W. 2d 711, 742-43 (Tex. Crim. App. 1987)(citations omitted).

2. *E.g.*, *Ransom v. State*, 920 S.W. 2d 288, 299 (Tex. Crim. App. 1996); *Willingham v. State*, 897 S.W.2d 351, 357-58 (Tex. Crim. App. 1995); *Penry v. State*, 903 S.W. 2d 715, 727 (Tex. Crim. App. 1995); *Banda v. State*, 890 S.W. 2d 42, 53 (Tex. Crim. App. 1994); *Powell v. State*, 898 S.W. 2d 821, 826 (Tex. Crim. App. 1994); *Etheridge v. State*, 903 S.W.2d 1, 6 (Tex. Crim. App. 1994); *Teague v. State*, 864 S.W. 2d 505, 509 (Tex. Crim. App. 1993); *Hathorn v. State*, 848 S.W. 2d 101, 109 (Tex. Crim. App. 1992); *Narvaiz v. State*, 840 S.W. 2d 415, 428 (Tex. Crim. App. 1992); *Long v. State*, 823 S.W.2d 259, 281 (Tex. Crim. App. 1991); *DeBlanc v. State*, 799 S.W.2d 701, 704-705 (Tex. Crim. App. 1990); *Faulder v. State*, 745 S.W. 2d 327, 337-339 (Tex.

Crim. App. 1987); *Phillips v. State*, 701 S.W. 2d 875, 879-880 (Tex. Crim. App. 1985); *Nethery v. State*, 692 S.W. 2d 686, 694-95 (Tex. Crim. App. 1979); *Freeman v. State*, 556 S.W. 2d 287, 296-97 (Tex. Crim. App. 1977).

3. The Texarkana court of appeals recently reversed an unusually highly publicized solicitation case, holding that the trial court erred in not granting a change of venue. *Harvey v. State*, 887 S.W. 2d 174, 177 (Tex. App.--Texarkana 1994, no pet.).

4. The trial court may also change venue on its own motion. *Brimage v. State*, 918 S.W. 2d 466, 508 (Tex. Crim. App. 1996).

B. Procedure

1. *Procedurally*, however, error sometimes occurs with regard to motions for change of venue.

a. It is error to deny a proper motion for change of venue without a hearing. *O'Brient v. State*, 588 S.W. 2d 940, 941 (Tex. Crim. App. 1979). This hearing should be held before the trial commences. A hearing during a motion for new trial comes too late. *Henley v. State*, 576 S.W. 2d 66, 73 (Tex. Crim. App. 1978).

b. It is error to deny a motion for change of venue which is uncontroverted by the state. *Durrough v. State*, 562 S.W. 2d 488, 489 (Tex. Crim. App. 1978); *but see Cooks v. State*, 844 S.W. 2d 697, 730 (Tex. Crim. App. 1992)(defendant waives right to change of venue as a matter of law by participating in hearing on the merits of the motion and allowing the state to put on evidence, without objection, controverting appellant's motion, at which time the issue becomes one of fact); *Bird v. State*, 692 S.W. 2d 65, 68 (Tex. Crim. App. 1985)(defendant waives his right to complain of uncontroverted motion to change venue if he proceeds to a hearing on that motion without objection).

2. The state joins issue by filing controverting affidavits. It is not required to put on testimony as well. *Beets v. State*, 767 S.W. 2d 711, 743 (Tex. Crim. App. 1987).

3. Failure to comply with the time limits for filing other pretrial motions, set out in article 28.01, § 2, does not waive the defendant's right to a hearing on his motion for change of venue. *Faulder v. State*, 745 S.W. 2d 327, 338 (Tex. Crim. App. 1987). Such a hearing may be held after the jury is empaneled, and before the defendant enters his plea to the indictment. *Foster v. State*, 779 S.W. 2d 845, 854 (Tex. Crim. App. 1989).

VIII. VOIR DIRE--WAINWRIGHT V. WITT: EXCLUSION FOR CAUSE BECAUSE OF VIEWS ON DEATH PENALTY

A. Witt, Not Witherspoon, Is The Law

1. In every venire there will be several persons who are opposed to the death penalty. Some will express their opposition with total, unalterable conviction and unmistakable clarity. Some will frankly say that they do not know just how strong their feelings are. Others will vacillate,

being against the death penalty one minute and for it the next. Generally, the defendant wants these people on the jury, or, at least he wants the state to use a valuable peremptory challenge to remove them. The state generally wants them off, and wants to use a challenge for cause rather than a peremptory. Formerly, the test for such venirepersons was stated in *Witherspoon v. Illinois*, 391 U.S. 510 (1968). Under *Witherspoon*, a venireperson could be excluded for cause only when he made it unmistakably clear he would automatically vote against imposition of the death penalty, or when his attitude would preclude him from making an impartial determination of guilt or innocence. This posed a difficult burden on the state.

2. Forget what you learned about *Witherspoon*. In *Wainwright v. Witt*, 469 U.S. 412 (1985), the Supreme Court clarified (that is, eviscerated) *Witherspoon*. Today, "the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright v. Witt*, 469 U.S. at 424. See also *Adams v. Texas*, 448 U.S. 38 (1980).

3. *Witt*, not *Witherspoon*, plainly governs in Texas today. E.g., *Livingston v. State*, 739 S.W. 2d 311, 322 (Tex. Crim. App. 1987); *Bell v. State*, 724 S.W. 2d 780, 794 (Tex. Crim. App. 1986); *Ex parte Russell*, 720 S.W. 2d 477, 484 (Tex. Crim. App. 1986).

4. "[A]n appellant complaining of an erroneously excluded juror must demonstrate one of two things: (1) the trial judge applied the wrong legal standard in sustaining the challenge for cause, or (2) the trial judge abused his discretion in applying the correct legal standard. *Broxton v. State*, 909 S.W. 2d 912, 916 (Tex. Crim. App. 1995). *Witt*, of course, articulates the "correct" legal standard. *Id.* at 917.

B. "Equivocating" And "Vacillating" Venirepersons

1. An "equivocating" juror is one who expresses uncertainty about being able to participate impartially where the death penalty is involved. A "vacillating" venireperson is one who sometimes suggests that he can answer the special issues based on the evidence, and other times suggests he cannot. *Vuong v. State*, 830 S.W. 2d 929, 944 (Tex. Crim. App. 1992).

C. Reversible Error Is Almost Inconceivable

1. *Witt* has removed a valuable weapon from the capital defendant's arsenal. Reversible error was a real possibility under the *Witherspoon* test. Now, at least where vacillating or equivocating jurors are concerned, appellate courts will reverse only for a "clear abuse of discretion," after considering the entire voir dire, and giving due deference to the ruling of the trial court. *Ransom v. State*, 789 S.W. 2d 572, 582 (Tex. Crim. App. 1989). see *Gunter v. State*, 858 S.W. 2d 430, 443 (Tex. Crim. App. 1993)(trial court is in "unique position" to decide whether venirepersons's conflicting views on capital punishment would prevent or substantially impair performance as juror).

2. The practical effect of the new standard is to insulate the trial court from reversible error in all but the most extraordinary cases. For example, under *Witherspoon*, excusal of a "vacillating" or an "equivocating" venireperson might result in reversal on appeal, because the record did not show a basis for the challenge with "unmistakable clarity." See *Hartfield v. State*, 645 S.W. 2d

436, 439-441 (Tex. Crim. App. 1980). Under *Witt*, no error is committed by excusing such a person. This is clear from *Nichols v. State*, 754 S.W. 2d 185, 194-96 (Tex. Crim. App. 1988), in which the venireperson was described as quintessentially vacillating and equivocating:

Where presented with such a juror elements such as demeanor, expression, emphasis and tone of voice, all of which escape the purview of a cold record, are important factors in assessing the message conveyed. Because of this fact, great deference is accorded to the trial court who is in the best position to view the juror and calibrate the strength of her views.

Id. at 195. It is difficult to imagine a case in which an appellate court, employing this deferential standard, would find a clear abuse of discretion.

3. *Perillo v. State*, 758 S.W. 2d 567, 577 (Tex. Crim. App. 1988), is another excellent example how unassailable the ruling of the trial court has become. There, the juror was a "classic" vacillating juror, sometimes seeming precisely the sort of venireperson who could *not* be challenged under *Adams*, other times seeming challengeable. The court of criminal appeals acknowledged that there was an adequate basis to support both the conclusion that she was challengeable, as well as the conclusion that she was not. In other words, there was support for the trial court's decision to excuse, and no error was committed. *Id.* at 576-77.

D. Trial Court's Ruling Is Not Presumptively Correct

1. Although entitled to great deference, the trial judge's ruling is not accorded a presumption of correctness on appeal. *Clark v. State*, 717 S.W. 2d 910, 915 (Tex. Crim. App. 1986); *accord*, *Cordova v. State*, 733 S.W. 2d 175, 186 (Tex. Crim. App. 1987).

E. Post-Witt Reversals

1. A few recent cases suggest a narrow possibility for succeeding on appeal even after *Witt*. In *Riley v. State*, 889 S.W. 2d 290, 291 (Tex. Crim. App. 1994), venireperson Brown frankly stated that she did not believe in the death penalty, and agreed that she personally could not participate in a proceeding that might result in a death penalty. However, once the special issue submission system was explained to her, she said she could answer the issues affirmatively if the evidence called for it, despite her personal beliefs, and that she would have to sacrifice her conscientious objections. She testified unequivocally that her opposition to the death penalty would not substantially impair her ability to follow her oath and render a true verdict. She was not a vacillating venireperson. *Id.* at 297-98. A venireperson who maintains unswervingly that his reservations against the death penalty will not prevent him from answering the special issues to the best of his abilities in accordance with the evidence, without conscious distortion, is qualified. Venireperson Brown was not disqualified simply because answering the issues affirmatively would be difficult or would violate her religious or moral beliefs. *Id.* at 299. The following principle from *Hernandez v. State*, 757 S.W. 2d 744 (Tex. Crim. App. 1988), is "resurrect[ed]:" "[A] juror may not be excluded merely because there is difficulty in resolving question of fact, even when that difficulty is exacerbated by a sensitive conscience. Only when there is a substantial likelihood that he will balk at the task or falsify an answer should he be judged unqualified." *Riley v. State*, 889 S.W.2d at 301. Here, Ms. Brown did not balk at the prospect of taking the oath, nor did she indicate she might falsify answers to the special issues to

protect her conscience. *Id.* The court noted that, when Mr. Riley was tried, the jury's function in a capital case was "purely that of a factfinder." The court expressed no opinion of the jury's role under the post-*Penry* statute. *Id.* at 299 n.2. Under the present statute, "it is arguable that categorical opposition to the death penalty can support a trial court's conclusion that a venireman is 'substantially impaired' under *Wainwright v. Witt*, supra, at least if that opposition would cause the venireman invariably to answer the special issue required to be submitted by subsection (e) in such a way as to prevent imposition of the death penalty." *Id.* at 301n.4.

2. In *Ransom v. State*, 920 S.W.2d 288 (Tex. Crim. App. 1994), the venireperson initially stated his opposition to the death penalty, and that he could not vote for it. However, when he was specifically asked whether he could follow the law and answer the special issues, he made it clear that his personal feelings would have no bearing. That is, "once he took into account the proper role of the jury in answering the special issues rather than selecting the punishment, [the venireperson] was unequivocal in stating that his views would not effect his performance." Accordingly, it was error to grant the state's challenge for cause. *Id.* at 293.

3. The trial court erred in granting the state's challenge for cause against venireperson Jones, following an "unusually brief" voir dire, in which the prosecutor never explained the sentencing procedure to her. *Clark v. State*, ___ S.W.2d ___, ___ No. 71,462 (Tex. Crim. App. May 22, 1996), slip op. 1. Instead, the venireperson indicated no more than a general religious based opposition to capital punishment, stating her preference to "let God take care of it." *Id.* at slip op. 2. "It is the burden of the challenging party to establish the venireman he has challenged for cause will be substantially impaired in his ability to follow the law." Demonstrating conscientious scruples against the death penalty is not alone sufficient to meet that burden. *Id.* at slip op. 4.

In order to meet that burden, the State should directly ask the question of the venireman whether his opposition to the death penalty is such as to cause him to answer one of the special issues in such a way as to assure a life sentence will be imposed, irrespective of what the evidence may be. Once that question is asked, the trial court's task is clear. If the venireman steadfastly maintains he will not consciously distort his answer to the special issues, he has shown no inability to follow the law, and may not be excused on State's challenge for cause. A venireman who steadfastly maintains he *will* consciously distort his answers *must* be excused on challenge for cause. Under either contingency, the trial court has no real discretion, for the venireman has unequivocally shown, in the former, that he can follow the law, and in the latter, that he cannot. On the other hand, once the question is asked, the venireman who genuinely equivocates or vacillates in his answer may be excused for cause or not, depending on demeanor, intonation, or expression. Here the trial court's discretion comes fully into play. However the trial court exercises its discretion under these circumstances, it will be upheld on appeal.

Id. at slip op. 5(emphasis in original). Under the circumstances in this case, the trial court could not have rationally concluded that the state discharged its burden to show the venireperson was unable to follow the statutory scheme, notwithstanding her preference to let God take care of it.

Id. at slip op. 6.

4. *Staley v. State*, 887 S.W.2d 885 (Tex. Crim. App. 1994), is interesting. There, the venireperson was arguably not challengeable, because she said she would not automatically answer the

special issues 'no' merely to prevent the death penalty. That is, although she was opposed to the death penalty, she may have been able to follow the law. In this case, though, the trial court questioned the venireperson on the fourth special issue--the appropriateness of the death penalty-- and concluded that her moral belief that death was not appropriate would impair her service under *Witt*. The court of criminal appeals agreed. *Id.* at 894. See *Broxton v. State*, 909 S.W. 2d 912, 917 (Tex. Crim. App. 1995); *but cf.*, *Clark v. State*, ___ S.W. 2d ___, ___ No. 71,462 (Tex. Crim. App. May 22, 1996), slip op. 6-7 (reversal required even though *Penry*-type instruction was given, where the state did not establish that less-than-categorical opposition to the death penalty was substantial enough to cause venireperson to answer the *Penry* special issue to foreclose the death penalty under any circumstances).

5. *Colella v. State*, 915 S.W. 2d 834 (Tex. Crim. App. 1995), was tried under the post-September 1, 1991 statute. Venireperson Bristol admitted he had "reservations" about the death penalty, that his feelings might "affect" his decision, that he could not kill another human being, and that he did not feel he "could give it." These answers supported the state's challenge for cause. "Although during his voir dire as a whole Bristol seemed to state that he could follow the statutory scheme, his answers were nevertheless sufficient to support a rational conclusion by the trial judge that he would automatically find mitigating circumstances to justify avoiding assessment of a death sentence, regardless of the evidence adduced at trial." *Id.* at 842-43.

F. Willingness To Set Aside Beliefs

1. "It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." *Lockhart v. McCree*, 476 U.S. 162, 176 (1986); *Ellis v. State*, 726 S.W. 2d 39, 44 (Tex. Crim. App. 1986); *Granviel v. State*, 723 S.W. 2d 141, 150 (Tex. Crim. App. 1986).

G. The Contemporaneous Objection Rule

1. Should *Witt* error somehow arise, a contemporaneous objection will be necessary to preserve error in any case tried after *Adams v. Texas*. Failure to make a timely and proper objection will waive any error on appeal. *Purtell v. State*, 761 S.W. 2d 360, 365 (Tex. Crim. App. 1988). Such objection must inform the trial judge of the basis of the objection and afford him an opportunity to rule on it. And, it must afford opposing counsel an opportunity to remove any objection to the matter. *Id.* at 365-66.

2. In *Purtell*, initially counsel properly informed the court it was resisting the state's challenge under *Witt*, by urging that the venireperson "stated sufficiently that she can follow the law as given to her by the Court." Both parties were then permitted to question further, and eventually, counsel for the defendant elicited an unfavorable answer, and thereafter he said he had nothing further. This response "created the distinct impression that he was abandoning his opposition . . ." Because he "failed to object in a manner which would have informed the trial judge that appellant was opposed to the State's motion," the error was not preserved on appeal. *Id.* at 366-67.

3. What constitutes a sufficient objection will depend on its context. In *Miller v. State*,

741 S.W. 2d 382, 387 (Tex. Crim. App. 1987), the very general "note our exception" was sufficient because, in context, defendant's objection was obvious to the judge and prosecutor. *Accord, Carter v. State*, 717 S.W. 2d 60, 76 (Tex. Crim. App. 1986); *Ex parte Bravo*, 702 S.W. 2d 189, 193 (Tex. Crim. App. 1982)("note our exception" sufficient when there is "no suggestion in the record that the parties did not know the basis and nature of . . . objection"); *see also Mann v. State*, 718 S.W. 2d 741, 746-47 (Tex. Crim. App. 1986)(objection that excusals violate *Witherspoon* and *Adams* is sufficient, without need to state "why" that rule was violated); *Green v. State*, 682 S.W. 2d 271, 275 (Tex. Crim. App. 1984)(objections "on the basis of the unconstitutionality of the statute," although not models of clarity, are sufficient).

4. To be timely, the trial objection must be made before the objectionable venireperson is dismissed and prior to the questioning of the next venireperson. It is not necessary that the objection be made before the court sustains the state's challenge for cause. *Barefield v. State*, 784 S.W.2d 38, 41 (Tex. Crim. App. 1989).

5. "[A]s long as the voir dire record reflects that an objection was lodged either during the voir dire and/or at the time of the trial court's ruling, and that the objection was not abandoned, an appellant will be able to raise on appeal objections to the granting of challenges for cause." *Zimmerman v. State*, 860 S.W. 2d 89, 95 (Tex. Crim. App. 1993), *vacated on other grounds*, 114 S.Ct. 374 (1993).

6. The objection on appeal must comport with that at trial, or error is not preserved. *Harris v. State*, 790 S.W. 2d 568, 580 (Tex. Crim. App. 1989).

7. For cases tried before *Adams*, failure to make a contemporaneous objection may be forgiven. *See Cuevas v. State*, 641 S.W. 2d 558, 563 (Tex. Crim. App. 1982)(defect of constitutional magnitude not established at time of trial); *see also Ex parte Williams*, 748 S.W. 2d 461, 463 n.3 (Tex. Crim. App. 1988); *Ex parte Bravo*, 702 S.W. 2d 189, 193 (Tex. Crim. App. 1982).

8. Granting the defendant an extra peremptory challenge would not ordinarily cure *Witt*-type error. Where defense counsel specifically requests an extra peremptory, suggesting that this will remedy *Witt* error, however, and where the trial court grants the request, *Witt* error is waived. Counsel received all the relief requested. *Stewart v. State*, 686 S.W. 2d 118, 120-21 (Tex. Crim. App. 1984).

H. Witt Error Is Not Harmless

1. The improper exclusion of a single venireperson under *Witt* (if this is possible) is reversible error and not subject to the harmless error rule. *See Gray v. Mississippi*, 481 U.S. 648, 666 (1987); *Ex parte Williams*, 748 S.W. 2d 461, 464 (Tex. Crim. App. 1988).

I. Commutation

1. There are several cases in which the court of criminal appeals initially reversed a death sentence for *Witt*-type error, and, after reversal, the Governor commuted the defendant's sentence to life imprisonment. According to a majority of the court, commutation renders *Witt* error harmless, which requires that the court grant the state's motion for rehearing and withdraw its earlier reversal. *E.g., Graham v. State*, 643 S.W. 2d 920, 925 (Tex. Crim. App. 1983); *see also Ex parte*

May, 717 S.W. 2d 84, 85-86 (Tex. Crim. App. 1986); *Adams v. State*, 624 S.W. 2d 568, 569 (Tex. Crim. App. 1981). Judge Clinton strongly disagrees with this practice. *Adams v. State*, 624 S.W. 2d at 569-73 (Clinton, J., dissenting).

J. Collateral Attack

1. A claim of *constitutional* violation, under *Witherspoon/Adams* (and now, presumably, *Witt*), can be raised for the first time by writ of habeas corpus, even though it was not raised on direct appeal. *Ex parte Bravo*, 702 S.W. 2d 189, 193 (Tex. Crim. App. 1982); *but cf. Ex parte Banks*, 769 S.W. 2d 539, 541 (Tex. Crim. App. 1989)(defendant may not complain for the first time by writ that a juror was excused in violation of a procedural *statute*).

2. An allegation of error under the *state* constitution, which is subject to a harmless error analysis, is "not cognizable in a post conviction writ of habeas corpus brought pursuant to Article 11.07" *Ex parte Dutchover*, 779 S.W.2d 76, 77 (Tex. Crim. App. 1989).

K. No Batson/Witherspoon Synthesis

1. In *Hernandez v. State*, 819 S.W.2d 806, 818 (Tex. Crim. App. 1991), the court rejected appellant's attempt to synthesize *Witherspoon* and *Batson*. Thus, the prosecution is not barred by the Sixth Amendment from using its peremptories to challenge persons opposed to the death penalty, but not excludable for cause. *Accord, Staley v. State*, 887 S.W.2d 885, 891 (Tex. Crim. App. 1994).

L. The Remedy For A Witt Violation

1. If the appellant establishes a *Witt* violation, the conviction itself need not be reversed. Rather, the court need only remand for a new punishment proceeding. "We hold that voir dire error regarding a subject that a jury would consider only during the punishment phase of a trial is 'error affecting punishment only,' unless the defendant produces evidence showing that the error necessarily produced a jury biased against the defendant on the issue of guilt." *Ransom v. State*, 920 S.W. 2d 288, 298, (Tex. Crim. App. 1996); *accord, Clark v. State*, ___ S.W. 2d ___, ___ No. 71,462 (Tex. Crim. App. May 22, 1996), slip op. 7.

IX. VOIR DIRE--THE DEFENDANT IS ENTITLED TO AN ADEQUATE OPPORTUNITY TO EXAMINE VENIREPERSONS BEFORE EXCUSAL

A. Perillo Error

1. What remedy is available to a defendant when a judge grants the state's challenge for cause without permitting defense counsel to question the venireperson? Although it will be difficult to win a reversal for *Witt* error, *per se*, the trial court may err in improperly curtailing the defendant's right to examine venirepersons prior to their excusal. "Excusing a prospective juror without giving counsel for the defendant an opportunity to question the juror should not ever occur, unless the record affirmatively and unequivocally reflects that the prospective juror would, regardless of the evidence, automatically vote for a verdict that would prohibit the assessment of the death

penalty." *Perillo v. State*, 656 S.W.2d 78, 81-82 (Tex. Crim. App. 1983); see *Rougeau v. State*, 651 S.W.2d 739, 741 (Tex. Crim. App. 1982); cf. *Zimmerman v. State*, 750 S.W.2d 194, 195 n.2 (Tex. Crim. App. 1988)(after reversing for other reasons, the court noted that "trial judges are skating on thin ice, despite the wide-scope of their discretion in voir dire matters, to totally exclude any interrogation by defense counsel").

2. Recent decisions, however, indicate that the trial court retains substantial powers to curtail questioning. E.g., *Gunter v. State*, 858 S.W. 2d 430, 445 (Tex. Crim. App. 1993); *Cantu v. State*, 842 S.W.2d 667, 687 (Tex. Crim. App. 1992); *Davis v. State*, 776 S.W.2d 211, 217-18 (Tex. Crim. App. 1989); *Allridge v. State*, 762 S.W.2d 146, 170 (Tex. Crim. App. 1988). *Marquez v. State*, 725 S.W.2d 217, 238 (Tex. Crim. App. 1987); *Sawyers v. State*, 724 S.W.2d 24, 29 (Tex. Crim. App. 1986).

B. Harmless Error

1. And, the error may be harmless. In *Drinkard v. State*, 776 S.W.2d 181 (Tex. Crim. App. 1989), the court reaffirmed the general soundness of the *Perillo* rule, and found that the trial court erred in excusing the venireperson without allowing defendant to question him. This error was harmless, however, because the venireperson's "views on capital punishment were such that they would prevent or substantially impair his performance as a juror." *Id.* at 188; see *Robinson v. State*, 851 S.W. 2d 216, 237 (Tex. Crim. App. 1993)(harmless); *Felder v. State*, 848 S.W. 2d 85, 94 (Tex. Crim. App. 1992)(error harmless where the record shows further questioning would be pointless); *McGee v. State*, 774 S.W.2d 229, 237 (Tex. Crim. App. 1989) (no error in refusing defense the opportunity to question "where the record shows that the venireperson was questioned at length and that she could not vote for the death penalty under any circumstances"); *Janecka v. State*, 739 S.W.2d 813, 833 (Tex. Crim. App. 1987)(harmless).

C. The Contemporaneous Objection Rule

1. Preservation of *Perillo*-type error requires a contemporaneous objection. *Ransom v. State*, 789 S.W.2d 572, 583 (Tex. Crim. App. 1989).

X. VOIR DIRE--BATSON V. KENTUCKY: RACIALLY DISCRIMINATORY USE OF PEREMPTORY CHALLENGES

A. The Practical Significance of Batson

Batson v. Kentucky is an extraordinarily significant case to both trial and appellate lawyers. Because *Batson* makes it more difficult for either side to strike minority venirepersons, it should make our juries more diverse. And, if the diverse jury does not do the right thing, the careful trial lawyer who is knowledgeable about *Batson* and its intricacies can set the stage nicely for appeal.

B. The Holding In Batson

1. In *Batson v. Kentucky*, 476 U.S. 79 (1986), the black defendant complained that the state used its peremptory challenges in a racially discriminatory way to strike all four black

persons on the panel. The Supreme Court recognized that purposeful racial discrimination in jury selection violates a defendant's right to equal protection of the law. *Id.* at 86. "Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, as long as that reason is related to his view concerning the outcome' of the case to be tried . . . the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Id.* at 89.

2. For more than 100 years before *Batson*, the Supreme Court had held that the Equal Protection Clause prevented the state from systematically excluding persons from jury service because of their race. See *Swain v. Alabama*, 380 U.S. 202 (1965); *Strauder v. West Virginia*, 100 U.S. 303 (1880). At least as far as petit juries were concerned, however, this was little more than an illusory protection, because, as a practical matter, it was impossible for the defendant to prove systematic exclusion. *Swain* itself is a perfect example of the problem. There, the evidence showed that no black had served on a jury in Talladega, Alabama since 1950. Despite this seemingly telling fact, the Court held that the defendant had not established systematic exclusion, because he failed to show that the prosecution "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes . . . with the result that no Negroes ever serve on petit juries." *Swain v. Alabama*, 380 U.S. at 223. By requiring proof of discrimination over a long period of time, the Court made it virtually impossible to make out a prima facie case.

3. *Batson* did not alter the substantive law of *Strauder* and *Swain*, which held that racial discrimination in selection of a jury is constitutionally impermissible. *Batson* is significant -- indeed revolutionary -- because it relaxes the defendant's burden of proving purposeful discrimination. Now, to make out an equal protection claim, the defendant need not shoulder the "crippling burden" of proving a *pattern* of discrimination in the past. Instead, the defendant may prove "purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection *in his case*." *Id.* at 95(emphasis in original). "*Batson* significantly changed Equal Protection jurisprudence." *Linscomb v. State*, 829 S.W. 2d 164, 165 (Tex. Crim. App. 1992). The effect of this change is that, for the first time, it is now possible to prove purposeful racial discrimination.

4. The precise burdens to be shouldered by each of the parties has also been clarified. *Batson* established a "tripartite procedure." *Young v. State*, 856 S.W. 2d 175, 176 (Tex. Crim. App. 1993). The first burden falls upon the defendant, who must present a prima facie case of purposeful racial discrimination by the state in the exercise of its peremptory challenges. Once this prima facie case has been made, the burden shifts to the state to provide race-neutral explanations for the challenges in question. If the state supplies race-neutral explanations, the defendant bears the burden of rebutting this explanation. *Cantu v. State*, 842 S.W. 2d 667, 688 n.15 (Tex. Crim. App. 1992).

C. Initially, Defendant Must Prove Prima Facie Case of Purposeful Discrimination

Initially, the burden is on the defendant to establish a prima facie case of purposeful discrimination.

To establish such a case, the defendant must first show that he is a member of a cog-

nizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.

Batson v. Kentucky, 476 U.S. at 96 (citations omitted).

D. Then, The State Must Prove A Racially Neutral Explanation

If the defendant proves a prima facie case of purposeful discrimination, the state must counter with a racially neutral explanation for its challenges. Purposeful discrimination "must be found true unless it is contradicted, impeached or rebutted by other evidence." *Tompkins v. State*, 774 S.W.2d 195, 201 (Tex. Crim. App. 1987), *aff'd by an equally divided Court sub nom.*, *Tompkins v. Texas*, 490 U.S. 754 (1989); *accord*, *Robinson v. State*, 851 S.W.2d 216, 226 n.10 (Tex. Crim. App. 1991). Such evidence "must be legally adequate to support a judgment in favor of the state." *Tompkins v. State*, 774 S.W.2d at 201.

E. Finally, Defendant May Show State's Explanations Are Merely A Sham Or Pretext

Once the state has given its explanations, the defendant can offer evidence showing that these explanations are merely a sham or pretext. *Batson* says that the state must do more than merely generally deny a "discriminatory motive." *Batson v. Kentucky*, 476 U.S. 79, 98 (1986); *See Emerson v. State*, 851 S.W. 2d 269, 272 (Tex. Crim. App. 1993)(explanation must be clear and specific, and not just a broad assertion of non-discrimination, or that the venireperson would be biased because of common race); *accord*, *Woods v. State*, 801 S.W.2d 932, 940 (Tex. App.--Austin 1990, pet. ref'd).

F. Opposition To The Death Penalty May Be A Neutral Reason

1. The courts have frequently overruled *Batson*-type challenges where the venireperson expresses some sort of antipathy to the death penalty. *E.g.*, *Garcia v. State*, 919 S.W. 2d 370, 394-95 (Tex. Crim. App. 1996); *Lewis v. State*, 911 S.W. 2d 1,4 (Tex. Crim. App. 1995); *Chambers v. State*, 866 S.W. 2d 9, 24 (Tex. Crim. App. 1993); *Adanandus v. State*, 866 S.W. 2d 210, 224 (Tex. Crim. App. 1993)(apparent unwillingness to assess the death penalty in this particular case); *Alexander v. State*, 866 S.W. 2d S.W. 2d 1, 8 (Tex. Crim. App. 1993)(problems with the death penalty; religious beliefs against the death penalty; inability to consider death penalty if any doubt about guilt); *Cook v. State*, 858 S.W. 2d 467, 472-73 (Tex. Crim. App. 1993)(inability to think of situation in which non-triggerman should receive the death penalty; vacillation on attitude toward the death penalty); *Mines v. State*, 852 S.W. 2d 941, 945 (Tex. Crim. App. 1992)(tentative, unclear opposition to the death penalty); *Sterling v. State*, 830 S.W. 2d 114, 119 (Tex. Crim. App. 1992)(one venireperson was unequivocally opposed to the death penalty; one venireperson believed theoretically in the death penalty, but did not feel like he could sit on a capital jury and make that decision, and also indicated he might hold the state to a higher burden of proof); *Harris v. State*, 827 S.W. 2d 949, 954-55 (Tex. Crim. App.), *cert. denied*, 113 S.Ct. 381 (1992)(inability to vote for the death penalty); *Earhart v. State*, 823 S.W. 2d 607, 625-26 (Tex. Crim. App. 1991)(spiritual beliefs made it difficult to assess the death penalty; equivocation on the death penalty; preference for minimum punishment); *Williams v. State*, 804 S.W. 2d 95, 106 (Tex. Crim. App. 1991), *cert. denied*, 111 S.Ct. 2875 (1991)(opposition to the infliction of the death penalty; propensity to favor a vote on the special issues resulting in a life sentence; dissatisfaction concerning the Texas scheme which gives preferential treatment to police officers; difficulty with the state's burden of proof); *Tennard v. State*, 802 S.W. 2d 678, 682 (Tex. Crim. App. 1990)(opposition to death penalty which is insufficient to support a challenge for cause); *Tompkins v. State*, 774 S.W.2d 195, 201 (Tex. Crim. App. 1987), *aff'd by an equally divided Court sub nom.*, *Tompkins v. Texas*, 490 U.S. 754 (1989)(general opposition to the death penalty); *Wyle v. State*, 836 S.W. 2d 796, 799 (Tex. App. -- El Paso 1992, no pet.)(opposition to assessing death penalty against minorities; belief that jurors should not have the power to cause death).

G. The Contemporaneous Objection

1. A contemporaneous objection will be required to preserve *Batson*-type error.
2. Whether or not an objection is timely depends on when the case was tried, and on what kind of case it is:
 - a. For cases tried after April 30, 1986, when *Batson* was decided, but before the effective date of Tex. Code Crim. Proc. Ann. art. 35.261 (Vernon 1989), the defendant must properly object after the composition of the jury is known, but before the jury is sworn and the venire is discharged. *Henry v. State*, 729 S.W. 2d 732, 736-37 (Tex. Crim. App. 1987); Failure to do so results in a waiver. *McGee v. State*, 774 S.W. 2d 229, 245 (Tex. Crim. App. 1989); *Brown v. State*, 769 S.W. 2d 565, 568 (Tex. Crim. App. 1989).
 - b. For *non-capital* cases tried after the effective date of article 35.261, which is August 31, 1987, a *Batson* challenge is timely if made after the strikes are delivered, but before the jury is impaneled, even if the jury has been discharged. *Hill v. State*, 827 S.W.2d 860, 864

(Tex. Crim. App. 1992); *See Rousseau v. State*, 824 S.W.2d 579, 581 (Tex. Crim. App. 1992); Tex. Code Crim. Proc. Ann. art. 35.261 (Vernon Supp. 1995); *accord*, *Somerville v. State*, 792 S.W. 2d 265, 267 (Tex. App. -- Dallas 1990, pet. ref d).

c. "[I]mpaneled' as it is used in article 35.261 means the time at which the actual trial jury is sworn." *Price v. State*, 782 S.W.2d 266, 269 (Tex. App.--Beaumont 1989, pet. ref d); *accord*, *Hill v. State*, 787 S.W.2d 74, 77 (Tex. App.--Dallas 1990), *aff'd*, 827 S.W. 2d 860 (Tex. Crim. App. 1992).

d. *Capital cases*, in which the juries are built individually, juror by juror, are different. Here, there is a "window of time in which to make objections," beginning when each juror is either struck or accepted. The window ends just before the court has impaneled the jury. Impanelment occurs when all twelve jurors, plus alternates, have been qualified, accepted, and the jury as a whole has been given the statutory oath. *Rousseau v. State*, 824 S.W.2d 579, 581 (Tex. Crim. App. 1992). Having said this, the court went on to state that, in a capital case, the objection should be made, and the evidence presented, immediately, or as soon as possible, after the venireperson is struck. *Id.* at 582. *See Alexander v. State*, 866 S.W. 2d S.W. 2d 1, 7 n.4 (Tex. Crim. App. 1993)(*Batson* challenge made after last juror had been sworn not timely where juror in question sworn after his individual voir dire).

e. In capital cases, the prima facie case must also be presented within this same window of time in which the objection must be made. Once the jury is sworn and seated, it is too late to preserve error. *Rousseau v. State*, 824 S.W.2d 579, 582 (Tex. Crim. App. 1992)(prima facie case made before entire jury was sworn was timely, even though it was made after several jurors had been examined).

3. Where appellant makes a late objection, but the trial court proceeds with the *Batson* hearing anyway, without objection from the state, appellant's objection is considered timely. "Whenever a trial court conducts a *Batson* hearing with the consent of the State, appellant's objection, although previously waived, is considered as timely made." *Lee v. State*, 747 S.W. 2d 57, 58 (Tex. App.--Houston [1st Dist.] 1988, pet. ref d); *accord*, *Grimes v. State*, 779 S.W. 2d 124, 125-26 (Tex. App. -- Houston [1st Dist.] 1989, pet. ref d); *Smith v. State*, 734 S.W. 2d 694, 697 (Tex. App.--Houston [1st Dist.] 1987, no pet.).

4. A premature objection may be better than none at all. In *Mata v. State*, 867 S.W. 2d 798, 801 n.1 (Tex. App. -- El Paso 1993, no pet.), appellant objected *before* any peremptory challenges were made. "While the better practice may be to wait to determine whether a *Batson* hearing is even necessary, we nonetheless find that Appellant's request for a hearing was timely." *Id.* at 801 n.1.

H. Article 35.261 In Capital Cases

1. In non-capital cases, litigants may be able to choose remedies, between quashal of the panel and seating the improperly struck venireperson. This option may not be available in capital cases. In *Butler v. State*, 872 S.W. 2d 227, 231-233 (Tex. Crim. App. 1994), the trial court divided the venire into mini-panels, and, after several mini-panels had been examined, appellant made a *Batson* objection. The court sustained the objection, and appellant moved to quash the entire venire. The trial

court quashed only the mini-panel which had contained the person improperly excluded under *Batson*. The court of criminal appeals held that article 35.261 did not apply to the voir dire procedure followed by the trial court. *Batson* was satisfied, though, by the remedy used by the trial court. It was "the most satisfactory method in the instant case to preserve appellant's right to equal protection."

XI. VOIR DIRE--CHALLENGES FOR CAUSE

A. By The Defendant

1. Tex. Code Crim. Proc. Ann. art. 35.16(c)(2)(Vernon 1989) permits the defendant to challenge a venireperson for cause on the ground "[t]hat he has a bias or prejudice against any of the law applicable to the case upon which the defendant is entitled to rely, either as a defense to some phase of the offense for which the defendant is being prosecuted or as a mitigation thereof or of the punishment therefor."

a. Thus, a venireperson unable to consider the minimum punishment for the lesser included offense of murder should be excused for cause. *Pierce v. State*, 696 S.W.2d 899, 903 (Tex. Crim. App. 1985); *Barrow v. State*, 688 S.W.2d 860, 863 (Tex. Crim. App. 1985); *Jordan v. State*, 635 S.W.2d 522, 523 (Tex. Crim. App. 1982).

b. A challenge for cause is proper if the venireperson admits he cannot afford defendant his right against self-incrimination. *Montoya v. State*, 819 S.W.2d 160, 173 (Tex. Crim. App. 1989).

c. The defendant may remove venirepersons who cannot consider a sentence of life imprisonment as appropriate punishment for capital murder. *Cumbo v. State*, 760 S.W.2d 251, 256 (Tex. Crim. App. 1988); *Pierce v. State*, 604 S.W.2d 185, 187 (Tex. Crim. App. 1980); *Cuevas v. State*, 575 S.W.2d 543, 546 (Tex. Crim. App. 1978); *Smith v. State*, 573 S.W.2d 763, 766 (Tex. Crim. App. 1977); *but cf. Curry v. State*, 910 S.W. 2d 490, 493-94 (Tex. Crim. App. 1995)(challenge for cause properly denied where venireperson admitted there were some instances where she could answer a special issue no, and where she acknowledged that she would answer the questions no if the state failed to prove them beyond a reasonable doubt).

d. Inability to distinguish between deliberate and intentional conduct is grounds for cause challenge. *Martinez v. State*, 763 S.W.2d 413, 415 (Tex. Crim. App. 1987); *accord, Bigby v. State*, 892 S.W. 2d 864, 882 (Tex. Crim. App. 1994); *Felder v. State*, 758 S.W.2d 760, 770 (Tex. Crim. App. 1988); *cf. Rougeau v. State*, 738 S.W. 2d 651, 659 (Tex. Crim. App. 1987)(juror did not unequivocally say she would always answer the first question "yes"); *Sattiewhite v. State*, 786 S.W.2d 271, 281 (Tex. Crim. App. 1989)(equivocating venireperson rehabilitated by agreeing to wait until the trial is over before deciding); *but see White v. State*, 779 S.W.2d 809, 818 (Tex. Crim. App. 1989)(no error under "unique circumstances of this case").

e. Inability to disregard an unlawfully obtained confession. *McCoy v. State*, 713 S.W.2d 940, 944 (Tex. Crim. App. 1986).

f. Bias or prejudice against the first and third issues. *Cumbo v. State*, 760

S.W.2d 251, 256 (Tex. Crim. App. 1988).

g. Inability to disregard parole in answering the second special issue is grounds for challenge. *Felder v. State*, 758 S.W.2d 760, 766 (Tex. Crim. App. 1988); *accord*, *Jackson v. State*, 819 S.W.2d 142, 151 (Tex. Crim. App. 1990).

h. A bias or prejudice against the law which forbids reliance on the law of parties at the punishment phase, if it can be established, is grounds for challenge. *Cuevas v. State*, 742 S.W. 2d 331, 332 (Tex. Crim. App. 1987).

I. The trial court erred in denying defendant's challenge for cause to a venireperson who had been called as a witness by the defense during a pretrial motion to change venue. This was a case of first impression construing Tex. Code Crim. Proc. Ann. art. 35.16(a)(6) (Vernon 1989). The court held that that provision's reference to "witness" encompasses witnesses at trial, at pretrial hearings, and persons who have personal knowledge of the facts of the case. *Wyle v. State*, 777 S.W.2d 709, 712 (Tex. Crim. App. 1989).

j. The trial court abuses its discretion in denying defendant's challenge for cause to a venireperson who believed that "probability" meant no more than "possibility." *Hughes v. State*, 878 S.W. 2d 142, 148 (Tex. Crim. App. 1993). The error was cured, however, when the trial court granted appellant an additional peremptory challenge. *Id.* at 152.

k. "The law requires a juror at least to consider youth as a mitigating factor in answering the special issues." *Teague v. State*, 864 S.W. 2d 505, 513 (Tex. Crim. App. 1993). The trial court should grant a challenge for cause where the venireperson indicates that he would not consider youth. Here, however, the venireperson was not informed that the law required him to consider youth or age in mitigation. As such, appellant could not demonstrate a bias against the law. *Id.*; *accord*, *Chambers v. State*, 903 S.W. 2d 21, 29 (Tex. Crim. App. 1995). *Garcia v. State*, 887 S.W. 2d 846 (Tex. Crim. App. 1994), is interesting in this regard. There, the trial court misinformed the jury that it could, but was not required to, consider intoxication in mitigation of punishment. Later, venireperson Newman announced that he would not. This was not grounds for a cause challenge. "Considering the statement of the law given by the court to the venireperson that it is not a requirement that one consider intoxication as a mitigating circumstance, Newman was still following the law, at least as it was given to him, and cannot be said to have been biased against it." *Id.* at 856.

l. "Any juror to whom mitigating factors are likewise irrelevant should be disqualified for cause, for that juror has formed an opinion concerning the merits of the case without basis in the evidence developed at trial." *Morgan v. Illinois*, 112 S.Ct. 2222, 2229-2235 (1992); *but see Chambers v. State*, 903 S.W. 2d 21, 29 (Tex. Crim. App. 1995) (intoxication is not mitigating as a matter of law); *Banda v. State*, 890 S.W. 2d 42, 54 (Tex. Crim. App. 1994) (the mere fact that venireperson believes evidence of voluntary intoxication deserves little or no mitigating weight is not cause for challenge under article 35.16). In *Heiselbetz v. State*, 906 S.W. 2d 500 (Tex. Crim. App. 1995), the defense asked the venirepersons whether they would consider a variety of specific circumstances -- including brain damage, poverty, unemployment, good behavior in jail, lack of a criminal record, and child abuse -- as mitigating evidence. Apparently, none of the venirepersons in question would have refused to consider *any* mitigating evidence, but, likewise, each balked at considering at least some of the specific evidence mentioned. The court held that a venireperson was

not subject to a challenge for cause just because they refused to consider each of the proffered circumstances as mitigating. "Since there is no precedent for requiring that jurors consider certain evidence mitigating as a matter of law, the trial court did not err in overruling appellant's challenges for cause." *Id.* at 508-509; see *Morrow v. State*, ___ S.W. 2d ___, ___ No. 71,219 (Tex. Crim. App. May 31, 1995), slip op. 4 (trial court did not err in overruling challenge for cause because the venirepersons in question did not believe that certain evidence was mitigating). The juror is the one who decides what weight, if any, to be given to mitigating evidence. There was no error in denying appellant's challenge to a venireperson who refused to consider appellant's abused and deprived childhood as mitigating. It is apparent that the venireperson did not consider the named factors as mitigating. *Curry v. State*, 910 S.W. 2d 490, 494 (Tex. Crim. App. 1995) (noting that counsel asked whether the venireperson would consider evidence of abuse and deprived childhood as mitigating, and not whether he would consider these factors at all).

m. Because of the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any venireperson who will automatically vote for the death penalty in every case. *Morgan v. Illinois*, 112 S.Ct. 2222, 2229-2230 (1992).

n. "A potential juror is challengeable for cause if she is unable to require the State to prove each element of the offense beyond a reasonable doubt." *Wheatfall v. State*, 882 S.W. 2d 829, 833 (Tex. Crim. App. 1994).

o. "A venireperson who is unwilling to afford a defendant the presumption of innocence is challengeable for cause." *Banda v. State*, 890 S.W. 2d 42, 55 (Tex. Crim. App. 1994) (no error, here, however, there was no evidence that the venireperson ever presumed appellant guilty).

p. "Where a venireperson would automatically answer one or more of the special issues in the affirmative, he or she is challengeable for cause." *Banda v. State*, 890 S.W. 2d 42, 57 (Tex. Crim. App. 1994) (no error, here, however, because the record contained sufficient evidence that venireperson would not answer automatically).

q. A venireperson who affirms that there is established in his mind "such a conclusion as to the guilt or innocence of the defendant as would influence him in his action in finding a verdict," is challengeable for cause under article 35.16(a)(10) of the code of criminal procedure. In *Heiselbetz v. State*, 906 S.W. 2d 500, 510 (Tex. Crim. App. 1995), the defense asked the venireperson whether she had formed a conclusion or opinion as to the guilt or innocence of the defendant, and when she answered, "yes," he asked whether it would take evidence to remove or overcome that conclusion. When she answered "yes" again, counsel challenged for cause. Rather than grant the challenge, the trial court asked further questions, ultimately rehabilitating the venireperson. On appeal, appellant claimed that the venireperson was incapable of rehabilitation, given article 35.16(a)(10). The court disagreed, faulting counsel for having "abandoned the statutory language," thereby failing to establish whether the venireperson's conclusion would influence her verdict. *Id.* This is a very strict reading of the statute. See *Curry v. State*, 910 S.W. 2d 490, 493 (Tex. Crim. App. 1995) (venireperson's admission that "already some picture of guilt" had been created during voir dire is not enough to sustain challenge under article 35.16(a)(1) absent testimony that the conclusion would in fact effect the venireperson's verdict).

2. A challenge for cause may be asserted on grounds not specifically enumerated in article 35.16 where the challenge is based on facts which show the venireperson would be incapable or unfit to serve on the jury. Such challenges are addressed to the sound discretion of the court. *Mason v. State*, 905 S.W.2d 570, 578 (Tex. Crim. App. 1995)(college student believed he would be unable to concentrate because of preoccupation with school).

3. The trial court does not err in overruling defendant's challenge for cause provided there is some support in the entire record that the venireperson's belief does not amount to a bias or prejudice against the law. *Pyles v. State*, 755 S.W.2d 98, 106 (Tex. Crim. App. 1988). The defendant has an uphill battle to fight to reverse a trial court for refusing to grant a challenge for cause. In *Cordova v. State*, 733 S.W. 2d 175 (Tex. Crim. App. 1987), the court of criminal appeals found "ambiguous" a venireperson's statement that "he really wanted to fry the guy." Because of this perceived ambiguity, the appellate court felt compelled to defer to the trial judge who had an opportunity to observe the person's demeanor. *Id.* at 181-82. "[The venireperson] was not as a matter of law subject to a challenge for cause." *Id.* at 183. In *Penry v. State*, 903 S.W. 2d 715 (Tex. Crim. App. 1995), the court disposed of a number of the appellant's contested challenges by noting that, whatever else the record showed, the venireperson ultimately stated he would follow the court's instructions. *Id.* at 736,737. Recitation of this mantra apparently cures all possibility of error.

4. To establish a challenge for cause against one for bias against the law, appellant may be required to inform the venireperson what the law requires. *Teague v. State*, 864 S.W. 2d 505, 513 (Tex. Crim. App. 1993).

5. "To preserve reversible error in regard to the denial of a defendant's challenge to a prospective juror for cause, the defendant must show that he has been forced to exercise a peremptory challenge to excuse the prospective juror to whom the defendant's challenge for cause should have been sustained, and that he has exhausted all his peremptory challenges and he had later been forced to accept a juror whom he found objectionable." *Felder v. State*, 758 S.W.2d 760, 766-67 (Tex. Crim. App. 1988); *accord*, *Lewis v. State*, 911 S.W. 2d 1, 4 (Tex. Crim. App. 1995); *Burks v. State*, 876 S.W. 2d 877, 892-893 (Tex. Crim. App. 1994); *Satterwhite v. State*, 858 S.W. 2d 412, 415 (Tex. Crim. App. 1993); *Bell v. State*, 724 S.W.2d 780, 795 (Tex. Crim. App. 1986).

6. Essentially the same rule was stated in greater detail in *Jacobs v. State*, 787 S.W.2d 397 (Tex. Crim. App. 1990):

We held [in *Harris v. State*] that in order to warrant a reversal by this Court for the trial court's erroneous denial of an appellant's valid challenge for cause the appellant must show:

"1. The voir dire of the individual venireperson was recorded and transcribed.

"2. The appellant at trial asserted a clear and specific challenge for cause clearly articulating the grounds therefor.

"3. After the challenge for cause is denied by the trial court, appellant uses a peremptory challenge on that juror.

- "4. All peremptory challenges are exhausted.
- "5. When all peremptory challenges have been exhausted, appellant makes a request for additional peremptory challenges.
- "6. Finally, the defendant must assert that an objectionable juror sat on the case. The appellant should point out to the trial court he is being forced to try the case with a juror seated whom he would have exercised a peremptory challenge had he one."

Id. at 405; *see Green v. State*, 840 S.W.2d 394, 402 (Tex. Crim. App. 1992).

7. Appellant may preserve error by claiming that a juror was objectionable; it is not necessary to explain why. *Garcia v. State*, 887 S.W. 2d 846, 852 (Tex. Crim. App. 1994). The failure to identify an objectionable juror, however, will constitute a waiver of the right to complain on appeal. *Broussard v. State*, 910 S.W. 2d 952, 957 (Tex. Crim. App. 1995).

8. The rule for preservation of error also applies to challenges for cause against alternate jurors. *Cooks v. State*, 844 S.W. 2d 697, 721 (Tex. Crim. App. 1992). The selection of alternate jurors is treated distinctly and separately from selection of the primary panel. *McFarland v. State*, ___ S.W. 2d ___, ___ No. 71,557 (Tex. Crim. App. February 21, 1996), slip op. 31. It is improper to claim the alternate juror as objectionable, for the purposes of preservation of error. *Id.*

9. Error in overruling a defendant's challenge for cause is harmless where the trial court grants an extra peremptory challenge. *See Chambers v. State*, 866 S.W. 2d 9, 23 (Tex. Crim. App. 1993); *Rector v. State*, 738 S.W.2d 235, 247 (Tex. Crim. App. 1986). Where the trial court grants one extra peremptory challenge, appellant must show that the trial court erroneously denied his cause challenges to at least two venirepersons. *Hughes v. State*, 878 S.W. 2d 142, 153 (Tex. Crim. App. 1993); *Garcia v. State*, 887 S.W. 2d 846, 852 (Tex. Crim. App. 1994)(because appellant was granted two additional challenges, he had to show that at least three cause challenges were erroneously denied).

10. Below we point out cases which hold that the state may challenge biased venirepersons for cause even though the nature of their bias would seem to make them good jurors for the state. The appellant in *Morrow v. State*, ___ S.W. 2d ___ No. 71,219 (Tex. Crim. App. May 31, 1995), was creative, arguing that he should be able to challenge venirepersons who are biased against a law the state is entitled to rely upon. Specifically, appellant unsuccessfully challenged venirepersons who said they would hold the state to a higher burden of proof than beyond a reasonable doubt. The court of criminal appeals disallowed such challenges by the defense. The state is able to make such challenges because of its duty to see that justice is done. "However, defense attorneys do not have an identical duty; rather their duty is to provide the best possible defense for their clients." *Id.* at slip op. 5.

B. By The State

1. Tex. Code Crim. Proc. Ann. art. 35.16(b)(3)(Vernon 1989) authorizes the state to challenge for cause venirepersons who have "a bias or prejudice against any phase of the law upon which the state is entitled to rely for conviction or punishment."

a. Thus the state can exclude venirepersons who would hold the state to a higher burden than "proof beyond a reasonable doubt." *E.g.*, *Coleman v. State*, 881 S.W. 2d 344, 348 (Tex. Crim. App. 1994); *Cook v. State*, 858 S.W. 2d 467, 471 (Tex. Crim. App. 1993); *Cantu v. State*, 842 S.W.2d 667, 682 (Tex. Crim. App. 1992); *Sawyers v. State*, 724 S.W.2d 24, 30 (Tex. Crim. App. 1986); *Franklin v. State*, 693 S.W.2d 420, 424 (Tex. Crim. App. 1985); *Hawkins v. State*, 660 S.W.2d 65, 76 (Tex. Crim. App. 1983); *but see Adams v. Texas*, 448 U.S. 38, 50 (1980)(death penalty may affect what a juror deems as reasonable doubt).

b. Incredibly, the *state* may remove a venireperson who cannot consider the minimum punishment. *E.g.*, *Allridge v. State*, 850 S.W.2d 471, 487 (Tex. Crim. App. 1991); *Nethery v. State*, 692 S.W.2d 686, 691 (Tex. Crim. App. 1985); *Hernandez v. State*, 643 S.W.2d 397, 402 (Tex. Crim. App. 1982); *Moore v. State*, 542 S.W.2d 664, 670 (Tex. Crim. App. 1976).

c. And, the *state* may remove a venireperson who cannot disregard an unlawfully obtained confession. *Phillips v. State*, 701 S.W.2d 875, 885 (Tex. Crim. App. 1985).

d. The *state* may successfully challenge a venireperson who would not find defendant not guilty based on a "technicality" even though this person would "probably be an asset to the State." *White v. State*, 779 S.W.2d 809, 826 (Tex. Crim. App. 1989).

e. The *state* may challenge for cause a venireperson who states she will consider appellant's failure to testify as an admission of guilt. *Flores v. State*, 871 S.W. 2d 714, 719 (Tex. Crim. App. 1993).

f. The *state* may challenge for cause a venireperson who cannot differentiate between "probability" and "possibility." *Patrick v. State*, 906 S.W. 2d 481, 489 (Tex. Crim. App. 1995). "Such a venireperson would be impaired in evaluating the evidence offered to prove future dangerousness." *Id.*

g. The state may remove a juror who would require evidence of premeditation. *Crane v. State*, 786 S.W.2d 338, 345 (Tex. Crim. App. 1990). *Chambers v. State*, 568 S.W.2d 313, 322 (Tex. Crim. App. 1978); *cf. Esquivel v. State*, 595 S.W.2d 516, 526 (Tex. Crim. App. 1980) (motive).

h. The state may remove a venireperson who could not base a guilty verdict on circumstantial evidence. *Barnard v. State*, 730 S.W. 2d 703, 714 (Tex. Crim. App. 1987).

i. The state may remove a venireperson who interprets the phrase "criminal acts of violence," as used in the second special issue, to be limited to murder. *Drew v. State*, 743 S.W. 2d 207, 211 (Tex. Crim. App. 1987).

j. The *state* may challenge a venireperson for cause who would automatically vote "yes" to the first special issue after jury found the defendant guilty of capital murder. *Caldwell v. State*, 818 S.W.2d 790, 795 (Tex. Crim. App. 1991).

k. The state may challenge a juror who could not consider the death penalty unless the appellant had previously been convicted of murder. *Fuller v. State*, 829 S.W.2d

191, 200 (Tex. Crim. App. 1992).

l. The trial court erred in granting, over appellant's objection, the state's challenge for cause against a venireperson who stated that he could never answer the second special issue affirmatively based solely on the facts of the offense itself. Although the facts, if severe enough, may support an affirmative answer, no case requires the venireperson to answer affirmatively solely on the facts of the offense. A venireperson is not subject to challenge for cause merely because he would require more evidence than the legal minimum to answer the special issues affirmatively. *Garrett v. State*, 851 S.W. 2d 853, 859-60 (Tex. Crim. App. 1993); *accord*, *Ransom v. State*, 920 S.W.2d 288, 292 (Tex. Crim. App. 1994); *Sigler v. State*, 865 S.W. 2d 957, 961 (Tex. Crim. App. 1993). This error is not harmless simply because the state has unused peremptories at the end of voir dire. *Ransom v. State*, 920 S.W.2d at 292-93. This sort of error, however, is waived if appellant does not object at trial. *Goff v. State*, ___ S.W. 2d ___, ___ No. 71,404 (Tex. Crim. App. May 22, 1996), slip op. 9-10.

m. The trial court erred in granting the state's challenge for cause against a venireperson who said that he could answer the second special issue if he had enough evidence, but that he could not answer it based solely on the circumstances of the offense. While a juror may consider the evidence of the instant offense sufficient, the law does not require it. *Wilson v. State*, 863 S.W.2d 59, 69 (Tex. Crim. App. 1993).

n. The trial court does not abuse its discretion in excusing a venireperson who states that he cannot write very well, due to his difficulty with reading. He could not understand about ten words of the second special issue, he could not read a newspaper, and his young children were helping him to learn to read. *Flores v. State*, 871 S.W.2d 714, 719 (Tex. Crim. App. 1993).

o. "A venireperson so traumatized by the experience of being called to jury duty that she is physically shaking, may be properly struck for cause as unfit under Article 35.15, despite her assurances that she will survive the 'crisis.'" *Powell v. State*, 897 S.W.2d 307, 312 (Tex. Crim. App. 1994).

p. The trial court properly grants a state's challenge to a venireperson who shows an inability to comprehend the limited function of a juror at the punishment phase, as shown by the court's inability to determine the venireperson's views. *Matamoros v. State*, 901 S.W. 2d 470, 476 (Tex. Crim. App. 1995).

q. The state may remove a juror who cannot find a murder committed during a robbery to be reasonable as a response to provocation, thus indicating a bias against appellant with respect to the third special issue. *Garcia v. State*, 919 S.W. 2d 370, 390 (Tex. Crim. App. 1996).

r. The state may challenge venirepersons who would always answer the mitigating circumstances issue in favor of the defendant, or who would never answer the future dangerousness issue in favor of the state. *Wolfe v. State*, 917 S.W. 2d 270, 276 (Tex. Crim. App. 1996).

s. The state, and presumably the defense too, may remove a venireperson who was convicted of a felony and put on probation if no order was subsequently entered terminating the probation. Completion of the probation is not alone enough. *Wolfe v. State*, 917 S.W. 2d 270, 277

(Tex. Crim. App. 1996).

2. It will be difficult to reverse the judge who sustains the state's challenge to an equivocating venireperson because, as in *Witt*, deference is paid to such a judgment. Thus, there is no error if a review of the *entire* voir dire discloses an "adequate basis in the record to support the trial court's conclusion" that the venireperson would not follow the law. *Montoya v. State*, 810 S.W.2d 160, 169 (Tex. Crim. App. 1989).

3. The *Witt* "prevent or substantially impair" standard also applies to cause challenges for bias and prejudice against the law. *Nichols v. State*, 754 S.W.2d 185, 197 (Tex. Crim. App. 1988).

4. In a capital case, if the trial court improperly sustains the state's challenge for cause to a qualified juror, the defendant preserves error by timely and specifically objecting, and the fact that the state has peremptory challenges remaining at the conclusion of voir dire does not render the error harmless. *Sigler v. State*, 865 S.W. 2d 957, 961 (Tex. Crim. App. 1993); *Bell v. State*, 724 S.W.2d 780, 795 (Tex. Crim. App. 1986). The objection must be *quite* specific. See *Ex parte Russell*, 720 S.W. 2d 477, 487 (Tex. Crim. App. 1986); *but see Crane v. State*, 786 S.W.2d 338, 345 (Tex. Crim. App. 1990)("we'll submit the juror is qualified" preserved error where it was apparent from the record that the trial court was informed of the basis of the objection).

5. Although unusual, special circumstances may permit the lodging of a challenge for cause after the venireperson has been chosen as a juror. *Jones v. State*, 843 S.W.2d 487, 494 n.10 (Tex. Crim. App. 1992).

6. An objection to the state's challenge for cause made after the juror has been excused and the questioning of the next juror has begun is too late. *Fuller v. State*, 827 S.W.2d 919, 925 (Tex. Crim. App. 1992). An objection before the juror is dismissed and before the next juror is questioned is timely. *Barefield v. State*, 784 S.W.2d 38, 41 (Tex. Crim. App. 1989), *cert. denied*, 110 S.Ct. 3256 (1990).

7. If the defendant fails to raise the impropriety of granting the state's *statutory* cause challenge on direct appeal, he will not be able to raise it for the first time by way of writ of habeas corpus. *Ex parte Banks*, 769 S.W.2d 539, 540-41 (Tex. Crim. App. 1989); *cf. Ex parte Russell*, 720 S.W. 2d 477, 477 (Tex. Crim. App. 1986)(court decided *Witt-Adams constitutional* issue which was raised for first time on state habeas corpus).

XII. EXCUSES FROM JURY SERVICE**A. Tex. Code Crim. Proc. Ann. art. 35.03 (Vernon 1989)**

1. The court or, when approved, the "court's designee," may hear and determine an excuse offered for not serving as a juror, and, if the excuse is deemed sufficient, the juror may be discharged, or his service postponed. Tex. Code Crim. Proc. Ann. art. 35.03, §§ 1 & 2 (Vernon 1989).

2. The court or the designee may discharge or postpone jury service because of the juror's observation of a religious holy day or religious beliefs if an affidavit is provided as required by article 29.012© of the Texas Code of Criminal Procedure.

3. The general rule is that a trial court may not excuse a juror *sua sponte*, or on its own motion, unless that juror is absolutely disqualified. See *Martinez v. State*, 621 S.W. 2d 797, 799 (Tex. Crim. App. 1981). In *Harris v. State*, 784 S.W. 2d 5 (Tex. Crim. App. 1989), *cert. denied*, 110 S.Ct. 1837 (1990), the court recognized the viability of this general rule, but distinguished excusals under article 35.03 from *sua sponte* excusals. Under article 35.03, "excusal . . . is within the sound discretion of the trial judge, and his decision will not be disturbed on appeal if the record supports his ruling." *Id.* at 18. In *Harris*, the venireperson stated that he was expecting permanent employment in the near future, and he was excused by the trial court, over defendant's objection. The court of criminal appeals held that this was not error, since the venireperson was excused under article 35.03, and not *sua sponte*.

4. A variety of excuses have sufficed:

a. *Rousseau v. State*, 855 S.W. 2d 666, 676-77 (Tex. Crim. App. 1993)(mother of three minor children had to be at home at a certain time or would risk leaving children inadequately supervised).

b. *McFarland v. State*, 845 S.W. 2d 824, 833 (Tex. Crim. App. 1992)(daughter's upcoming wedding would weigh heavily on venireperson's mind), *cert. denied*, 113 S. Ct. 2937 (1993).

c. *Kemp v. State*, 846 S.W. 2d 289, 293-95 (Tex. Crim. App. 1992)(undue hardship due to care of six emotionally disturbed foster children who required round-the-clock supervision; also ability to be fair would be impaired by wife's surgery).

d. *Butler v. State*, 830 S.W. 2d 125, 132 (Tex. Crim. App. 1992)(potential for loss of pay).

e. *Narvaiz v. State*, 840 S.W. 2d 415, 425-26 (Tex. Crim. App. 1992)(civic minded candidate for Texas Senate testified that his concentration would be diluted by campaign), *cert. denied*, 113 S. Ct. 1422 (1993).

f. *Moody v. State*, 827 S.W. 2d 875, 879 (Tex. Crim. App.)(out-of-town vacation scheduled), *cert. denied*, 113 S. Ct. 119 (1992).

g. *Harris v. State*, 784 S.W. 2d 5, 19 (Tex. Crim. App. 1989)(new job in different county), *cert. denied*, 110 S. Ct. 1837 (1990).

h. *Johnson v. State*, 773 S.W. 2d 322, 330 (Tex. Crim. App. 1989)(care for ten year old grandson).

I. *Murray v. State*, 861 S.W. 2d 47, 52 (Tex. App. -- Texarkana 1993, pet. ref'd)(discomfort about hearing the case, pressure from neighbors and residents of the area, and relationship to some of the witnesses are adequate reasons for excusal).

5. "[A] trial court has the authority to excuse a juror for a proper basis, although sworn, at any point up to the time the jury has been sworn as a whole and impaneled." *Kemp v. State*, 846 S.W. 2d 289, 295 n.4 (Tex. Crim. App. 1992); *see Butler v. State*, 830 S.W. 2d 125, 131 (Tex. Crim. App. 1992)(power to excuse "inheres to the trial judge from the first assemblage of the array until the juror is, at last, seated").

6. There is a distinction between excusal for cause under article 35.16 and excusal from jury service under article 35.03. *Butler v. State*, 830 S.W. 2d 125, 129 (Tex. Crim. App. 1992). *Cf., Green v. State*, 764 S.W. 2d 242, 244-46 (Tex. Crim. App. 1989)(trial court errs in excusing juror for cause *sua sponte* who is not absolutely disqualified). Article 35.03 may be used against qualified venirepersons who request an excuse from jury service based on personal reasons. Article 35.16, on the other hand, is used to excuse statutorily unqualified venirepersons. *Butler v. State*, 830 S.W. 2d at 130.

7. "[T]he exercise of this authority by trial judges should be jealously

guarded and relied upon, not by the parties, but by the judges as a last resort for excusing, what would otherwise be, a proper juror". *Johnson v. State*, 773 S.W.2d 322, 330 (Tex. Crim. App. 1989).

B. Tex. Gov't Code Ann. § 62.110 (Vernon 1988)

1. Subsections (a) and (b) of Section 62.110 of the Texas Government Code are worded similarly to article 35.03, permitting the court or its designee to grant reasonable excuses of prospective jurors.

2. Subsection © prohibits excusal "for an economic reason unless each party of record is present and approves the release of the juror for that reason." Tex. Gov't Code Ann. § 62.110© (Vernon 1988).

a. The trial judge may excuse a venireperson for job-related excuses where there is no showing "that jury service . . . would have resulted in the loss of a job, loss of compensation, salaries, wages, etc., the suffering of a financial burden or other economic reasons." *White v. State*, 591 S.W. 2d 851, 857 (Tex. Crim. App. 1979).

b. The trial judge may excuse a venireperson who is "so preoccupied by personal problems so that she could not be fair," since that person is incapable or unfit to serve under article 35.16(a) of the Texas Code of Criminal Procedure. *Moore v. State*, 542 S.W. 2d 664, 669 (Tex. Crim. App. 1976)(venireperson had teenage children and no husband, was not paid when not at work, and stated she could not keep her mind on the case for worrying about how to pay the bills).

XIII. VOIR DIRE--SUA SPONTE EXCUSAL BY THE COURT

A. Sua Sponte Excusal Of The Absolutely Disqualified Is Permissible

1. In addition to its power to grant or deny challenges made by the parties, the court retains the right to excuse venirepersons, *sua sponte*, or, on its own motion. If a venireperson is excused without challenge by a party, the excusal is "unquestionably" *sua sponte*. *Green v. State*, 764 S.W. 2d 242, 246 (Tex. Crim. App. 1989).

2. Venirepersons may be either qualified, disqualified, or absolutely disqualified. *Green v. State*, 764 S.W.2d, 246 (Tex. Crim. App. 1989).

3. Venirepersons may not be excused *sua sponte* unless they are absolutely disqualified under article 35.19 of the Texas Code of Criminal Procedure. *Martinez v. State*, 621 S.W.2d 797, 799 (Tex. Crim. App. 1981). One is absolutely disqualified who has been convicted of theft or any felony, is under indictment or legal accusation for theft or any felony, or is insane. Tex. Code Crim. Proc. Ann. art. 35.19 and 35.16(a)(2)(3)(4)(Vernon 1989). A disqualified juror is not absolutely disqualified under article 35.19, but is subject to a challenge for cause.

4. The Government Code further specifies that a person is disqualified if he:

- (1) is a witness in the case;
- (2) is interested, directly or indirectly, in the subject matter of the case;
- (3) is related by consanguinity or affinity within the third degree, as determined under Article 5996h, Revised Statutes, to a party in the case;
- (4) has a bias or prejudice in favor of or against a party in the case; or
- (5) has served as a petit juror in a former trial of the same case or in another case involving the same questions of fact.

Tex. Gov't Code Ann. § 62.105 (Vernon Supp. 1995).

5. Certain things are clearly *not* grounds for *sua sponte* excusal:

- a. An inability to distinguish deliberate and intentional conduct. *Green v. State*, 764 S.W. 2d 242, 247 (Tex. Crim. App. 1989).
- b. Preoccupation with an upcoming wedding. *Nichols v. State*, 754 S.W. 2d 185, 193 (Tex. Crim. App. 1988)(error not reversible since defendant did not show he was tried by a jury to which he had a legitimate objection).
- c. Pre-paid trip to Hong Kong. *Rougeau v. State*, 738 S.W. 2d 651, 661 (Tex. Crim. App. 1987)(error waived in absence of objection).
- d. That the venireperson is disinclined to accept responsibility to judge another. *Martinez v. State*, 621 S.W. 2d 797, 799 (Tex. Crim. App. 1981).
- e. A prior conviction for felony driving while intoxicated, in which the defendant had served his probationary period and had his probation terminated. *Payton v. State*, 572 S.W. 2d 677, 679 (Tex. Crim. App. 1978).
- f. A mere stated prejudice in the case. *Ernster v. State*, 308 S.W. 2d 33, 35 (Tex. Crim. App. 1957).
- g. Visiting relatives. *Johnson v. State*, 666 S.W. 2d 518, 518 (Tex. App.--Corpus Christi 1983, pet. ref d).
- h. Former employment with the district attorney's office and the police department, coupled with statement that venireperson could not be fair in driving while intoxicated case. *Neel v. State*, 658 S.W. 2d 856, 857 (Tex. App.--Dallas, pet. ref d).

B. Preservation of Error When Judge Excuses Disqualified and Qualified Venirepersons

1. As noted, the trial court may legally excuse absolutely disqualified

venirepersons on its own motion. To preserve error from the excusal of a qualified or a disqualified (as distinguished from an *absolutely* disqualified) venireperson, defendant must properly object and show harm. The applicable test depends on whether the venireperson is qualified or disqualified.

2. Should a qualified venireperson be excused, *sua sponte*, defendant can show harm by establishing that the state has exhausted its peremptory challenges. *Green v. State*, 764 S.W.2d 242, 246 (Tex. Crim. App. 1989). The error is harmless if the state has unused peremptory challenges at the end of voir dire. *Richardson v. State*, 744 S.W. 2d 65, 71 (Tex. Crim. App. 1987).

3. If a disqualified venireperson is excused *sua sponte*, to preserve error and show harm, a defendant must:

- a) object;
- b) claim at the conclusion of the voir dire that he is to be tried by a jury to which he has a legitimate objection;
- c) specifically identify the jurors of whom he is complaining.
- d) exhaust all his peremptory challenges and request additional peremptories.

Green v. State, 764 S.W.2d 242, 247 (Tex. Crim. App. 1989).

4. Defendant's objection to the jury was legitimate where he specifically identified the objectionable jurors and there was a basis in the record for his complaints. *Green v. State*, 764 S.W. 2d 242, 248 (Tex. Crim. App. 1989).

5. Although a specific objection is always preferable, the defendant in *Nichols v. State*, 754 S.W. 2d 185, 192-93 (Tex. Crim. App. 1988), preserved error by saying, "note our exception," where that statement, given its context, sufficiently apprised the trial court of defendant's objection to its *sua sponte* excusal of a venireperson. *But see Richardson v. State*, 744 S.W. 2d 65, 71 (Tex. Crim. App. 1987)(trial objection must "address the *sua sponte* nature of the trial court's action").

XIV. VOIR DIRE--MISCELLANEOUS

A. When Must Peremptory Strikes Be Made

1. In non-capital cases, peremptory strikes are made after all the venirepersons have been examined. Tex. Code Crim. Proc. Ann. art. 35.25 (Vernon 1989). In capital cases, it is customary for peremptory strikes to be made, not at the end of the voir dire, but after each venireperson has been individually examined. *See* Tex. Code Crim. Proc. Ann. art. 35.13 (Vernon 1989).

2. In *Sanne v. State*, 609 S.W.2d 762 (Tex. Crim. App. 1980), the defendant complained that article 35.13 violated his right to due process and equal protection of the law by

denying him the right of a non-capital defendant to make sensible and circumspect use of his peremptory strikes. Without deciding this issue, the court of criminal appeals intimated that "this constitutional challenge is not without merit." *Id.* at 767.

3. In a later case, however, the court has squarely rejected this contention. *Janecka v. State*, 739 S.W.2d 813, 833-834 (Tex. Crim. App. 1987)(customary method does not violate due process or equal protection).

4. Still later, however, the court rejected a *Sanne*-type argument, not on the merits, but because the appellant did not properly preserve error in the detailed manner specified in *Sanne*. *Pierce v. State*, 777 S.W.2d 399, 413 (Tex. Crim. App. 1989). Does *Pierce* mean that *Sanne* is still good law?

5. In *Rousseau v. State*, 824 S.W.2d 579, 582 n.4 (Tex. Crim. App. 1992), the court recognized that "[a]n alternative procedure sometimes utilized in building the jury list is to question a number of venirepersons individually with no action being taken on individuals except challenges for cause. After forty-two persons have been qualified and questioned . . . the parties then make their strikes and objections much the same as in a non-capital case."

6. Article 35.13 requires the state to exercise both its challenge for cause and its peremptory challenges before appellant must exercise his challenges. The proper order of challenges should be the state's challenge for cause, the state's peremptory challenge, the defendant's challenge for cause and the defendant's peremptory challenge. The trial court therefore errs when it requires appellant to exercise his challenge for cause before the state has exercised its peremptory on a particular juror. *Bigby v. State*, 892 S.W. 2d 864, 880 (Tex. Crim. App. 1994). The error, though, was harmless because the reversal of the challenges would have had no effect on the selection of jurors. *Id.* at 881-82.

7. Although the state should be required to use its peremptory strikes at the time the venireperson is qualified, rather than when voir dire is concluded, error is waived unless defendant objects. *Montoya v. State*, 744 S.W.2d 15, 23 (Tex. Crim. App. 1987).

8. In *Franklin v. State*, 693 S.W. 2d 420, 427 (Tex. Crim. App. 1985), the state first exercised a cause challenge on the venireperson, which was granted. A ten minute recess was then had, after which the state confessed it might have erred in challenging the venireperson for cause. The state then withdrew its cause challenge and used one of its peremptories. This practice was upheld on appeal, "since no other prospective jurors were examined or struck between the granting of the challenge for cause and the request to substitute a peremptory challenge" *See also Cuevas v. State*, 742 S.W. 2d 331, 349 (Tex. Crim. App. 1987). In *Barnard v. State*, 730 S.W. 2d 703, 710-12 (Tex. Crim. App. 1987), the state moved to withdraw its cause challenge of one venireperson, after it had examined the next venireperson, but before the defense had commenced its examination. The court of criminal appeals found that substitution of a peremptory at this point was permissible and cured any error in granting the cause challenge. Additionally, the court pointed out that defendant waived any error by failing to object.

9. The trial court does not err in denying appellant's request to make out-of-time peremptory challenges. *See Beavers v. State*, 856 S.W. 2d 429, 435 (Tex. Crim. App. 1993)(not

constitutional error).

B. When May Challenges For Cause Be Made

1. The trial court did not err in allowing the state to challenge for cause a venireperson who had already been sworn and impaneled. "At least where, as here, the entire jury has not yet been selected and no evidence received in trial of the cause, the judge is permitted general discretion to allow further examination and to entertain additional challenges when it comes to his attention that a previously selected juror may be objectionable for cause, excusable, or otherwise disqualified from jury service." Appellant did not claim any specific unfair disadvantage. *Draughon v. State*, 831 S.W.2d 331, 335 (Tex. Crim. App. 1992).

2. "Although it is unusual for a challenge for cause to be lodged after the veniremember had already been chosen as a juror, this Court has allowed this procedure in special circumstances such as the one presented in this case." *Jones v. State*, 843 S.W. 2d 487, 494 n.10 (Tex. Crim. App. 1992)(after being selected, the venireperson told the court that she could not answer the special issues "yes").

3. Are these cases still good law after *Bigby v. State*, 892 S.W.2d 864 (Tex. Crim. App. 1994)?

C. Scope Of Voir Dire

1. The trial court abuses its discretion in not allowing a defendant to inquire whether venirepersons would be prejudiced against an accused who raises the insanity defense. *Robinson v. State*, 720 S.W.2d 808, 810 (Tex. Crim. App. 1986).

2. An attempt to ascertain if "deliberately" is synonymous with "intentionally" is a proper inquiry. *Gardner v. State*, 730 S.W.2d 675, 689 (Tex. Crim. App. 1987)(harmless error though). It is proper for a defendant to question potential jurors on whether they understand there is a difference between a murder committed intentionally and one committed deliberately. The trial court erred in preventing appellant from doing that here. Error was cured, however, when the trial court granted an extra peremptory. *Teague v. State*, 864 S.W. 2d 505, 512 (Tex. Crim. App. 1993); *Cf. Ex parte McKay*, 819 S.W.2d 478, 483 (Tex. Crim. App. 1990)(harmful error for court to prohibit appellant from asking 35 venirepersons whether they would automatically answer the first special issue); *But see Wheatfall v. State*, 882 S.W. 2d 829, 835 (Tex. Crim. App. 1994)(no error where trial court would not allow defense to ask juror what deliberate meant to him, but was allowed to propound questions about the difference between deliberately and intentionally).

3. There are older cases which hold that the trial court may prohibit inquiry into venireperson's understanding of certain punishment terminology. *E.g., Esquivel v. State*, 595 S.W.2d 516, 525 (Tex. Crim. App. 1980)("deliberately" and "probability"); *Battie v. State*, 551 S.W.2d 401, 405 (Tex. Crim. App. 1977)("criminal acts of violence"). In light of *Gardner v. State, supra*, the continued validity of these holdings is questionable. *But see Trevino v. State*, 815 S.W.2d 592, 610 (Tex. Crim. App. 1991).

4. The Texas Court of Criminal Appeals has held that the trial court can prohibit inquiry into the venireperson's understanding of the law of parole. *King v. State*, 631 S.W.2d 486, 490 (Tex. Crim. App. 1982). The United States Court of Appeals for the Fifth Circuit agrees. *King v.*

Lynaugh, 850 F.2d 1055 (5th Cir. 1988). See also *Ford v. State*, 919 S.W. 2d 107, 116 (Tex. Crim. App. 1996); *Sonnier v. State*, 913 S.W. 2d 511, 518 (Tex. Crim. App. 1995).

5. In *Santana v. State*, 714 S.W. 2d 1 (Tex. Crim. App. 1986), the trial court prohibited defense counsel from questioning certain venirepersons about the lesser included offense of murder. The court of criminal appeals found that this restriction was clearly erroneous, but refused to reverse because the facts adduced at trial did not raise the offense of murder. *Id.* at 10.

6. "For cases in which an appellant challenges the jury voir dire process, as distinguished from appeals concerning the trial judge's failure to grant a specific challenge for cause, there is no requirement that appellant show harm. Such cases are reviewed under an abuse of discretion standard. The standard focuses on whether a question proffered by counsel and refused by the trial judge was proper. If the disallowed question was proper, harm is presumed because appellant has been denied the intelligent use of his peremptory strikes. The State's contention that appellant must show harm is without merit." *Cockrum v. State*, 758 S.W. 2d 577, 584 (Tex. Crim. App. 1988). To preserve such a claim, however, the record on appeal must show that counsel asked a question which the judge disallowed. *Cockrum* was affirmed "[b]ecause the record does not reflect any refused questions." *Id.* at 585. Accord, *Goff v. State*, ___ S.W. 2d ___, ___ No. 71,404 (Tex. Crim. App. May 22, 1996), slip op. 7(not subject to a harm analysis under Rule 81(b)(2)); but see *Rachal v. State*, 917 S.W. 2d 799, 815 (Tex. Crim. App. 1996)(such error *is* subject to a harmless error analysis).

7. The trial court may impose a reasonable time limit on individual voir dire. *Boyd v. State*, 811 S.W.2d 105, 115-116 (Tex. Crim. App. 1991)(45 minutes); see *Etheridge v. State*, 903 S.W.2d 1, 10 (Tex. Crim. App. 1994)(appellant failed to preserve error where venireperson in question did not serve on the jury, and where appellant failed to exhaust his peremptory challenges).

8. "Appellant was entitled to inform the jurors that the law requires that they consider the age of the defendant in the assessment of punishment and if they could do so. This was not done." Instead, appellant attempted to bind the jurors to a course of action without explaining what the law required. *Trevino v. State*, 815 S.W.2d 592, 599 (Tex. Crim. App. 1991).

9. The prosecutor erred in trying to limit the venireperson's views of "continuing threat to society" to exclude rehabilitation. This was harmless, though, since appellant did not offer any evidence of rehabilitation at trial. *Jackson v. State*, 819 S.W.2d 142, 149 (Tex. Crim. App. 1990).

10. The state may inform the venirepersons of the consequences of their answers to the special issues. *Jones v. State*, 843 S.W.2d 487, 494 (Tex. Crim. App. 1992). "To prevent the state from explaining to the veniremembers the effect of their answers to the special issues would tend to relieve them of their awesome responsibility to determine whether a defendant would live or die, and would also prevent the state from adequately eliciting a prospective juror's feelings about the death penalty." *Id.*

11. The trial court did not err in permitting the state to question venirepersons about their attitudes toward the death penalty. "[W]ithin reasonable limits both the State and the defendant must be allowed to explore any attitudes of veniremembers which might render them challengeable for cause or otherwise subjectively undesirable as jurors. In a death penalty case, such

attitudes plainly include beliefs concerning the propriety, efficacy, and desirability of capital punishment as a component of the criminal justice system." *Draughon v. State*, 831 S.W.2d 331, 333-334 (Tex. Crim. App. 1992)(citations omitted).

12. Lawyers may not attempt to commit venirepersons "to any particular hypothetical circumstances." *Newton v. State*, ___ S.W.2d ___, ___, No. 70,770 (Tex. Crim. App. June 17, 1992), slip op. 10.

13. Due Process entitles a defendant to ask venirepersons whether they would automatically vote for the death penalty in a capital case. *Morgan v. Illinois*, 112 S.Ct. 2222, 2228 (1992).

14. "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, 201 (Tex. Crim. App. 1993). See *Burks v. State*, 876 S.W.2d 877, 895 (Tex. Crim. App. 1994) (proper for state to determine, without committing, whether venirepersons could conceive of arson and burglary as crimes of violence).

15. The trial court does not err in refusing to provide counsel with a mitigation instruction at the time of voir dire. There is no allegation that counsel was prohibited from questioning the venire on mitigation. *Robertson v. State*, 871 S.W. 2d 701, 711 (Tex. Crim. App. 1993).

16. The trial court did not err in not permitting appellant to question 10 venirepersons about the definition of "deliberately" that the court intended to give in its jury instructions. *Clark v. State*, 881 S.W.2d 682, 687 (Tex. Crim. App. 1994).

17. The trial court is under no obligation to formulate during voir dire the instruction on mitigating evidence that will be later given in the jury charge. *Clark v. State*, 881 S.W.2d 682, 687 (Tex. Crim. App. 1994).

18. Nothing in article 35.17 requires the court to define terms to the venire during voir dire. *Staley v. State*, 887 S.W.2d 885, 896 (Tex. Crim. App. 1994).

19. "Evidence which tends to mitigate against a defendant receiving the death penalty is a proper area for inquiry by defense counsel." *Goff v. State*, ___ S.W. 2d ___, ___ No. 71,404 (Tex. Crim. App. May 22, 1996), slip op. 7.

20. In *Coleman v. State*, 881 S.W.2d 344 (Tex. Crim. App. 1994), the trial court refused to allow appellant to ask the venirepersons whether they would consider as mitigating, evidence of poor family conditions and good conduct in jail. It is not error to refuse to allow appellant to ask questions based on facts peculiar to the case on trial. *Id.* at 350-351; accord, *Garcia v. State*, 919 S.W. 2d 370, 399-400 (Tex. Crim. App. 1996)(no error in refusing to permit appellant to commit venirepersons to consider as mitigating evidence of alcohol and drug problems, family history, jail conduct and voluntary intoxication).

21. Although the trial court abused its discretion in curtailing appellant's examination concerning "reasonable doubt," the error was harmless, since jury selection concluded prior to reaching the venireperson in question. *Dinkins v. State*, 894 S.W. 2d 330, 345 (Tex. Crim. App. 1995).

22. The trial court did not err in forbidding appellant from informing the jury that certain evidence is mitigating and must be considered as such in assessing punishment. This is an incorrect statement of the law. *Morrow v. State*, ___ S.W. 2d ___, ___ No. 71,219 (Tex. Crim. App. May 31, 1995), slip op. 4.

D. Misleading Hypotheticals

1. The court of criminal appeals has declared that "intentional" and "deliberate" mean different things. See *Heckert v. State*, 612 S.W.2d 549, 552 (Tex. Crim. App. 1981). When pressed to illustrate the difference by example, however, lawyers and judges often fail. One invalid example commonly used is that of a hypothetical defendant who robs a store and, desiring to scare the clerk, intentionally shoots his gun into the air. Unfortunately, the bullet strikes a beam, ricochets down, and kills the clerk. *Martinez v. State*, 763 S.W.2d 413, 416-18 (Tex. Crim. App. 1988). Supposedly, this illustrates intentional conduct--firing a gun-- that results in a non-deliberate result--death. This is fallacious, though, since in Texas one cannot be convicted of capital murder unless he also intends to cause the death of his victim. Thus the defendant in the hypothetical would not even be guilty of capital murder, much less of deliberate conduct. *Id.* at 419-420.

2. In *Morrow v. State*, 753 S.W.2d 372, 376-77 (Tex. Crim. App. 1988), the conviction was reversed when the "prosecutor's use of the erroneous hypothetical . . . over appellant's objection, so distorted the lawful course of the whole voir dire that appellant was denied due course of law and effective representation of counsel as guaranteed by Article I, §§ 19 and 10 of the Texas Constitution." See also *Lane v. State*, 743 S.W.2d 617, 627-29 (Tex. Crim. App. 1987); *Gardner v. State*, 730 S.W.2d 675, 689 (Tex. Crim. App. 1987).

3. This sort of error is harmless if the defendant does not exhaust his peremptories. *Kinnamon v. State*, 791 S.W.2d 84, 103 (Tex. Crim. App. 1990).

E. § 12.31(b) Oath

1. Until September 1, 1991, Tex. Penal Code Ann. § 12.31(b)(Vernon 1974) stated:

Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.

2. In *Adams v. Texas*, 448 U.S. 38 (1980), the Supreme Court reversed a long line of Texas cases and held that venirepersons could not constitutionally be disqualified merely

because they were unable to swear that they would not be "affected" by the death penalty, as provided by § 12.31(b).

3. The Texas Court of Criminal Appeals has consistently held that merely giving this oath, without using it to disqualify, does not constitute reversible error. *E.g., Rodriguez v. State*, 899 S.W. 2d 658, 663 (Tex. Crim. App. 1995); *Teague v. State*, 864 S.W. 2d 505, 511 (Tex. Crim. App. 1993); *Granviel v. State*, 723 S.W.2d 141, 154-156 (Tex. Crim. App. 1986).

4. The Fifth Circuit seems to agree, although not without some "uncertainty as to the elusive doctrinal premise of *Adams*." *Milton v. Proncunier*, 744 F.2d 1091 (5th Cir. 1984); *Brooks v. Estelle*, 697 F.2d 586 (5th Cir. 1982).

5. Section 12.31(b), effective September 1, 1991, has omitted the oath. It now reads:

In a capital felony trial in which the state seeks the death penalty, prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. In a capital felony trial in which the state does not seek the death penalty, prospective jurors shall be informed that the state is not seeking the death penalty and that a sentence of life imprisonment is mandatory on conviction of the capital felony.

F. The Right To Individual Voir Dire

1. A defendant in a capital case has a right, upon demand, to examine prospective jurors "individually and apart from the entire panel . . ." Tex. Code Crim. Proc. Ann. art. 35.17(2)(Vernon 1989); *See Batten v. State*, 533 S.W.2d 788, 793 (Tex. Crim. App. 1976)(trial court erred in refusing demand for individual voir dire).

2. Article 35.17(2) also requires the court in a capital case to "propound to the entire panel of prospective jurors questions concerning the principles, as applicable to the case on trial, of reasonable doubt, burden of proof, return of indictment by grand jury, presumption of innocence, and opinion." The failure of the court to do so is harmless where the record reflects that the court and the parties so examined each venireperson individually, and the court properly instructed the jury on these principles at the close of the case. *Harris v. State*, 790 S.W. 2d 568, 582 (Tex. Crim. App. 1989).

3. The trial court did not err, over defendant's objection, in permitting both sides a general voir dire of the panel, before individual voir dire, to save time. *Barnard v. State*, 730 S.W. 2d 703, 715-16 (Tex. Crim. App. 1987).

4. Exactly what happened in *Martinez v. State*, 867 S.W. 2d 30 (Tex. Crim. App. 1993), is not clear from the opinion. It appears, however, that the trial court required the parties to discuss non-death penalty issues in the general voir dire, and limited individual voir dire to "the law relating to capital murder." The court of criminal appeals sanctioned this practice, holding that the trial court has discretion in conducting voir dire, and that the procedure employed does not violate article 35.17(2). *Id.* at 35; *see Powell v. State*, 897 S.W.2d 307, 311 (Tex. Crim. App. 1994)("procedure employed by the trial judge in this case satisfies Article 35.17(2) and in no way interfered with

appellant's right to counsel").

5. For offenses committed after September 1, 1992, where the state does not seek the death penalty, there is no absolute right to individual voir dire. Tex. Code Crim. Proc. Ann. art. 35.17(2)(Vernon Supp. 1995).

G. Shuffle

1. The trial court, upon demand of either party, must shuffle the names of those assigned to and seated in the courtroom as prospective jurors. Tex. Code Crim. Proc. Ann. art. 35.11 (Vernon 1989).

2. Article 35.11 clearly applies in capital cases where there is no special venire. "We therefore hold that in capital murder cases which do not involve a special venire . . . when timely and properly requested, the accused is entitled to have the names of those persons assigned to and seated in the courtroom where the cause is to be heard, shuffled or redrawn." *Hall v. State*, 661 S.W.2d 113, 116 (Tex. Crim. App. 1983). Failure to grant a request to shuffle is automatic reversible error. *Id.* at 115. The *Hall* court did not decide whether the parties have a right to shuffle if there is a special venire. *Id.* at 116 n.3.

3. Capital cases are treated differently than non-capital cases. In a capital case, voir dire commences when the judge (not the state) begins examination of the venire. *Davis v. State*, 782 S.W.2d 211, 215 (Tex. Crim. App. 1989).

4. The trial court erred in granting the state's motion to shuffle the jury after the venire had already been shuffled at appellant's request. Only one shuffle is allowed under article 35.11, absent a showing of misconduct. This sort of error is not subject to a harm analysis. *Chappell v. State*, 850 S.W. 2d 508, 509, 513 (Tex. Crim. App. 1993).

5. It is not an improper "one-person 'jury shuffle'" for the trial court to permit a venireperson with vacation plans to appear later than the date he was originally scheduled to be examined. *Goff v. State*, ___ S.W. 2d ___, ___ No. 71,404 (Tex. Crim. App. May 22, 1996), slip op. 15.

H. Jury List Must Be Provided At Least Two Days In Advance

1. A defendant in a capital case must be provided at least two days (including holidays) prior to trial with a copy of the names of the persons summoned as veniremen, for the week for which his case is set for trial except where he waives the right or is on bail. When the defendant is on bail, the clerk shall furnish such a list to the defendant or his counsel at least two days prior to the trial (including holidays) upon timely motion by the defendant. Tex. Code Crim. Proc. Ann. art. 34.04 (Vernon 1989).

2. Where defendant received the jury list on January 14, and the judge made general introductory remarks to the panel, but voir dire questioning by the parties did not begin until January 17, defendant received the list in a timely fashion. *May v. State*, 738 S.W. 2d 261, 267 (Tex. Crim. App. 1987).

3. The law does not require personal service on the defendant himself. Service on his attorney is adequate. *Wyle v. State*, 777 S.W.2d 709, 714 (Tex. Crim. App. 1989).

4. Article 34.04 has been amended, effective for offenses committed after September 1, 1991. Thus, in capital cases where the state does not seek the death penalty, there is no requirement that the jury list be provided prior to voir dire. Tex. Code Crim. Proc. Ann. art. 34.04 (Vernon Supp. 1995).

I. Number of Peremptory Challenges

1. Where the state seeks the death penalty, each party gets 15 peremptory challenges if there is only one defendant. Tex. Code Crim. Proc. Ann. art. 35.15(a)(Vernon Supp. 1995).

2. Where the state seeks the death penalty and there is more than one defendant, each party gets eight peremptory challenges. Tex. Code Crim. Proc. Ann. art. 35.15(a)(Vernon Supp. 1995).

3. Where the state does not seek the death penalty, each party gets 10 peremptory challenges if there is only one defendant. Tex. Code Crim. Proc. Ann. art. 35.15(b)(Vernon Supp. 1995).

4. Where the state does not seek the death penalty and there is more than one defendant, each party gets six peremptory challenges. Tex. Code Crim. Proc. Ann. art. 35.15(b)(Vernon Supp. 1995).

J. Special Venire

_____ 1. Article 34.01 of the Texas Code of Criminal Procedure provides that a "special venire" is a writ issued in a capital case ordering the sheriff to summon at least 50 venirepersons.

2. Where more than 100 jurors are called for jury service, the decision to grant a special venire is within the discretion of the trial court. *Barnes v. State*, 876 S.W.2d 316, 324 (Tex. Crim. App. 1994).

3. Where a special venire is called, the trial court cannot designate others to decide whether to grant or deny excuses to venirepersons. Other judges can be designated where jury selection occurs from the general assembly. *Chambers v. State*, 903 S.W. 2d 21, 30 (Tex. Crim. App. 1995).

K. Alternate Jurors

1. In a capital case in which the state seeks the death penalty, the court may direct that two alternate jurors be selected and that the first fourteen names not stricken be called off by the clerk. The last two names to be called are the alternate jurors." Tex. Code Crim. Proc. Ann. art. 35.26 (Vernon Supp. 1995).

2. "If alternate jurors have been selected in a capital case in which the state seeks the death penalty and a juror dies or becomes disabled from sitting at any time before the charge of the court is read to the jury, the alternate juror whose name was called first under Article 35.26 of this code shall replace the dead or disabled juror. Likewise, if another juror dies or becomes disabled from sitting before the charge of the court is read to the jury, the other alternate juror shall replace the second juror to die or become disabled." Tex. Code Crim. Proc. Ann. art. 36.29(b)(Vernon 1989).

3. In *Broussard v. State*, 910 S.W. 2d 952 (Tex. Crim. App. 1995), the court, pursuant to article 36.29(b), replaced a juror disabled with work pressures with an alternate before the jury was sworn. The court of criminal appeals first noted that article 36.29(b) is not applicable until the jury is sworn. Even so, there was no error, since there was no specific statute prohibiting replacement. Moreover, even if this was error, it was harmless. *Id.* at 958.

L. Presence Of The Defendant

1. "In all prosecutions for felonies, the defendant must be personally present at the trial . . . ; provided, however, that in all cases when the defendant voluntarily absents himself after pleading to the indictment or information, or after the jury has been selected when trial is before a jury, the trial may proceed to its conclusion." Tex. Code Crim. Proc. Ann. art. 33.03 (Vernon 1989).

2. Under article 33.03, "an accused's right to be present at his trial is unwaivable until such a time as the jury 'has been selected.'" *Miller v. State*, 692 S.W. 2d 88, 91 (Tex. Crim. App. 1985).

3. In *Adanandus v. State*, 866 S.W. 2d 210 (Tex. Crim. App. 1993), the trial court permitted appellant to miss a couple of days of voir dire, during which eight venirepersons were examined. Later the judge decided it had been improper to proceed in appellant's absence, and, to fix it, he ordered that the eight be returned to court and re-examined. This procedure satisfied article 33.03. "Appellant's absence for part of the voir dire examination was essentially 'undone' due to re-examination in appellant's presence of the eight venirepersons that had been voir dired in his absence. Because appellant was provided the opportunity to fully voir dire in his presence each of the venirepersons who were previously voir dired in his absence, the purposes of the statute were met and no error occurred. Moreover, appellant did not utilize any peremptories on these venirepersons and none of these persons served on the jury." *Id.* at 217. Nor did appellant argue that his trial strategy in any way was disrupted by these events. *Id.* at 217 n.3.

4. In *Lawton v. State*, 913 S.W. 2d 542 (Tex. Crim. App. 1995), the trial judge examined a venireperson in chambers, and in the absence of appellant, to determine whether she had been affected by a telephone call from the jail. After this meeting, the venireperson was dismissed from the jury. The court held that this procedure did not constitute a voir dire proceeding which required appellant's presence. "The *in camera* meeting lacked the traditional adversarial elements of a voir dire proceeding. [The venireperson] was not instructed or examined in the traditional sense of a

voir dire examination; neither party desired to question her. She was dismissed upon the suggestion, agreement, and by request of both parties without challenge for cause or peremptory challenge. Both parties and the trial court stated that their purpose in the dismissal was to protect the integrity of the trial proceedings." *Id.* at 549. "Article 33.03 neither purports to govern nor was intended to govern the peculiar situation which arose in this case." *Id.*

M. Videotaping The Proceedings

1. The trial court's refusal to allow the videotaping of the voir dire proceedings by appellant was not an abuse of discretion. *Curry v. State*, 910 S.W. 2d 490, 492 (Tex. Crim. App. 1995).

XV. **GUILT/INNOCENCE PHASE OF A CAPITAL MURDER TRIAL**

A. **The Right to Jury (Whether You Want It Or Not)**

1. **Before September 1, 1991**

a. In offenses occurring before September 1, 1991, the defendant in a capital case cannot waive the right to trial by jury nor can the state waive the death penalty. *Sorola v. State*, 693 S.W.2d 417, 418 (Tex. Crim. App. 1985); *Ex parte McKinney*, 688 S.W.2d 559, 560 (Tex. Crim. App. 1985); *Ex parte Bailey*, 626 S.W.2d 741, 742 (Tex. Crim. App. 1981); *Ex parte Jackson*, 606 S.W.2d 934, 934 (Tex. Crim. App. 1980); *Ex parte Dowden*, 580 S.W.2d 364, 366 (Tex. Crim. App. 1979); *Batten v. State*, 533 S.W.2d 788, 793 (Tex. Crim. App. 1976). The statute prohibiting waiver of a jury trial in a capital case is constitutional. *Phillips v. State*, 701 S.W. 2d 875, 894 (Tex. Crim. App. 1985).

b. The state waived the death penalty in *Hicks v. State*, 664 S.W.2d 329 (Tex. Crim. App. 1984), but the error was harmless. Because defendant was given 15 peremptory challenges and the right of individual voir dire, "no right granted a capital defendant [was] abrogated . . ." *Id.* at 330; *cf. Sorola v. State*, 693 S.W.2d at 419 (defendant need not show harm where right to jury sentencing was abrogated).

c. Clearly the trial court can permit the state to reduce a capital murder indictment to murder, allow the defendant to waive a jury, and accept his guilty plea. *Ex parte McClelland*, 588 S.W.2d 957, 958 (Tex. Crim. App. 1979).

d. The defendant is also entitled to plead guilty to capital murder and have the jury assess punishment. *E.g., Morin v. State*, 682 S.W.2d 265, 269 (Tex. Crim. App. 1983); *Williams v. State*, 674 S.W.2d 315, 319 (Tex. Crim. App. 1984); *Crawford v. State*, 617 S.W.2d 925, 929 (Tex. Crim. App. 1980). In such a case, it is permissible for the judge to instruct the jury to find the defendant guilty of capital murder in the same instrument which submits the special issues and punishment charge. *Holland v. State*, 761 S.W. 2d 307, 313 (Tex. Crim. App. 1988).

e. Since capital murder and murder are not "different" offenses under article 28.10© of the Texas Code of Criminal Procedure, the state may amend a capital murder indictment to charge murder only. *Horst v. State*, 758 S.W.2d 311, 313-314 (Tex. App.--Amarillo 1988, pet. ref d).

2. **After September 1, 1991**

a. Texas law has been amended to permit the waiver of a jury in a capital case where the state consents and does not seek the death penalty. Tex. Code Crim. Proc. Ann. art. 1.13(b)(Vernon Supp. 1995).

B. **Joinder and Severance**

1. In *Goode v. State*, 740 S.W.2d 453 (Tex. Crim. App. 1987), jury selection commenced with defendant joined for trial with her co-defendant. Since there were two co-defendants,

each initially received eight peremptory strikes, instead of 15. Tex. Code Crim. Proc. Ann. art. 35.15(a)(Vernon 1989). After the jury was sworn, the trial court severed defendants, on the ground that they were pursuing mutually exclusive defenses. Defendant Goode's motion for mistrial was overruled, and she was tried and convicted of capital murder. *Id.* at 456. The court of criminal appeals reversed Goode's conviction, holding that the failure to grant defendant a mistrial violated her statutory right to 15 peremptory strikes, to which she was entitled as a capital murder defendant separately tried. *Id.* at 457.

2. It is improper for the trial court to submit both capital murder and aggravated robbery, alleged in a single indictment, to the same jury. *Callins v. State*, 780 S.W.2d 176, 182 (Tex. Crim. App. 1989). The remedy is to reform the judgment to delete the conviction for aggravated robbery. *Id.* at 186.

3. The indictment in *Cook v. State*, 741 S.W.2d 928 (Tex. Crim. App. 1987), alleged one incident of capital murder in six different counts, charging murder in the course of aggravated rape, aggravated sexual abuse, burglary of a habitation with intent to commit aggravated rape, burglary of a habitation with intent to commit aggravated sexual abuse, burglary of a habitation with intent to commit theft, and burglary of a habitation with intent to commit aggravated assault. The trial court properly overruled defendant's pretrial motion to require the state to elect, since it is permissible for the state to allege one transaction of capital murder in multiple counts of a single indictment, to meet possible variations in proof. *See Franklin v. State*, 606 S.W.2d 818, 821 (Tex. Crim. App. 1979); *Jurek v. State*, 522 S.W. 2d 934, 941 (Tex. Crim. App. 1975), *aff'd*, 428 U.S. 262 (1976). In *Cook*, five of the six original counts were submitted to the jury, which returned a general verdict. To be sufficient, the evidence need only support a finding of guilt under at least one of the counts. *Cook v. State*, 741 S.W. 2d at 935. The trial court does not err in permitting the jury to return a general verdict, without designating under which count guilt was found. *Franklin v. State*, 606 S.W. 2d at 822. The state may also join in a single paragraph allegations of murder in the course of burglary and murder in the course of robbery. *Jernigan v. State*, 661 S.W. 2d 936, 942 (Tex. Crim. App. 1983).

4. *Wilder v. State*, 583 S.W.2d 349, 358 (Tex. Crim. App. 1979), holds that severance of defendants joined for trial is discretionary unless one defendant has an admissible prior conviction, or a joint trial would be prejudicial. *See* Tex. Code Crim. Proc. Ann. art. 36.09 (Vernon 1981).

5. An indictment may properly allege both capital murder and its lesser included offense of murder, without violating the rules prohibiting misjoinder. *Washington v. State*, 771 S.W. 2d 537, 547 (Tex. Crim. App. 1989).

6. State joinder rules have been liberalized by an amendment to the Penal Code. *See* Tex. Penal Code Ann. § 3.01 (Vernon Supp. 1995).

7. A defendant does not have the right to compel *consolidation* (as opposed to severance) of two indictments alleging capital murder and attempted capital murder. *Nelson v. State*, 864 S.W. 2d 496, 498 (Tex. Crim. App. 1993).

C. **Accomplice Witness Testimony**

1. The General Rule

a. Tex. Code Crim. Proc. Ann. art. 38.14 (Vernon 1979) provides:

A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense.

b. Formerly it was the law in Texas that, in a capital murder case, accomplice witness testimony had to be corroborated as to the specific elements that elevated the offense to capital murder. *E.g.*, *County v. State*, 668 S.W.2d 708, 711 (Tex. Crim. App. 1984); *Granger v. State*, 605 S.W.2d 602, 604 (Tex. Crim. App. 1980); *Fortenberry v. State*, 579 S.W.2d 482, 486 (Tex. Crim. App. 1979).

c. This requirement was abandoned in *Holladay v. State*, 709 S.W.2d 194 (Tex. Crim. App. 1986). Now, corroborating evidence must simply tend to connect the accused with the crime. *Id.* at 199; *E.g.*, *May v. State*, 738 S.W. 2d 261, 266 (Tex. Crim. App. 1987); *Losada v. State*, 721 S.W.2d 305, 309 (Tex. Crim. App. 1986); *Anderson v. State*, 717 S.W.2d 622, 631 (Tex. Crim. App. 1986); *Romero v. State*, 716 S.W.2d 519, 520 (Tex. Crim. App. 1986).

d. In *Thompson v. State*, 691 S.W. 2d 627 (Tex. Crim. App. 1984), the defendant urged the court to adopt a special accomplice witness rule in capital cases, namely that the corroborating evidence alone must be sufficient to establish guilt beyond a reasonable doubt or must tend to connect the defendant to the offense beyond a reasonable doubt. The court rejected this contention, holding that neither the Constitution nor article 38.14 require a stricter standard of review in capital cases. *Id.* at 631.

2. Accomplice As A Matter Law Or Fact?

a. A co-indictee for the same offense is an accomplice as a matter of law. "When there exists no doubt as to the character of a witness as an accomplice as a matter of law the court is under a duty to so instruct the jury." *Burns v. State*, 703 S.W. 2d 649, 651-52 (Tex. Crim. App. 1985)(charge error is reversible under "some harm" analysis established in *Almanza*, since accomplice testimony was "essential" to state's case).

b. When the accomplice has not been indicted, and there is a fact question as to whether he is an accomplice, "it is proper to submit that issue to the jury, and this is sufficient even though the evidence appears to preponderate in favor of the conclusion that the witness is an accomplice as a matter of law. It is only when the evidence clearly shows that the witness is an accomplice as a matter of law that the trial court must so instruct the jury." *Harris v. State*, 645 S.W. 2d 447, 454 (Tex. Crim. App. 1983)(citations omitted). In *Harris*, the trial court was correct in not instructing that the witness was an accomplice as a matter of law, but erred in not submitting her status as a question of fact. *Id.*

c. On retrial, Harris was again convicted, and on appeal he again challenged the trial court's ruling that the witness was not an accomplice as a matter of law. The court of criminal appeals rejected this challenge, citing the "law of the case" which was established in *Harris I. Harris v. State*, 790 S.W. 2d 568, 579 (Tex. Crim. App. 1989). This time, however, Harris raised an

additional challenge. He requested that a special issue be submitted to the jury asking it to answer whether or not it found the witness to be an accomplice. The court of criminal appeals also rejected this approach, holding that, except for article 37.071, special issues are not submitted in Texas criminal cases. *See* Tex. Code Crim. Proc. Ann. art. 37.07 § 1a (Vernon 1981). Having said this, the court further remarked: "This is not to say that a special issue could never be constitutionally necessary despite the statutory prohibition of Article 37.07, §1(a), *supra*." *Id.* at 579-80.

3. Sufficiency

a. In determining the sufficiency of evidence when an accomplice as a matter of law testifies, the court will "eliminate from consideration the accomplice's testimony . . . and examine the remaining evidence to ascertain whether it independently tends to connect the appellant to the commission of capital murder." *Jackson v. State*, 745 S.W. 2d 4, 11 (Tex. Crim. App. 1988); *Erwin v. State*, 729 S.W. 2d 709, 711 Tex. Crim. App. 1987). "[I]f there is such evidence, the corroboration is sufficient; otherwise, it is not." *Streetman v. State*, 698 S.W. 2d 132, 136 (Tex. Crim. App. 1985).

b. Cases holding that the evidence was sufficient to corroborate the accomplice witness are abundant. *E.g. May v. State*, 738 S.W. 2d 261, 267 (Tex. Crim. App. 1987); *Harris v. State*, 738 S.W. 2d 207, 219 (Tex. Crim. App. 1986); *Gardner v. State*, 730 S.W. 2d 675, 679 (Tex. Crim. App. 1987).

c. Much rarer are capital cases in which the court has determined the evidence was insufficient to corroborate the accomplice.

i. In *Cruz v. State*, 690 S.W.2d 246 (Tex. Crim. App. 1985), after eliminating the accomplice testimony, the court found only "scanty scientific and investigatory evidence, none of which links appellant to the murder." The only corroborating evidence corroborated extraneous matters. The conviction was reversed and the cause remanded for entry of a judgment of acquittal. *Id.* at 251.

ii. In *Walker v. State*, 615 S.W. 2d 728 (Tex. Crim. App. 1981), the court noted that an accomplice witness is a "discredited witness," whose testimony is "untrustworthy and . . . should be received and viewed and acted on with caution." *Id.* at 731. Applying the elimination test, the court found the evidence merely corroborated what the accomplice said and verified extraneous matters, without connecting the defendant to the crime, and placed the accomplice and defendant together near the time of the commission of the offense. The court found this evidence insufficient to corroborate the accomplice. The conviction was reversed and reformed to reflect an acquittal. *Id.* at 732-33.

iii. In *Munoz v. State*, 853 S.W. 2d 558 (Tex. Crim. App. 1993), the evidence did not connect appellant to the murder weapon, and there was no evidence, outside the accomplices, that appellant was near the scene of the crime and no evidence he was in possession of stolen property or incriminating evidence. The evidence was insufficient to connect appellant to the offense. *Id.* at 563.

D. Sufficiency Of The Evidence To Support Conviction

1. Standard Of Review

a. The standard of review for determining sufficiency of the evidence in any criminal case "is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). This standard applies in both direct and circumstantial evidence cases. *Geesa v. State*, 820 S.W.2d 154 (Tex. Crim. App. 1991).

b. For cases tried before November 6, 1991, the date *Geesa* was decided, a more rigorous standard binds the state. In those cases, "a conviction based upon circumstantial evidence cannot be sustained if the evidence does not exclude every reasonable hypothesis other than the guilt of the defendant." *Fuller v. State*, 827 S.W.2d 919, 931 (Tex. Crim. App. 1992); *accord*, *Newton v. State*, __S.W.2d __, __ No. 70,770 (Tex. Crim. App. June 17, 1992), slip op. 4. The proper procedure is for the appellate court to accept the inculpatory circumstances, and then to ask if there is a reasonable hypothesis other than guilt which would also account for such circumstances. "Thus, if exculpatory aspects of appellant's statements are fully consistent and in harmony with all of what would otherwise appear to be purely inculpatory circumstantial evidence presented by the State, then . . . [the court] would be constrained to hold the evidence insufficient. If, on the other hand, exculpatory aspects of appellant's version of events necessarily contradict or conflict with inculpatory inferences drawn from other circumstantial evidence presented by the State, and all of the evidence viewed in the light most favorable to the prosecution would rationally support a jury verdict of guilt to a degree of confidence beyond a reasonable doubt, we must hold the evidence sufficient." *Gunter v. State*, 858 S.W. 2d 430, 439 (Tex. Crim. App. 1993).

c. Where the state does not object to the court's charge, the appellate court must measure sufficiency of the evidence according to the theory of the case which was actually submitted to the jury. *Elliott v State*, 858 S.W. 2d 478, 480 (Tex. Crim. App. 1993).

2. Aggravated Murder

a. Section 19.02(a)(1) of the Texas Penal Code defines "ordinary" murder as intentionally or knowingly causing the death of an individual. Capital murder is § 19.02(a)(1) "ordinary" murder aggravated by one of six statutory factors. Tex. Penal Code Ann. § 19.03 (Vernon Supp 1995).

b. Statistically, most capital murders fall under § 19.03(a)(2), which prohibits intentional murders committed "in the course of committing or attempting to commit kidnaping, burglary, robbery, aggravated sexual assault, or arson." Defendants frequently concede the murder evidence, but challenge the sufficiency of the evidence to support the underlying felony. These challenges are almost always unsuccessful. *E.g.*, *Cannon v. State*, 691 S.W. 2d 664, 675 (Tex. Crim. App. 1985); *O'Pry v. State*, 642 S.W. 2d 748, 762 (Tex. Crim. App. 1982); *Dorough v. State*, 639 S.W. 2d 479, 480 (Tex. Crim. App. 1982).

c. In *Boyle v. State*, 820 S.W.2d 122 (Tex. Crim. App. 1989), the state alleged murder in the course of kidnaping and aggravated sexual assault. On appeal, the court found that the evidence was sufficient to prove kidnaping. The conviction was therefore upheld, without the necessity of examining the sufficiency of the evidence to prove aggravated sexual assault.

d. In *Lawton v. State*, 913 S.W. 2d 542 (Tex. Crim. App. 1995), the state charged appellant with murder during the course of burglary of a vehicle and robbery. Appellant argued that it is not capital murder to commit murder during the course of burglary of a vehicle. The court assumed "for argument's sake that appellant is correct and that capital murder as defined in section 19.03(a)(2) excludes burglary of a vehicle...." *Id.* at 550. Nevertheless, the court ruled against appellant, finding the error harmless, since the jury also unanimously convicted appellant of murder during the course of a robbery. *Id.* Judge Clinton dissented, arguing that burglary is intended to

protect against intrusion in special places where people expect to be free from such intrusion. *Id.* at 561. Judge Maloney, joined by Judges Baird and Mansfield, concurred, believing that murder in the course of burglary of a vehicle is not a capital offense. *Id.* at 561-62.

3. Insufficient Proof Of Underlying Felony

a. On rare occasion, the conviction is reversed because the evidence is insufficient to prove that the murder was committed during the course of the specified felony.

I. In *Ibanez v. State*, 749 S.W. 2d 804 (Tex. Crim. App. 1986), the evidence showed both that the defendant murdered the victim and stole his property. In his confession, which was introduced by the state, the defendant claimed he first killed the victim in a rage, and that thereafter, he took the victim's car out of fear, desiring to flee. The court found that the theft of the car was "incidental." That is, there was no proof that the murder was committed with the intent to obtain control of the car. "A killing and unrelated taking of property do not constitute capital murder under 19.03(a)(2): the State must prove a nexus between the murder and the theft, i.e. that the murder occurred in order to facilitate the taking of the property." *Id.* at 807. Finding no such nexus, the conviction for capital murder was reversed and a judgment of acquittal was ordered. *Id.* at 808.

ii. Evidence that the defendant killed the victim out of anger, and that after doing so, decided to take some property to make it appear like a burglary, does not establish that the murder was committed during the course of a burglary. *Palafox v. State*, 608 S.W. 2d 177, 183 (Tex. Crim. App. 1979); *but see Hathorn v. State*, 848 S.W. 2d 101, 108 (Tex. Crim. App. 1992)(even assuming appellant's motive in stealing property was to conceal involvement in murders, that fact does not diminish intent to unlawfully appropriate property, since intent and motive are distinct).

iii. "Murder and a subsequent theft do not constitute capital murder unless the violent conduct causing death was done with the intent to obtain or maintain control over the victim's property." *Cruz v. State*, 629 S.W. 2d 852, 859 (Tex. App.--Corpus Christi 1982, pet. ref'd). That is, the *mens rea* of the theft must accompany the violent conduct which causes the death. *Id.* In *Cruz* the court found that evidence that the appellant had murdered the victim, coupled with evidence that he was in recent unexplained possession of the victim's watch, was insufficient to establish the nexus necessary for capital murder. "The possession of the watch by appellant in this case, without more, is as consistent with the fact that he killed to obtain it as with the fact that he did not." *Id.* at 859-860. Accordingly, the conviction was reversed and the cause remanded to the trial court to enter a judgment of acquittal to the charge of capital murder. *Id.* at 860; *but see Garrett v. State*, 851 S.W. 2d 853, 856 (Tex. Crim. App. 1993)("Evidence is sufficient to support a capital murder conviction if it shows an intent to obtain or maintain control of property which was formed before or contemporaneously with the murder"); *see Robertson v. State*, 871 S.W. 2d 701, 705 (Tex. Crim. App. 1993)(sufficient); *Nelson v. State*, 848 S.W. 2d 126, 132 (Tex. Crim. App. 1992)(sufficient).

iv. *Freeman v. State*, 723 S.W. 2d 727 (Tex. Crim. App. 1986), was prosecuted as a murder, not a capital murder, case. In *dicta*, the court noted that the case could not have been prosecuted as capital murder because defendant murdered the victim "and then committed robbery only to disguise his motive and hopefully his identity in committing the murder." *Id.* at 728 n.2.

v. Proof that a robbery occurred as an afterthought and unrelated to a murder would not establish capital murder. *Moody v. State*, 827 S.W.2d 875, 892 (Tex. Crim. App. 1992).

4. Insufficient Corroboration

a. As previously noted in this paper, the court occasionally reverses because the evidence is insufficient to corroborate an accomplice witness. *See Munoz v. State*, 858 S.W. 2d 558, 563 (Tex. Crim. App. 1993); *Cruz v. State*, 690 S.W. 2d 246, 251 (Tex. Crim. App. 1985); *Walker v. State*, 615 S.W. 2d 728, 731-33 (Tex. Crim. App. 1981).

5. Insufficient Circumstantial Evidence

a. In *Stogsdill v. State*, 552 S.W. 2d 481, 487 (Tex. Crim. App. 1977), the purely circumstantial evidence against the defendant was found insufficient to support a conviction for capital murder.

b. In *Skelton v. State*, 795 S.W.2d 162 (Tex. Crim. App. 1989), the court found the evidence insufficient in a bombing case even though appellant had made numerous threats against the deceased, and had recently been in possession of materials similar to those used in the bombing. There was no evidence connecting him to the actual setting of the bomb as principal or party. "Although the evidence against appellant leads to a strong suspicion or probability that appellant committed this capital offense, we cannot say that it excludes to a moral certainty every other reasonable hypothesis except appellant's guilt. Specifically, there remains the outstanding possibility that someone other than appellant committed the offense." *Id.* at 169 (citations omitted); *but cf. Geesa v. State*, 820 S.W.2d 154, 161 (Tex. Crim. App. 1991)(abandoning "outstanding reasonable hy-

pothesis" standard).

c. The "reasonable alternative hypothesis construct" is only applicable in circumstantial evidence cases. *Emery v. State*, 881 S.W. 2d 702, 706 (Tex. Crim. App. 1994)(extrajudicial confession is direct evidence).

6. Conspiracy To Rob

a. Murder committed during the course of a *conspiracy* to commit robbery is not capital murder. *English v. State*, 592 S.W. 2d 949, 952 (Tex. Crim. App. 1980).

7. Remuneration

a. A person who kills another in order to receive a benefit or financial settlement paid upon the death of the victim, such as proceeds of insurance and retirement benefits, is guilty of murder for remuneration under § 19.03(a)(3). *Beets v. State*, 767 S.W. 2d 711, 737 (Tex. Crim. App. 1987).

b. Remuneration is a reward given or received because of some act. The state failed to prove remuneration where it showed that a gang member killed a "snitch" in prison for the secondary purposes of continuing to share in drug profits, and increasing his prestige. Status is too intangible. Remuneration must be for something more than the defendant is already entitled to receive. *Rice v. State*, 805 S.W.2d 432, 435 (Tex. Crim. App. 1991).

c. According to the rules of the Texas Syndicate, a gang member was entitled to an increase in rank, and, accordingly, an increase in illicit profits, for murdering an objectionable inmate. Although the court believes there is a strong suspicion that appellant acted with the gang rules in mind, this was not proven beyond a reasonable doubt. *Urbano v. State*, 837 S.W. 2d 114, 116-117 (Tex. Crim. App. 1992).

d. Remuneration is not limited to pecuniary gain. Defendant's offer to kill two persons constituted remuneration to another in return for his killing another. *Underwood v. State*, 853 S.W. 2d 858, 860 (Tex. App. -- Fort Worth 1993, no pet.).

e. See Note, *Widening the Net: Murder For Remuneration in Texas--An Examination of Beets v. State*, 17. Am. J. Crim. L. 307 (1990).

8. Same Criminal Transaction

a. In *Chapman v. State*, 838 S.W. 2d 574 (Tex. App. -- Amarillo 1992, pet. ref'd), the Amarillo court of appeals opted for an "expansive" interpretation of the phrase "same criminal transaction," found in § 19.03(a)(6)(A). Specifically, "the term 'criminal transaction' describes multiple acts that are closely connected in time, place and circumstance and that arise out of a single guilty design." The court found that the evidence was sufficient where it showed that appellant killed two persons within fifteen minutes and 150 feet of each other, with the single design to kill both. *Id.* at 577-78.

b. The evidence was sufficient to prove that appellant killed two persons during the same criminal transaction, as required by § 19.06(a)(6)(A), where the evidence suggested no realistic scenario other than that appellant carried out two murders in a continuous and uninterrupted process over a short period of time. *Rios v. State*, 846 S.W. 2d 310, 314 (Tex. Crim. App. 1992).

c. In *Coble v. State*, 871 S.W. 2d 192 (Tex. Crim. App. 1993), appellant killed his wife's brother, father and mother. "Given that the three murders occurred in close proximity to each other, on the same road, within a few hours of each other, in a continuous and uninterrupted series of events, a jury could have *rationaly* concluded beyond a reasonable doubt that appellant murdered [the victims] during the 'same criminal transaction.'" *Id.* at 199.

9. Manner And Means

a. When an indictment alleges that the manner and means used to inflict an injury is unknown, and the evidence at trial does not show what type of object was used, a prima facie showing exists that the object was unknown to the grand jury. If the evidence does show what object was used, then the state must prove that, in fact, the grand jury did not know the manner and means of inflicting the injury, and that it used due diligence in attempting to ascertain the manner and means of death. Since there was no evidence here that the weapon used was known, there is no need to prove due diligence. *McFarland v. State*, 845 S.W. 2d 824, 830-31 (Tex. Crim. App. 1993); *see Matson v. State*, 819 S.W. 2d 839, 847 (Tex. Crim. App. 1991).

b. "Because the evidence is inconclusive as to the instrumentality that was responsible for the deceased's death, the State need not prove that the grand jury used due diligence in attempting to ascertain the murder weapon. Moreover, the indictment's various allegations of the alternative possible instrumentalities that might have caused the deceased's death evidences the grand jury's efforts in attempting to ascertain the actual cause of death." *Hicks v. State*, 860 S.W. 2d 419, 425 (Tex. Crim. App. 1993).

10. Lawful Discharge of Duty

a. When determining whether a police officer was acting in the lawful discharge of an official discharge, it is irrelevant whether the officer's stop of the appellant was constitutionally reasonable. *Hughes v. State*, 897 S.W.2d 285, 298 (Tex. Crim. App. 1994).

11. Corroboration of Extrajudicial Confessions

a. "An extrajudicial confession is not alone sufficient to support a conviction; there must be independent evidence of the *corpus delicti*." *Emery v. State*, 881 S.W.2d 702, 705 (Tex. Crim. App. 1994).

b. In capital murder cases, extrajudicial confessions must be corroborated as to the underlying felony offense, since it is part of the *corpus delicti*. That is, there must be some evidence which renders commission of the underlying offense more probable than it would be without the evidence. *Chambers v. State*, 866 S.W. 2d 9, 15 (Tex. Crim. App. 1993)(ample evidence corroborating appellant's confession as to sexual assault); *see also Emery v. State*, 881 S.W.2d 702, 705 (Tex. Crim. App. 1994); *Gribble v. State*, 808 S.W.2d 65, 71 (Tex. Crim. App. 1990).

12. No Waiver

a. Defendant does not "waive" his right to complain about the trial court's decision overruling his motion for instructed verdict by putting on defensive evidence. *Madden v. State*, 799 S.W.2d 683, 686 (Tex. Crim. App. 1990). And, even though evidence may be sufficient at the time the motion for instructed verdict is overruled, defendant's defensive or exculpatory evidence may later render the evidence insufficient. *Id.*

13. Murder While Serving A Life Sentence

a. Under § 19.03(a)(6) of the Texas Penal Code, a person may be indicted for capital murder if he commits murder while serving a sentence of life imprisonment or a term of 99 years for the commission of a 3(g) offense. Conviction is not barred simply because the prior offenses were committed before the effective date of the capital statute. *State v. Cannady*, 913 S.W. 2d 741, 744 (Tex. App.--Corpus Christi 1995).

E. The Law Of Parties At The Guilt/Innocence Phase

1. The law of parties applies to the guilt/innocence phase of a capital murder trial. *Blansett v. State*, 556 S.W. 2d 322, 326 (Tex. Crim. App. 1977).

2. The state most often seeks to convict persons as parties under § 7.02(a)(2) or §7.02(b) of the Texas Penal Code.

a. Section 7.02(a)(2) provides that a person is criminally responsible for the conduct of another if "acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense."

b. Section 7.02(b) provides that: "If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy." *See Andrews v. State*, 744 S.W. 2d 40, 48 (Tex. Crim. App. 1987); *accord, Fuller v. State*, 827 S.W.2d 919, 932 (Tex. Crim. App. 1992); *Montoya v. State*, 810 S.W. 2d 160, 164 (Tex. Crim. App. 1989).

3. A defendant may be convicted as a party to capital murder even though his indictment does not allege that he acted as a party. *Goff v. State*, ___ S.W. 2d ___, ___ No. 71,404 (Tex. Crim. App. May 22, 1996); *Duff-Smith v. State*, 685 S.W. 2d 26, 34 (Tex. Crim. App. 1985); *Green v. State*, 682 S.W. 2d 271, 291 (Tex. Crim. App. 1984).

4. When the evidence shows that two or more persons actively participated in the crime, but that the participation of the appellant was "sufficient in and of itself" to sustain the conviction, no parties submission is required. Where there is evidence that the conduct of the defendant is not sufficient, in and of itself, to sustain a conviction, then parties must be submitted. *Goff v. State*, ___ S.W. 2d ___, ___ No. 71,404 (Tex. Crim. App. May 22, 1996), slip op. 5(parties submission proper where there was evidence to support the inference that appellant acted as a party,

even though "defendant as the principal actor" was the theory best supported by the evidence). See *Etheridge v. State*, 903 S.W.2d 1,13 (Tex. Crim. App. 1994)(where evidence of appellant's conduct is sufficient "in and of itself" to sustain his conviction, the trial court does not err in refusing to instruct on the law of parties). See also *Ransom v. State*, 920 S.W. 2d 288, 302 (Tex. Crim. App. 1996) (parties submission proper).

5. In *Stewart v. State*, 686 S.W. 2d 118, 124 (Tex. Crim. App. 1984), the defendant objected to the jury charge at the guilt/innocence phase because it did not require the jury to specify whether it found defendant guilty as a party or a primary actor. The court held that this was not error.

6. Where the state's theory is that the defendant is guilty as a party under § 7.02(b) because he conspired to commit one felony and should have anticipated that a murder would occur in furtherance thereof, the defendant is entitled to a charge on the defensive theory of independent impulse, if raised by the evidence. Under this theory, the defendant claims that he is guilty only of the underlying felony agreed upon, and not the capital murder, because he should not have anticipated that his co-conspirator would commit the murder on his independent impulse. See *Simmons v. State*, 594 S.W. 2d 760, 763 (Tex. Crim. App. 1980).

7. The law of parties does apply to the multiple murder statute. *Johnson v. State*, 853 S.W. 2d 527, 534 (Tex. Crim. App. 1992); accord, *Richardson v. State*, 879 S.W. 2d 874, 880 (Tex. Crim. App. 1993).

8. There is no need for the court to define the term "contemplated" as that term is used in section 7.02(b) of the Texas Penal Code. *Johnson v. State*, 853 S.W. 2d 527, 536 (Tex. Crim. App. 1992).

9. The court's charge must apply the law of parties to the facts of the case by sufficiently informing the jury which mode of conduct under § 7.02(a)(2) could form an alternative basis for conviction. *Teague v. State*, 864 S.W. 2d 505, 517 (Tex. Crim. App. 1993)(harmless error, though, where evidence of guilt as primary actor was the theory best supported by overwhelming evidence). Error, if any, is not reversible absent a timely and specific objection. *Ransom v. State*, 920 S.W. 2d 288, 303 (Tex. Crim. App. 1996).

10. In the abstract portion of the charge, the court instructed the jury on party liability as a conspirator, pursuant to § 7.02(b). The court failed, however, to apply this portion of the law to the facts of the case, over appellant's objection. The trial court erred in denying appellant's request to apply the law of conspiracy to the facts of the case in the application paragraph of the charge. *Campbell v. State*, ___ S.W. 2d ___, ___ No. 71,491 (Tex. Crim. App. June 14, 1995), slip op. 3. The error was harmless, though, because the state chose to proceed on a theory of party liability under § 7.02(a)(2). Failure of the charge to apply the law of parties described in the abstract portion of the charge is not error unless timely and sufficiently objected to. *McFarland v. State*, ___ S.W. 2d ___, ___ No. 71,557 (Tex. Crim. App. February 21, 1996), slip op. 43.

F. The Law Of Causation At The Guilt/ Innocence Phase

1. Tex. Penal Code Ann. § 6.04 (Vernon 1974), provides:

(a) A person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient.

(b) A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that:

(1) a different offense was committed; or

(2) a different person or property was injured, harmed, or otherwise affected.

2. In *Dowden v. State*, 758 S.W.2d 264 (Tex. Crim. App. 1988), the appellant entered the jail with a loaded gun to break his brother out. A gun battle ensued between appellant and the police, and one policeman shot and killed another policeman, Captain Gray.

In the instant case all of appellant's actions were voluntary. Under our present case law the evidence is sufficient to prove that appellant intentionally and knowingly caused the death of Captain Gray, knowing that he was a peace officer. By acting intentionally, appellant showed that he was aware of the nature of his conduct and that initiating a shoot-out in the police station would result in the death of one of the officers on duty. The evidence is also sufficient to prove that appellant acted knowingly and therefore his malicious conduct was sufficient to hold him criminally responsible for Captain Gray's resulting death.

Id. at 273. See also *Blansett v. State*, 556 S.W. 2d 322, 325 (Tex. Crim. App. 1977)(companion case).

3. The theory of causation relied on by the state under § 6.04(a) need not be alleged in the indictment. *Dowden v. State*, 758 S.W. 2d at 274.

4. In *Lewis v. State*, 815 S.W.2d 560 (Tex. Crim. App. 1991), the defendant complained that the law of "transferred intent" is not applicable to a capital murder case because it permits conviction without requiring the jury specifically to find an intentional killing. The court found no need to decide this, however, since the charge, when read as a whole, did not authorize a conviction under a theory of transferred intent. *Id.* at 562.

5. The trial court errs in including an instruction on causation where there is no real issue of causation raised by the evidence. *Hughes v. State*, 897 S.W.2d 285, 297 (Tex. Crim. App. 1994). Reversal is not required, however, where the instruction is abstract only, and the jury is not authorized to convict on this theory in the application paragraph. *Id.*

6. In *Norris v. State*, 902 S.W. 2d 428 (Tex. Crim. App. 1995), appellant was convicted of killing a mother and child, and on appeal argued that the transferred intent provision of section 6.04(b)(2) of the penal code does not apply to the serial capital murder provision in Texas. The

court disagreed. *Id.* at 438.

7. There is no need to give a causation charge where the evidence shows that appellant must have fired at least one fatal shot. *McFarland v. State*, ___ S.W. 2d ___, ___ No. 71,557 (Tex. Crim. App. February 21, 1996), slip op. 45.

G. Gruesome Photographs

1. For many years, gruesome photographs were admissible if they were relevant, unless the defendant could show that they were offered solely to inflame the jury. *E.g.*, *Martin v. State*, 475 S.W.2d 265, 267 (Tex. Crim. App.), *cert. denied*, 409 U.S. 1201 (1972). Under this standard, it was virtually impossible to reverse the trial court. *But see Terry v. State*, 491 S.W.2d 161, 164 (Tex. Crim. App. 1973)(autopsy pictures of child were inadmissible); *Cf. O'Neill v. State*, 681 S.W.2d 663, 671 (Tex. App.--Houston [1st Dist.] 1984, pet. ref'd)(although post-autopsy photos are generally inadmissible, such photos may be admissible where relevant and not overly prejudicial).

2. Recently, though, the court of criminal appeals held that the rules of evidence govern the admissibility of photographs, and that, to be admissible, photographs must both be relevant to a material issue in the case, and their probative value must not be substantially outweighed by their prejudicial effect. *Long v. State*, 803 S.W.2d 259, 271 (Tex. Crim. App. 1991). Thus, first the trial court must determine whether the photos are relevant. If so, and if the defendant objects under Rule 403, the court must balance the probative value against the potential for prejudice. *Id.* The number of exhibits offered, their gruesomeness, their detail, their size, whether they are black and white or color, whether they are close-up, whether the body is naked or clothed, and the availability or other means or proof and the circumstances unique to each individual case are factors for consideration in the Rule 403 analysis. *Id.* at 270. The *Martin* case was overruled. *Id.* at 272.

3. The photos were held admissible under the new standard in *Hicks v. State*, 860 S.W. 2d 419, 427 (Tex. Crim. App. 1993); *see also Matamoros v. State*, 901 S.W. 2d 470, 476 (Tex. Crim. App. 1995); *Etheridge v. State*, 903 S.W.2d 1, 21 (Tex. Crim. App. 1994); *Emery v. State*, 881 S.W.2d 702, 710 (Tex. Crim. App. 1994); *Barnes v. State*, 876 S.W.2d 316, 326 (Tex. Crim. App. 1994); *Richardson v. State*, 879 S.W. 2d 874, 880-881 (Tex. Crim. App. 1993); *McFarland v. State*, 845 S.W. 2d 824, 840-41 (Tex. Crim. App. 1993); *Narvaiz v. State*, 840 S.W. 2d 415, 429-430 (Tex. Crim. App. 1992); *Jones v. State*, 843 S.W.2d 487, 501 (Tex. Crim. App. 1992); *Green v. State*, 840 S.W.2d 394, 410-411 (Tex. Crim. App. 1992); *Fuller v. State*, 829 S.W.2d 191, 206, 207 (Tex. Crim. App. 1992).

4. Reversible error is difficult to imagine. The very quality which makes the pictures gruesome and prejudicial is also what makes them powerful evidence. *Sonnier v. State*, 913 S.W. 2d 511, 519 (Tex. Crim. App. 1995). "[W]hen the power of the visible evidence emanates from nothing more than what the defendant has himself done we cannot hold that the trial court has abused its discretion merely because it admitted the evidence." *Id.*

5. Preservation of error regarding videotapes requires that appellant specifically object at trial to that portion of the video which he believes is inadmissible, and that he designate the video for inclusion in the appellate record. *Sonnier v. State*, 913 S.W. 2d 511, 518 (Tex. Crim. App. 1995).

H. Future Hardship

1. Testimony regarding the victim's future hardship is generally irrelevant at guilt/innocence. On the other hand, testimony concerning treatment may be relevant to prove that appellant caused bodily injury or placed the victim in fear of imminent bodily injury or death. *Etheridge v. State*, 903 S.W.2d 1,14 (Tex. Crim. App. 1994).

I. The Admissibility Of Extraneous Offenses At The Guilt/Innocence Phase Of The Trial

1. In General

a. Rule 404(a) of the Texas Rules of Criminal Evidence establishes that character evidence is not generally admissible to prove that the accused "acted in conformity therewith." Stated another way, a person may not be tried for being a criminal in general.

b. Rule 404(b) of the Texas Rules of Criminal Evidence permits the admission of extraneous offenses offered for limited purposes, such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident"

c. Formerly, the law was that the state as the proponent of extraneous offense evidence bore the burden of proving that the evidence was both relevant to a material issue, and that its probative value exceeded its potential for prejudice. See *Williams v. State*, 662 S.W.2d 344, 346 (Tex. Crim. App. 1983). This put a "heavy burden" on the state. *Smith v. State*, 646 S.W. 2d 452, 458 (Tex. Crim. App. 1983).

d. In *Montgomery v. State*, 810 S.W.2d 372 (Tex. Crim. App. 1990), the court held that the Texas Rules of Criminal Evidence alter the rule established in *Williams*. Initially, the proponent of the extraneous evidence bears the burden of showing that it is relevant under Rule 401. The evidence is then admissible under Rule 402 unless the opponent of the evidence shows that it must be excluded for some constitutional, statutory or evidentiary reason. *Id.* at 387. If the opponent would exclude the evidence, it is his "burden to not only demonstrate the proffered evidence's negative attributes, but to show also that these negative attributes '*substantially outweigh*' any probative value." *Id.* at 388-89. Since almost all evidence offered by an adverse party is prejudicial, the court made it clear that "only 'unfair' prejudice provides the basis for exclusion of relevant evidence." *Id.* at 389. Appellate courts will only reverse decisions admitting or excluding evidence reluctantly, for an abuse of discretion. *Id.* at 391.

2. Held Admissible

Extraneous offenses have been found admissible at the guilt/innocence phase of a capital murder trial for a variety of reasons:

a. Evidence of needle marks was admissible, since appellant's drug use was relevant to show his motive in committing capital murder. *Etheridge v. State*, 903 S.W.2d 1, 10-11 (Tex. Crim. App.1994).

b. Evidence that appellant was afraid of having to serve federal time, and that he committed the instant offense to finance his flight to Belize, is admissible to show motive. *Gosch v. State*, 829 S.W.2d 775, 783 (Tex. Crim. App. 1991).

c. Evidence of an escape or attempted escape from pretrial detention is admissible if it has some legal relevance to the offense under prosecution, unless the defendant can show that the escape is directly connected to some other transaction and that it is not connected with the offense on trial. *Havard v. State*, 800 S.W.2d 195, 203 (Tex. Crim. App. 1989); *Rumbaugh v. State*, 629 S.W. 2d 747, 752 (Tex. Crim. App. 1982); *accord*, *Bigby v. State*, 892 S.W. 2d 864, 884 (Tex. Crim. App. 1994).

d. Extraneous offense evidence is admissible to rebut a defensive theory and establish participation in the instant offense. *Crank v. State*, 761 S.W. 2d 328, 347 (Tex. Crim. App. 1988).

e. Evidence of a robbery 11 days prior to killing police officer was relevant to prove that defendant's motive in shooting the officer was to avoid apprehension. *Porter v. State*, 623 S.W. 2d 374, 384 (Tex. Crim. App. 1981); *accord*, *Barefoot v. State*, 596 S.W. 2d 875, 886 (Tex. Crim. App. 1980); *Hughes v. State*, 563 S.W. 2d 581, 589 (Tex. Crim. App. 1978); *see also Crane v. State*, 786 S.W.2d 338, 350 (Tex. Crim. App. 1990) (probation).

f. The state was permitted to prove that defendant had been *investigated* (not convicted) several years earlier for kidnapping and sexual assault, where there was evidence that he feared further investigation when he shot a policeman. According to the court, this proved motive. *Hafdahl v. State*, 805 S.W.2d 396, 398 (Tex. Crim. App. 1990).

g. Evidence that defendant had previously been charged with robbing the deceased was admissible to prove his motive to eliminate the principal witness in that prosecution. *Russell v. State*, 598 S.W. 2d 238, 251 (Tex. Crim. App. 1980).

h. Murders that occurred a half hour before the instant murder were admissible to show "one continuous episode," and to show that the case on trial was "blended or closely interwoven." *Moreno v. State*, 721 S.W. 2d 295, 301 (Tex. Crim. App. 1986).

i. A murder that occurred in the same continuous transaction as the instant offense may be proven. *Lincecum v. State*, 736 S.W. 2d 673, 681 (Tex. Crim. App. 1987); *Mann v. State*, 718 S.W. 2d 741, 743 (Tex. Crim. App. 1986).

j. Evidence of an extraneous burglary was admissible to "show the context in which the criminal act occurred." *Wools v. State*, 665 S.W. 2d 455, 471 (Tex. Crim. App. 1983).

k. Evidence of an extraneous robbery was admissible on the question of identity where there were distinguishing characteristics common to the offenses. *Castillo v. State*, 739 S.W. 2d 280, 291 (Tex. Crim. App. 1987).

l. Evidence of medical and surgical procedures used to repair the stab wounds and remove an eye of a surviving witness were necessary to prove the aggravated assault on that witness, which was the underlying felony of the burglary alleged in the indictment. *Nobles v.*

State, 843 S.W.2d 503, 512-13 (Tex. Crim. App. 1992). Although admissible under those circumstances, the court acknowledged that "evidence of the nature complained of could, under some circumstances, be considered extraneous and improper." *Id.*

m. Evidence that appellant presented false identification to the police when pulled over is admissible because it indicates a "consciousness of guilt." *Felder v. State*, 848 S.W. 2d 85, 98 (Tex. Crim. App. 1992).

n. Evidence of an attempted drug offense, stolen car, and stolen license plate constituted contextual evidence indivisibly connected to the offense, relevant under Rule 401, and not unfairly prejudicial under Rule 403. *Lockhart v. State*, 847 S.W. 2d 568, 571 (Tex. Crim. App. 1992).

o. Admission of extraneous kidnapping and murders were admissible as "same transaction contextual evidence," to prove appellant's intent at the time of the burglary. *Camacho v. State*, 864 S.W. 2d 524, 532 (Tex. Crim. App. 1993).

p. Evidence that appellant solicited the help of another to commit a robbery before the instant offense was admissible as part of appellant's plan and preparations to carry out the instant offense. Also, the evidence is admissible as "same transaction contextual evidence." *Burks v. State*, 876 S.W. 2d 877, 899-900 (Tex. Crim. App. 1994).

q. Evidence of an extraneous aggravated robbery was admissible to show appellant's motive and intent. *Smith v. State*, 898 S.W. 2d 838, 842 (Tex. Crim. App. 1995).

r. Evidence that appellant kidnaped two teenage boys was admissible to show flight. *Alba v. State*, 905 S.W. 2d 581, 586 (Tex. Crim. App. 1995).

s. Evidence of other vehicle burglaries the night of the instant offense was admissible to prove the context in which the murder occurred, to corroborate the accomplice witness, to prove appellant's motive, and that the murder was premeditated. *Lawton v. State*, 913 S.W. 2d 542, 553 (Tex. Crim. App. 1995).

t. Evidence of a recent prior murder was admissible to show intent, identity, motive, and to rebut a defensive theory. *Taylor v. State*, ___ S.W. 2d ___, ___ No. 71,949 (Tex. Crim. App. April 24, 1996), slip op. 3-4.

u. Attacks upon the prosecutor and defense in the courtroom during trial clearly fall within the "consciousness of guilt" exception to the general rule excluding extraneous offenses. *Ransom v. State*, 920 S.W. 2d 288, 299 (Tex. Crim. App. 1996).

v. Evidence that appellant stole the murder weapon "links him somewhat more strongly to the gun than mere possession would, as it implies purported ownership rather than incidental control." Also, this evidence is admissible to rebut a defensive theory raised during cross-examination which may have raised the inference that appellant did not own this weapon. *Ransom v. State*, 920 S.W. 2d 288, 300-301 (Tex. Crim. App. 1996).

3. Held Inadmissible

Occasionally, the court of criminal appeals reverses for the improper admission of an extraneous offense at the guilt/innocence phase of a capital trial. All these cases, except one, were decided before *Montgomery*.

a. In *Ruiz v. State*, 579 S.W. 2d 206, 210 (Tex. Crim. App. 1979), reversal was required for the admission of an extraneous murder where the state's evidence of guilt in the instant offense was direct and uncontroverted.

b. In *Riles v. State*, 557 S.W. 2d 95, 99 (Tex. Crim. App. 1977), the court rejected the state's argument that extraneous robberies committed some 40 minutes later at a different location were admissible on the question of flight because flight was not shown on the facts. Nor was this evidence admissible to prove intent, because intent "was clearly inferable from the acts of the appellant." *Id.*

c. The "first basic prerequisite necessary to warrant the introduction of an extraneous offense" is that defendant's participation be clearly shown. Since the state failed to show that the defendant was the perpetrator of the extraneous offense, the trial court erred in allowing its introduction. The trial court also erred in admitting an extraneous robbery which was "completely disassociated" from the instant offense. It was a separate and independent offense and could not have helped the jury understand the instant offense. *Harris v. State*, 790 S.W. 2d 568, 583-84 (Tex. Crim. App. 1989). Here, however, the error was harmless, and reversal was not required. *Id.* at 588.

d. The trial court erred in overruling defendant's motion to strike two extraneous offenses from his confession. *Wyle v. State*, 777 S.W.2d 709, 715-716 (Tex. Crim. App. 1989). The possession of a pistol was 24 hours before the murder, and had nothing to do with it. The possession of marijuana did not in any way facilitate defendant's escape, did not place the capital murder in its immediate context, and was not admissible as *res gestae* of the capital murder.

e. The trial court erred in not striking a reference in defendant's confession to "getting" a car, since car theft had nothing to do with the capital murder charged, except to provide transportation to and from the general vicinity of the crime. *Ramirez v. State*, 815 S.W.2d 636, 645 (Tex. Crim. App. 1991).

f. In *Bush v. State*, 628 S.W. 2d 441, 443 (Tex. Crim. App. 1982), appellant was tried for capital murder, the proof showing that appellant killed a police officer during commission of a burglary of a pharmacy. Proof of the burglary was admissible since it was so connected to the murder as to "constitute an indivisible criminal transaction." *Id.* The state also, however, put on evidence that appellant had used Preludin intravenously to get high. This evidence was inadmissible. It was not related in time or place to the capital murder. *Id.* at 443-44. Nor was this evidence relevant to prove motive. Such evidence was not offered to prove the motive for the offense charged -- capital murder -- but rather for another offense, burglary of the pharmacy. "We find that the extraneous offense of drug use is impermissibly offered to show a motive to commit an *additional* extraneous offense and that it is not material or relevant to the offense charged." *Id.* at 444. There is no relevancy in demonstrating the motive for an offense other than the one charged. *Id.*

4. Held Harmless

a. The erroneous admission of inadmissible extraneous evidence, of course, may be harmless under Rule 81(b)(2) of the Texas Rules of Appellate Procedure. *Lockhart v. State*, 847 S.W. 2d 568, 573 (Tex. Crim. App. 1992); *accord, Moreno v. State*, 858 S.W. 2d 453, 466 (Tex. Crim. App. 1993).

b. The trial court erred in admitting that portion of appellant's statement referring to his parole officer, since this was not relevant apart from its tendency to show that appellant was a criminal. *Etheridge v. State*, 903 S.W.2d 1, 11 (Tex. Crim. App. 1994)(harmless error, though).

5. Waiver

a. Appellant does not preserve this sort of error by objecting merely that the evidence is hearsay and irrelevant. "[T]he proper legal basis for appellant's trial objection 'should have been that the evidence was offered to prove an extraneous uncharged offense not within the permissible scope of 404(b) and was offered to show that appellant was a criminal generally.'" *Camacho v. State*, 864 S.W. 2d 524, 533 (Tex. Crim. App. 1993).

b. The court of criminal appeals reaffirmed the *DeGarmo* doctrine which holds that error occurring at the guilt/innocence phase of the trial (such as erroneous admission of extraneous offenses) is deemed to be waived if the defendant admits his guilt to the charged offense during the punishment phase of the trial. *McGlothlin v. State*, 896 S.W.2d 183, 189 (Tex. Crim. App. 1995).

6. Limiting Instruction

a. If the trial court admits an extraneous offense for a limited purpose, the defendant is entitled to an instruction to the jury so limiting the use of the offense. *See Crank v. State*, 761 S.W.2d 328, 347 (Tex. Crim. App. 1988).

b. This limiting instruction should be requested contemporaneously, at the time of the evidence is admitted, pursuant to Rule 105 of the Texas Rules of Criminal Evidence. *Rankin v. State*, ___ S.W.2d ___, ___ No. 0374-94 (Tex. Crim. App. April 10, 1996).

c. No limiting instruction is required where the extraneous offenses in question are "same transaction contextual evidence." *Camacho v. State*, 864 S.W. 2d 524, 535 (Tex. Crim. App. 1993).

7. Texas Code of Criminal Procedure Article 38.36

a. "In all prosecutions for murder, the state or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense." Tex. Crim. Proc. Ann. art. 38.36(a)(Vernon Supp. 1995).

b. Article 38.36(a)'s predecessor, § 19.06 of the Texas Penal Code, was held also to apply to capital murder trials. *Lamb v. State*, 680 S.W.2d 11, 17 (Tex. Crim. App. 1984).

8. Guilt/Innocence Versus Punishment

a. Remember that the foregoing discussion deals with the admission of extraneous offenses at the *guilt/innocence* phase. The law regulating admissibility of extraneous offenses at *punishment* is much different, and is discussed in § XXI.A of this paper.

J. Shackling and Guards

1. Shackling a defendant at the guilt-innocence phase is harmful because it infringes his presumption of innocence. It is justified only under exceptional circumstances. The fact that a person is charged with capital murder does not override his presumption of innocence. The trial court abuses its discretion in shackling a defendant merely based on general concerns, where there is no violence or threats of violence during the trial. *Long v. State*, 823 S.W.2d 259, 283 (Tex. Crim. App. 1991)(error harmless, though, where there is no evidence that the jury actually saw the shackles); *see Cooks v. State*, 844 S.W. 2d 697, 722-23 (Tex. Crim. App. 1992)(although shackling is seriously prejudicial and only called for in rare circumstances, it was harmless here, absent evidence the jury actually saw shackles).

2. Shackling is permitted where the record supports the court's decision. *See Jacobs v. State*, 787 S.W.2d 397, 407 (Tex. Crim. App. 1990); *Marquez v. State*, 725 S.W.2d 217, 227 (Tex. Crim. App. 1987); *Kelley v. State*, 841 S.W. 2d 917, 920 (Tex. App. -- Corpus Christi 1992, no pet.)(trial court did not abuse discretion in shackling appellant where appellant had earlier tried to hide the state's physical evidence).

3. The presence of armed guards is not inherently as prejudicial as is shackling. Accordingly, to prevail an appellant must show actual prejudice. Absent prejudice, there is no error. *Sterling v. State*, 830 S.W.2d 114, 117-118 (Tex. Crim. App. 1992).

4. Shackling at the punishment phase of a non-capital trial was held to be reversible error where there was no evidence of escape, threats of physical violence, resistance, repeated interruptions, or other such egregious conduct. "[J]udicial patience is part of the job and such extreme methods as binding and gagging should only be imposed after clear warnings to the defendant and as a last resort." *Shaw v. State*, 846 S.W. 2d 482, 487 (Tex. App. -- Houston [14th Dist.] 1993, pet. ref'd).

K. Jury Instructions At The Guilt/Innocence Phase

1. In General

a. In general, articles 36.14, 36.15 and 36.16 of the Texas Code of Criminal Procedure state the law applicable to jury instructions in criminal cases in Texas.

b. The most significant Texas case is *Almanza v. State*, 686 S.W. 2d 157 (Tex. Crim. App. 1984), a non-capital case, which states the standards of review for fundamental and ordi-

nary reversible error in jury charge situations:

If the error in the charge was the subject of a timely objection in the trial court, then reversal is required if the error is "calculated to injure the rights of defendant," which means no more than that there must be *some* harm to the accused from the error. In other words, an error which has been properly preserved by objection will call for reversal as long as the error is not harmless.

On the other hand, if no proper objection was made at trial and the accused must claim that the error was "fundamental," he will obtain a reversal only if the error is so egregious and created such harm that he "has not had a fair and impartial trial"--in short "egregious harm."

Id. at 171.

2. Lesser Included Offenses

a. Where evidence in a capital case supports a verdict of guilty of a lesser included noncapital offense, due process requires that the jury be instructed regarding that offense. *Beck v. Alabama*, 447 U.S. 625, 637 (1980); *see also Hopper v. Evans*, 456 U.S. 605, 609 (1982).

b. The Constitution requires that the jury be instructed on any and all lesser included offenses "if the jury could rationally acquit on the capital crime and convict for the noncapital crime." *Cordova v. Lynaugh*, 838 F. 2d 764, 767 (5th Cir.), *cert. denied*, 108 S.Ct. 2832 (1988).

c. Texas uses a two step analysis to determine whether a lesser included instruction is required: "First, the lesser included offense must be included within the proof necessary to establish the offense charged. Secondly, there must be some evidence in the record that if the defendant is guilty, he is guilty of only the lesser offense." *Royster v. State*, 622 S.W. 2d 442, 446 (Tex. Crim. App. 1981); *see* Tex. Code Crim. Proc. Ann. art. 37.09 (Vernon 1981).

d. It is not clear whether the federal standard stated in *Cordova* differs from *Royster's* "guilty only" test. *See Perillo v. State*, 758 S.W. 2d 567, 574 n.9 (Tex. Crim. App. 1988); *cf. Moreno v. State*, 858 S.W. 2d 453, 459 (Tex. Crim. App. 1993)(*Cordova* due process test discussed); *Miniel v. State*, 831 S.W.2d 310, 318 (Tex. Crim. App. 1992)(both tests discussed). Until this is clarified, defendants who want a lesser offense instruction should argue that *Cordova* establishes a more generous test.

e. The court has recently clarified the *Royster* test, pointing out that the "guilty only" test should be tied to the rational findings of a jury. *Rousseau v. State*, 855 S.W. 2d 666, 672-73 (Tex. Crim. App. 1993). That is, in applying the two-prong *Royster* test, "the trial court should make a determination as to whether the evidence of the lesser offense would be sufficient for a jury rationally to find that the defendant is guilty only of that offense, and not the greater offense." *Id.*

f. The trial court properly refuses to instruct on the lesser included offense of murder where there is "no evidence negating the underlying offense of robbery, and the evidence supporting the underlying offense is not so weak that the jury could interpret it in such a way as to give

it no probative value." *Wolfe v. State*, 917 S.W. 2d 270, 278 (Tex. Crim. App. 1996).

g. Various offenses have been found to be lesser included offenses of capital murder:

(I) Felony-murder. *Ross v. State*, 861 S.W. 2d 870, 876 (Tex. Crim. App. 1993); *Adanandus v. State*, 866 S.W. 2d 210, 230 (Tex. Crim. App. 1993); *Rousseau v. State*, 855 S.W. 2d 666, 673 (Tex. Crim. App. 1993); *Allridge v. State*, 762 S.W. 2d 146, 154 (Tex. Crim. App. 1988); *Santana v. State*, 714 S.W. 2d 1, 9 (Tex. Crim. App. 1986); *but see Hernandez v. State*, 819 S.W.2d 806, 814 (Tex. Crim. App. 1991)(felony murder under § 19.02(a)(3) is not a lesser of capital murder under § 19.03(a)(5)).

(ii) Aggravated assault. *Dowden v. State*, 758 S.W. 2d 264, 269 (Tex. Crim. App. 1988); *Weaver v. State*, 855 S.W. 2d 116, 121 (Tex. App. -- Houston [14th Dist.] 1993, no pet.).

(iii) Involuntary manslaughter. *Adanandus v. State*, 866 S.W. 2d 210, 232 n.21 (Tex. Crim. App. 1993); *Montoya v. State*, 744 S.W. 2d 15, 28 (Tex. Crim. App. 1987).

(iv) Murder. *Thomas v. State*, 701 S.W. 2d 653, 656 (Tex. Crim. App. 1985); Tex. Penal Code Ann. § 19.03(c)(Vernon Supp. 1995).

(v) Voluntary manslaughter. *Havard v. State*, 800 S.W.2d 195, 216 (Tex. Crim. App. 1989). *Lamb v. State*, 680 S.W. 2d 11, 16 (Tex. Crim. App. 1984).

(vi) Criminally negligent homicide. *Hicks v. State*, 664 S.W. 2d 329, 330 (Tex. Crim. App. 1984).

h. Although voluntary manslaughter can be a lesser included offense of capital murder, the court does not believe that sudden passion arises from an adequate cause "when a defendant is in the course of committing one of the underlying offenses delineated in V.T.C.A. Penal Code, Sec. 19.03(a)(2)." *Hernandez v. State*, 726 S.W. 2d 53, 59 n.8 (Tex. Crim. App. 1986); *Penry v. State*, 691 S.W. 2d 636, 642 n.2 (Tex. Crim. App. 1985).

I. "When a defendant begins a violent criminal episode his or her subsequent acts of violence cannot constitute an 'adequate cause' so as to warrant an instruction on voluntary manslaughter." *Vuong v. State*, 830 S.W. 2d 929, 939 (Tex. Crim. App. 1992); *accord*, *Penry v. State*, 903 S.W. 2d 715, 756 (Tex. Crim. App. 1995); *Adanandus v. State*, 866 S.W. 2d 210, 231 (Tex. Crim. App. 1993); *see Harris v. State*, 784 S.W.2d 5, 10 (Tex. Crim. App. 1989)(court "will not consider the deceased's justified actions as an adequate cause for appellant's illegal acts"); *Lincecum v. State*, 736 S.W. 673, 679 (Tex. Crim. App. 1987)(defendant may not claim that victim's acts in self defense gave rise to adequate cause for killing her, even if he was acting under sudden passion).

j. In an ordinary murder case, where voluntary manslaughter is raised and submitted to the jury, sudden passion should be negated in the murder application paragraph of the charge. *Cobarrubio v. State*, 675 S.W. 2d 749, 751-52 (Tex. Crim. App. 1983). There would seem to be no reason the same rule should not apply in a capital case where the issue was raised, which would require the negation of sudden passion in the capital murder application paragraph. *See Lincecum v. State*, 736 S.W. 2d 673, 682 (Tex. Crim. App. 1987); *Lamb v. State*, 680 S.W. 2d 11, 16 (Tex. Crim. App. 1984). Recently, however, the court held that, where the burden is properly placed in the murder application paragraph, there is no need to restate the *Cobarrubio* instruction in the capital application paragraph. *Sattiewhite v. State*, 786 S.W.2d 271, 289 (Tex. Crim. App. 1989); *but see Harris v. State*, 784 S.W.2d 5, 9 (Tex. Crim. App. 1989) (no need to decide *Cobarrubio* issue since evidence did not raise voluntary manslaughter). In *Boyd v. State*, 811 S.W.2d 105, 114 (Tex. Crim. App. 1991), the court refused to decide whether *Cobarrubio* need be extended to capital murder since there was no evidence raising capital murder. In *Narvaiz v. State*, 840 S.W. 2d 415 (Tex. Crim. App. 1992), the court rejected appellant's argument that trial counsel were ineffective for not requesting a *Cobarrubio* instruction, because there was no reasonable probability that the jury would have found appellant not guilty of capital murder even if a *Cobarrubio* charge had been given. *Id.* at 434.

k. Sudden passion need not only arise from the deceased, but can also derive from someone acting with the deceased. Testimony that appellant was emotionally hurt and mad, and in fear of his life at which time he was fired upon by another, indicated that appellant was acting under the immediate influence of a sudden passion arising from an adequate cause. The trial court therefore erred in refusing to instruct on voluntary manslaughter. *Havard v. State*, 800 S.W.2d 195, 215-217 (Tex. Crim. App. 1989).

l. In *Ross v. State*, 861 S.W. 2d 870, 877 (Tex. Crim. App. 1993), the trial court erred in not instructing the jury on the lesser included offense of felony murder where the evidence clearly raised the issue that appellant may have been guilty only of murder by committing an act clearly dangerous to human life and causing the death of the deceased.

3. Self Defense

a. The trial court errs in not instructing the jury on self-defense when it is raised by the evidence. *See Horne v. State*, 607 S.W. 2d 556, 557 (Tex. Crim. App. 1980).

b. Must the state negate the issue of self-defense in the application paragraph of the court's charge? The court side-stepped this question in *Lockhart v. State*, 847 S.W. 2d 568, 574-75 (Tex. Crim. App. 1992), holding that, in any event, such error would be harmless since self-defense was not raised there.

4. Culpable Mental States

a. Some Texas penal statutes specify and are directed to the "nature of conduct," and others specify and are directed to the "result of conduct." *See Alvarado v. State*, 704 S.W. 2d 36, 39 (Tex. Crim. App. 1985).

I. There is a line of cases which says that capital murder is a "result of conduct" crime. *See Martinez v. State*, 763 S.W. 2d 413, 419 (Tex. Crim. App. 1988); *Morrow v. State*, 753 S.W. 2d 372, 375-76 n.3 (Tex. Crim. App. 1988). Defendants should request that the jury be instructed only as to "result of conduct." Failure to so limit the instruction could result in reversible error. *Cf. Alvarado v. State*, 704 S.W. 2d at 39. *See also Cook v. State*, 884 S.W. 2d 485, 490 (Tex. Crim. App. 1994)(intentional murder is a result of conduct offense, and the trial court errs in not so limiting the culpable mental states).

ii. On the other hand, there is a case which says that capital murder is *both* a result of conduct *and* as nature of conduct crime, and that therefore intentional should be defined in terms of both. *Hernandez v. State*, 819 S.W.2d 806, 811-812 (Tex. Crim. App. 1991).

iii. In *Hughes v. State*, 897 S.W. 2d 285 (Tex. Crim. App. 1994), the trial court defined the culpable mental states in terms of all three conduct elements -- result of conduct, nature of circumstances and nature of conduct. This was error, because the offense there, capital murder in the course of killing a peace officer, only involved two conduct elements -- result of conduct and nature of circumstances. The error was harmless, though, because the application paragraph pointed the jury to the appropriate portions of the definitions. *Id.* at 294-96.

iv. Capital murder during the course of burglary involves all three of the conduct elements. Murder and entering the habitation are result of conduct elements. "[W]ithout the effective consent" is a circumstance surrounding the conduct element. Unlawful appropriation refers to the nature of the conduct. "Because this offense contained all three of the conduct elements, the trial court did not err in defining the culpable mental states to nature, result, and circumstances surrounding conduct." *Patrick v. State*, 906 S.W. 2d 481, 492 (Tex. Crim. App. 1995). "The trial court's error, instead, was in not limiting the additional language concerning the culpable mental state to proving the 'conduct element' of the underlying offense." *Id.* Appellant did not object at trial, though, and he was unable to prove egregious harm, in light of the application paragraph of the charge. *Id.* For an example of how the trial court might properly limit definitions, *see Hughes v. State*, 897 S.W.2d 285, 296 n.16 (Tex. Crim. App. 1994).

b. In *Abbott v. State*, 751 S.W. 2d 305 (Tex. App.--San Antonio 1988, no pet.), the defendant had been convicted of capital murder, that is, murder in the course of robbery, pursuant to § 19.03(a)(2) of the penal code. The jury was instructed it could find defendant guilty if it believed she intentionally *or knowingly* caused the death of another in the course of a robbery. *Id.* at 306-308. Defendant properly objected to this instruction by requesting an instruction that the jury must find that she had acted *intentionally*, and not knowingly. *Id.* at 306. The court reversed the conviction. "The necessary *mens rea* for § 19.03(a)(2) capital murder is 'intentionally.'" A portion of the charge incorrectly stated the *mens rea* as intentionally *or knowingly*. "The jury was incorrectly allowed to find appellant guilty of capital murder based upon a culpable mental state less than that required by statute." *Id.* at 309.

c. Contrast the charge in *Abbott* with that in *Richardson v. State*, 744 S.W. 2d 65 (Tex. Crim. App. 1987), which stated, in pertinent part:

Now if you find from the evidence beyond a reasonable doubt that . . . Miguel A. Richardson, did intentionally *or knowingly* cause the death of John G. Ebbert, by shooting the said John G. Ebbert with a gun, and the said Miguel A. Richardson, did then and there *intentionally* cause the death of the said John G. Ebbert while in the course of committing or attempting to commit robbery . . . you will find the defendant guilty of capital murder.

Id. at 83(emphasis supplied). This submission was authorized because it literally tracks § 19.03(a)(2). *Id.*

d. The necessary *mens rea* for murder of a peace officer under § 19.03(a)(1) is intentionally *or* knowingly. Where the indictment alleges culpable mental states conjunctively, *i.e.*, intentionally *and* knowingly, the court does not err in submitting the mental states disjunctively, *i.e.*, intentionally *or* knowingly. *Rogers v. State*, 774 S.W. 2d 247, 251 (Tex. Crim. App. 1989).

L. Submission of Alternative Theories

1. It is permissible to submit alternative theories of committing capital murder--murder in the course of robbery and murder in the course of sexual assault--in a single application paragraph. *Kitchens v. State*, 823 S.W.2d 256, 258 (Tex. Crim. App. 1991); *see generally Schad v. Arizona*, 111 S.Ct. 2491 (1991).

2. The indictment in *Cook v. State*, 741 S.W.2d 928 (Tex. Crim. App. 1987), alleged one incident of capital murder in six different counts, charging murder in the course of aggravated rape, aggravated sexual abuse, burglary of a habitation with intent to commit aggravated rape, burglary of a habitation with intent to commit aggravated sexual abuse, burglary of a habitation with intent to commit theft, and burglary of habitation with intent to commit aggravated assault. The trial court properly overruled defendant's pretrial motion to require the state to elect, since it is permissible for the state to allege one transaction of capital murder in multiple counts of a single indictment, to meet possible variations in proof. *See Hathorn v. State*, 848 S.W. 2d 101, 113 (Tex. Crim. App. 1992); *Franklin v. State*, 606 S.W.2d 818, 821 (Tex. Crim. App. 1979); *Jurek v. State*, 522 S.W.2d 934, 941 (Tex. Crim. App. 1975), *aff'd*, 428 U.S. 262 (1976). In *Cook*, five of the six original counts were submitted to the jury, which returned a general verdict. To be sufficient, the evidence need only

support a finding of guilt under at least one of the counts. *Cook v. State*, 741 S.W.2d at 935. The trial court does not err in permitting the jury to return a general verdict, without designating under which count guilt was found. *Franklin v. State*, 606 S.W.2d at 822. The state may also join in a single paragraph allegations of murder in the course of burglary, and murder in the course of robbery. *Jernigan v. State*, 661 S.W.2d 936, 942 (Tex. Crim. App. 1983).

3. Where appellant is indicted for murder during the course of robbery and aggravated sexual assault, it is not fundamentally erroneous to authorize a conviction for murder in the course of *attempting* to commit robbery or aggravated sexual assault, because attempt is included in the allegation of actual commission. *Kitchens v. State*, 823 S.W.2d 256, 258-59 (Tex. Crim. App. 1991).

M. The Merger Doctrine (Bootstrapping)

1. In *Fearance v. State*, 771 S.W. 2d 486 (Tex. Crim. App. 1988), the two paragraph indictment alleged that the defendant committed murder in the course of committing burglary with intent to commit theft, and in the course of committing burglary with intent to commit murder. *Id.* at 492 n.1. On appeal, the defendant contended that the trial court had erred in not quashing the second paragraph of the indictment because it violated the merger doctrine. Specifically, the defendant contended that the state was relying in this paragraph twice on the murder of the victim, first to create a burglary, and then to elevate murder to capital murder. The court of criminal appeals disagreed. First, the merger doctrine of the felony murder statute does not apply to capital murder prosecutions. Second, the first paragraph alleged a pure property offense--burglary with intent to commit theft--and there was proof to support this theory. Third, the Texas capital statute properly narrows the class of death eligible murderers. *Id.* at 492-93; *see also Boyd v. State*, 811 S.W.2d 105, 114 (Tex. Crim. App. 1991).

2. In *Barnard v. State*, 730 S.W. 2d 703 (Tex. Crim. App. 1987), the defendant contended that his indictment for capital murder in the course of robbery was defective because it used a shooting to convert a theft into a robbery, and then used the same shooting coupled with the robbery to elevate the offense to capital murder. The court disagreed. The fact that robbery and murder have a shared element is irrelevant in light of the purpose of the capital murder statute to authorize the death penalty for murder/robbery with a pecuniary motive. *Id.* at 708-709.

3. *Barber v. State*, 737 S.W. 2d 824 (Tex. Crim. App. 1987), was a murder/burglary case. The trial court instructed the jury that burglary was entry into a habitation with intent to commit theft or a felony. On appeal, the defendant argued that, by defining burglary in its broadest possible terms, the court authorized the jury to use the murder to prove the burglary of a habitation and then reuse the same murder as the basis for a guilty verdict for the offense of capital murder. *Id.* at 834-35. Since there was no objection to the charge at trial, the court reviewed the record for egregious harm under *Almanza v. State*, and found none, apparently since the state did not rely on this theory at trial. *Id.* at 836-37.

4. A prosecution for capital murder is not barred by the fact that the state relies on a single act to prove both murder and the aggravating element of the underlying rape. *Muniz v. State*, 851 S.W. 2d 238, 245 (Tex. Crim. App. 1993).

XVI. THE PUNISHMENT PHASE OF A CAPITAL MURDER TRIAL: TEXAS' RESPONSE TO FURMAN V. GEORGIA**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' 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' effort was article 1257 of the Texas Penal Code, which later became Tex. Penal Code Ann. § 19.03 (Vernon Supp. 1995) and Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1995).

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.

3. The Texas scheme, on the other hand, is unlike the Model Penal Code, and is unlike that in any other state, except Oregon, which adopted a punishment statute similar to article 37.071. *See Or. Rev. Stat. § 163.150 (1985)*.

4. The Texas scheme has been 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 twice caused the United States Supreme Court to render decisions which virtually cleared Texas death row of inmates. *See Estelle v. Smith*, 451 U.S. 454 (1981); *Adams v. Texas*, 448 U.S. 38 (1980). Recently, the Court rendered an opinion which has as much potential for "jail-clearing" as *Smith* and *Adams*. *See Penry v. Lynaugh*, 109 S.Ct. 2934 (1989), which is discussed in detail in § XXI of this paper. In response to these not so subtle hints, the Texas legislature modified our statute to try and make it comply with the Constitution. The new statute, article 37.071 of the Texas Code of Criminal Procedure, applies only to offenses committed after September 1, 1991.

XVII. ARTICLE 37.071 (FOR OFFENSES COMMITTED ON OR AFTER SEPTEMBER 1, 1991)**A. The New Statute**

Article 37.071 has been drastically amended for offenses committed on or after September 1, 1991. At the present time, only a few cases have construed the new statute.

B. The First Special Issue

1. Under the new statute, the 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. 1995).

2. 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.*

C. The Second Special Issue

1. 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. 1995).

2. 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).

D. Mitigating Circumstances

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)(Vernon Supp. 1995).

2. 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. 1995).

3. A frequent challenge leveled at the new statute is that it does not assign a burden of proof regarding mitigating evidence. The court has rejected this challenge. *E.g., McFarland v. State*, ___ S.W. 2d ___, ___ No. 71,557 (Tex. Crim. App. February 21, 1996), slip op. 50;

4. The statute *does*, however, explicitly place the burden on the prosecution to prove aggravating factors. *McFarland v. State*, ___ S.W. 2d ___, ___ No. 71,557 (Tex. Crim. App. February 21, 1996), slip op. 50.

5. There is no need to define the word "mitigates" 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*, ___ S.W. 2d ___, ___ No. 71,818 (Tex. Crim. App. May 22, 1996), slip op. 11. Of course, following the law is set out by the Texas Legislature is exactly what caused the entire *Penry* fiasco.

6. "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*, ___ S.W. 2d ___, ___ No. 71,557 (Tex. Crim. App. February 21, 1996), slip op. 9. 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." *Id.* at slip op. 9 n. 9. Appellant did not make this argument in this case.

7. In *McFarland v. State*, ___ S.W. 2d ___ No. 71,557 (Tex. Crim. App. February 21, 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 slip op. 49.

8. 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.

9. 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.*

10. 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).

11. 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.

12. Article 37.071 § 2(e) 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).

E. 10-2

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.

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*, ___ S.W. 2d ___, ___ No. 71,557 (Tex. Crim. App. February 21, 1996), slip op. 51-52. 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.* at 52. "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.*

F. Anti-Parties Charge

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*, ___ S.W. 2d ___, ___ No. 71,557 (Tex. Crim. App. February 21, 1996), slip op. 46-47(citations omitted).

G. Miscellaneous

1. 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).

2. 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.*

3. Assuming that a *Geesa* instruction is required at the punishment phase, it is only necessary that the charge given substantially comply with the dictates of that case. *Sonnier v. State*, 913 S.W. 2d 511, 522 (Tex. Crim. App. 1995).

XVIII. THE FIRST SPECIAL ISSUE (Pre-September 1, 1991)

A. Article 37.071(b)(1)

The first special issue is submitted in all capital cases, and it asks: 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.

B. Tremendous "Confusion And Dissension"

1. Everyone convicted of capital murder has necessarily been found guilty of intentionally or knowingly causing a death. Tex. Penal Code Ann. § 19.03(a)(Vernon Supp. 1995). Some wonder what purpose is served by the first special issue, given that the jury has already found that the defendant acted intentionally or knowingly.

2. In *Blansett v. State*, 556 S.W.2d 322 (Tex. Crim. App. 1977), the court recognized the obvious: "a jury having found that defendant intentionally committed a capital murder to be consistent *would have to find* that the act was deliberately done." *Id.* at 327 n.6 (emphasis supplied). See also Searcy & Patterson, *Practice Commentary on the Law of Capital Murder*, Tex. Penal Code Ann. § 19.03 (Vernon Supp. 1995)("An intentional or knowing killing of course is 'deliberate'"). For some time, even the court of criminal appeals itself seemed to believe that deliberate and intentional were synonymous. See *Ex parte Davis*, 866 S.W. 2d 234, 241 n.4 (Tex. Crim. App. 1993).

3. Since *Blansett*, however, the court has retreated from this position that an affirmative answer to the first issue necessarily follows from a finding that the defendant acted intentionally or knowingly. In *Heckert v. State*, 612 S.W.2d 549, 552 (Tex. Crim. App. 1981), the court declared that "deliberately" and "intentionally" are not linguistic equivalents. And, by now we know that the court has "repeatedly and resoundingly" rejected defendants' claims that "intentional" is synonymous with "deliberate". *Marquez v. State*, 725 S.W.2d 217, 244 (Tex. Crim. App. 1987); *DeLuna v. State*, 711 S.W. 2d 44, 47 (Tex. Crim. App. 1986)("issue appears to be well settled").

4. Nevertheless, special issue number one continues to be problematic. In 1982, the court noted the "tremendous amount of confusion and dissension among the bench and bar over the meaning and import of the word 'deliberately.'" *King v. State*, 631 S.W.2d 486, 502 (Tex. Crim. App. 1982).

5. Attorneys continue to demonstrate that there is no principled distinction between the two words. In *Gardner v. State*, 730 S.W.2d 675 (Tex. Crim. App. 1987), the court devotes seven pages to the examination of venireperson Kirklin. *Id.* at 684-690. The court recognized that the illustrative hypothetical posed by the state to demonstrate that intentional and deliberate are not synonymous "utterly fails to illustrate the intended point." *Id.* at 687; *see also* *Martinez v. State*, 763 S.W. 2d 413, 419-20 (Tex. Crim. App. 1988)(faulty hypothetical does not illustrate intentional or deliberate killing); *Morrow v. State*, 753 S.W.2d 372, 376 (Tex. Crim. App. 1988)(reversed where hypotheticals incorrectly illustrated the difference between intentional and deliberate); *Lane v. State*, 743 S.W.2d 617, 627 (Tex. Crim. App. 1987)("blatant misstatement of the law of capital murder . . . created a false distinction between the two terms"); *McCoy v. State*, 713 S.W.2d 940, 951 n.1 (Tex. Crim. App. 1986)(court does "not endorse" examples used to illustrate the difference between intentional and deliberate).

6. Justice Blackmun has grasped the meaningless of this special issue:

It appears that every person convicted of capital murder in Texas will satisfy the other requirement relevant to Barefoot's sentence, that "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 a capital murder conviction requires a finding that the defendant intentionally or knowingly cause[d] the death of an individual.

Barefoot v. Estelle, 463 U.S. 880, 917 n.1 (1983)(Blackmun, J., dissenting); *see also* *Streetman v. Lynaugh*, 108 S. Ct. 588, 588 (1988)(Brennan, J., joined by Marshall, J., dissenting to denial of application for stay of execution)("an affirmative answer to this questions is generally a foregone conclusion because intent is usually an element of the underlying crime of capital murder").

7. "This case is instructive in that it shows the difficulty jurors have in understanding the differences between 'deliberate' and 'intentional.'" *Sattiewhite v. State*, 786 S.W.2d 271, 281 (Tex. Crim. App. 1989). Is there anyone left who needs instruction on something so obvious?

8. A juror who would equate deliberately and intentionally would render the first special issue a nullity. "To allow such a juror who is obviously not guided by the special issues in determining punishment would undermine the constitutionality of our sentencing scheme." *Ex parte McKay*, 819 S.W.2d 478, 485 (Tex. Crim. App. 1990).

C. Confusion And Dissension Notwithstanding, The Court Will Not Compel A Jury Instruction Defining "Deliberately"

1. Given that attorneys and judges can reach no consensus about the distinction, it would at least seem that "deliberately" should be defined for the jury. A majority of the court has been unwilling to require this. The rationale for this rule is stated in the majority's opinion in *Russell v. State*, 665 S.W. 2d 771 (Tex. Crim. App. 1983):

It is not error, in a prosecution for violating a statute, to refuse to define a word used in the statute, when such word is used in its ordinary sense, and it is easily comprehended

by everyone.

Where there is no statutory definition of a term, the question of trial court's obligation to define the term depends on whether the term has such a common and ordinary meaning that jurors can be fairly presumed to know and apply such meaning.

Where terms used are words simple in themselves and are used in their ordinary meaning, jurors are supposed to know such common meaning and terms, and under such circumstances such common words are not necessarily to be defined in the charge to the jury.

Id. at 780(citations omitted). Obviously the court believes that "deliberately" is a word "used in its ordinary sense" and "easily comprehended by everyone" and "has such a common and ordinary meaning that jurors can be fairly presumed to know and apply such a meaning." See e.g., *Williams v. State*, 674 S.W. 2d 315, 321-22 (Tex. Crim. App. 1984); *East v. State*, 702 S.W. 2d 606, 615 (Tex. Crim. App. 1985); *King v. State*, 553 S.W. 2d 105, 107 (Tex. Crim. App. 1977).

2. How does this position square with the statement in *Sattiewhite v. State*, 786 S.W.2d 271, 281 (Tex. Crim. App. 1989), where the court recognized "the difficulty jurors have in understanding the differences between 'deliberate' and 'intentional?'"

3. Although the majority of the court of criminal appeals refuses to require a definition, it has noted "how beneficial it would be to this Court in resolving voir dire points of error for the Legislature to accept its responsibility and define the term 'deliberately'" *Lane v. State*, 743 S.W. 2d 617, 628 n. 7 (Tex. Crim. App. 1987). "Once again we note the need for a statutory definition and exemplify the clarification to be afforded by legislative action in this area." *Nichols v. State*, 754 S.W. 2d 185, 201 n.17 (Tex. Crim. App. 1988); see *Williams v. State*, 674 S.W. 2d 315, 320 (Tex. Crim. App. 1984)(court agrees that distinction between deliberate and intentional would have been "helpful" to the jury). Is there a glaring inconsistency between cases like *Russell*, which hold that no judicial definition is necessary because "deliberately" has a common meaning, easily understood by all jurors, and *Lane* and *Nichols* and *Williams*, which hold that a legislative definition of deliberately is "need[ed]," "helpful" and would be "beneficial?"

4. There have been several well-reasoned minority opinions urging that a definition be given. Dissenting in *Russell*, Judge Clinton recognized that the word "deliberately," though simple of and by itself, has taken on a technical meaning in the context of capital murder procedure. *Russell v. State*, 665 S.W. 2d at 782-84(Clinton, J., dissenting). Specifically, deliberately is not the linguistic equivalent of intentionally:

It has come to this Court's attention from numerous and diverse sources that the term "deliberately" as employed in the first special punishment issue in our statutory capital murder scheme has created a great deal of confusion, calling into question the reliability of jury findings made thereon. * * *

It is now unreasonable to assume that jurors will be able to determine the issue reliably without further assistance when legal scholars and members of the bench and bar have debated the subject continuously for more than seven years. The meaning of the word

"deliberately" is now settled; thus, assistance to the jury is available. Accordingly, we should now employ that power reserved to us by the Supreme Court in *Jurek*, supra, and hold that upon timely request by a capital murder defendant or the State, that party is entitled to have the jury instructed at the punishment phase

Id., 665 S.W. 2d at 787(Clinton, J., dissenting); see also *James v. State*, 772 S.W. 2d 84, 103 (Tex. Crim. App. 1989)(Clinton, J., dissenting); *Penry v. State*, 691 S.W. 2d 636, 657 (Tex. Crim. App. 1985)(Clinton, J., concurring); *Morin v. State*, 682 S.W.2d 265, 270 (Tex. Crim. App. 1984)(Clinton, J., dissenting); *Esquivel v. State*, 595 S.W. 2d 516, 529-30 (Tex. Crim. App. 1980)(Clinton, J., dissenting).

5. In *Williams v. State*, 674 S.W.2d 315, 322 n.6 (Tex. Crim. App. 1984), a statistical fact was stated: "four judges, W.C. Davis, Clinton, Teague and Miller do agree that upon timely request" a capital defendant is entitled to have deliberately defined. Later, Judge Duncan wrote:

[I]t is my opinion that the absence of a definition of "deliberately" during the punishment phase of a capital murder trial does nothing to further the administration of justice in that it invariably causes confusion among the judges, lawyers and jurors. Therefore, in the future (trials that commence after the date of this opinion) I would suggest that upon request by either the State or the defendant that trial judges give the jury an appropriate definition of "deliberately" that they are to use in answering the first special issue under Art. 37.071(b)(1).

Lane v. State, 743 S.W.2d 617, 631 (Tex. Crim. App. 1987)(Duncan, J., concurring).

6. Judge Duncan's concurrence in *Lane* seemed to be a clear warning to the courts and the state that "deliberately" be defined in the future. Subsequent cases have failed to enforce this warning, however. Currently, the court perfunctorily dismisses efforts to require a definition. *E.g.*, *Rachal v. State*, 917 S.W. 2d 799, 818 (Tex. Crim. App. 1996); *Lewis v. State*, 911 S.W. 2d 1, 6 (Tex. Crim. App. 1995); *Patrick v. State*, 906 S.W. 2d 481, 494 (Tex. Crim. App. 1995); *Banda v. State*, 890 S.W. 2d 42, 64 (Tex. Crim. App. 1994); *Chambers v. State*, 866 S.W. 2d 9, 27 (Tex. Crim. App. 1993); *Adanandus v. State*, 866 S.W. 2d 210, 227 (Tex. Crim. App. 1993); *Ex parte Kunkle*, 852 S.W. 2d 499, 507 (Tex. Crim. App. 1993); *Muniz v. State*, 851 S.W. 2d 238, 255 (Tex. Crim. App. 1993); *Johnson v. State*, 853 S.W. 2d 527, 537 (Tex. Crim. App. 1992); *Cooks v. State*, 844 S.W. 2d 697, 738 (Tex. Crim. App. 1992); *Harris v. State*, 827 S.W.2d 949, 962 (Tex. Crim. App. 1992).

7. Recently the court of criminal appeals has required the trial courts to define "proof beyond a reasonable doubt," even though the legislature has never required a definition. *Geesa v. State*, 820 S.W.2d 154 (Tex. Crim. App. 1991). Logically, if the courts can compel this definition without legislative mandate, they can compel a definition of deliberately. *But see Chambers v. State*, 903 S.W. 2d 21, 35 (Tex. Crim. App. 1995).

8. Regardless of whether there are, or will ever be, a majority of judges who would require a definition, it is suggested that defense lawyers request, and trial judges give, at the very least, an instruction similar to the following at the penalty phase of a capital murder trial:

a) as employed in the first special issue, the word "deliberately" has a meaning differ-

ent and distinct from the word "intentionally," as that word was previously defined in the charge on guilt, and

b) instead, as employed in the first special issue, the word "deliberately" means a manner of doing an act characterized by or resulting from careful and thorough consideration; characterized by awareness of the consequences; willful, slow, unhurried, and steady as though allowing time for a decision.

See Russell v. State, 665 S.W.2d 771, 787 (Tex. Crim. App. 1983)(Clinton, J. dissenting); *but see Zimmerman v. State*, 860 S.W. 2d 89, 101 (Tex. Crim. App. 1993), *vacated on other grounds*, 114 S.Ct. 374 (1993).

9. Although deliberately need not be defined, it is not error to define it thusly: "As used in the first special issue, the word 'deliberately' has a meaning different and distinct from the word 'intentionally' as that word was previously defined in the charge on guilt. The word 'deliberately' as used in the first special issue means a manner of doing an act characterized by or resulting from careful consideration: 'A conscious decision involving a thought process which embraces more than mere will to engage in the conduct.'" *Martinez v. State*, 867 S.W. 2d 30, 37 (Tex. Crim. App. 1993); *see Lewis v. State*, 911 S.W. 2d 1, 6 (Tex. Crim. App. 1995)(deliberately "in accordance with common usage, means something more than intentional and something less than premeditation. It contemplates a conscious decision involving a thought process which embraces more than mere will to engage in the conduct"); *see also Rodriguez v. State*, 899 S.W. 2d 658, 664 (Tex. Crim. App. 1995); *Bigby v. State*, 892 S.W. 2d 864, 890 (Tex. Crim. App. 1994).

10. In *Richardson v. State*, 879 S.W. 2d 874 (Tex. Crim. App. 1993), the jury was authorized to affirmatively answer the first special issue if it believed "that the defendant's participation was major and his mental state was one of reckless indifference to the value of human life." *Id.* at 882. This seems to squarely conflict with the myriad of cases which hold that deliberateness is more than intentional. The court was able to avoid the merits of the question, holding that even if the instruction was erroneous, the error was harmless, since "[n]o evidence was presented from which the jury could have concluded rationally that appellant's conduct was anything less than intentional, premeditated, and deliberate." *Id.*

11. The defendant in *Montoya v. State*, 744 S.W. 2d 15 (Tex. Crim. App. 1987), used a slightly different approach, arguing that "deliberately" has acquired a particular meaning in the capital murder context, and that therefore, § 311.011(b) of the Code Construction Act requires that it be defined to the jury with the particular meaning. This ground was rejected because the defendant did not make this objection in the trial court, thereby failing to preserve error on appeal. *Id.* at 19; *but see Farris v. State*, 819 S.W.2d 490, 505 (Tex. Crim. App. 1990)(rejecting this position on appeal).

D. The Many Judicial Meanings Of Deliberately

1. Although the court refuses to tell the jury what "deliberately" means, it has frequently defined the term for the bench and bar. The following comments have been made:

a. "For purposes of evidentiary review, we believe that the common understanding of the term 'deliberately' in a capital murder context is 'something more than intentional,

. . . [but] less than premeditation, . . . [representing] a conscious decision--greater than mere will--to cause the death of the victim." *Farris v. State*, 819 S.W.2d 490, 497 (Tex. Crim. App. 1990); *accord*, *Hernandez v. State*, 819 S.W.2d 806, 810 (Tex. Crim. App. 1991).

b. The defendant's conduct alone must constitute "a conscious decision--greater than mere will--to cause the death of the victim." *Nichols v. State*, 754 S.W. 2d 185, 201 (Tex. Crim. App. 1988); *Tucker v. State*, 771 S.W. 2d 523, 529 (Tex. Crim. App. 1988).

c. "The State was not bound to prove that the defendant carefully weighed or considered or carefully studied the situation immediately prior to killing the deceased . . ." *Carter v. State*, 717 S.W. 2d 60, 67 (Tex. Crim. App. 1986); *Smith v. State*, 676 S.W. 2d 379, 393 (Tex. Crim. App. 1984).

d. "To find the act of deliberateness, there must be the moment of deliberation and the determination on the part of the actor to kill." *Cannon v. State*, 691 S.W. 2d 664, 677 (Tex. Crim. App. 1985); *accord*, *Johnson v. State*, 853 S.W. 2d 527, 532 (Tex. Crim. App. 1992); *Kinnamon v. State*, 791 S.W.2d 84, 95-96 (Tex. Crim. App. 1990; *Rector v. State*, 738 S.W. 2d 235, 242 (Tex. Crim. App. 1986).

e. Deliberately "is the thought process which embraces more than a will to engage in conduct and activates the intentional conduct." *Fearance v. State*, 620 S.W. 2d 577, 584 (Tex. Crim. App. 1981).

f. Deliberately is not the linguistic equivalent of intentionally or knowingly. *Heckert v. State*, 612 S.W. 2d 549, 552 (Tex. Crim. App. 1981).

g. Proof of deliberation and expectation "is a matter of psychologic fact [which] arise from internal psychological processes . . ." *Franklin v. State*, 606 S.W. 2d 818, 823 (Tex. Crim. App. 1979).

h. Proof of deliberation does not require proof of premeditation. *Granviel v. State*, 552 S.W. 2d 107, 123 (Tex. Crim. App. 1976).

I. A finding of deliberate conduct need not be predicated upon repetitious harmful acts. *Livingston v. State*, 739 S.W. 2d 311, 339 (Tex. Crim. App. 1987).

j. The first special issue "must always be proven circumstantially." *Rector v. State*, 738 S.W. 2d 235, 242 (Tex. Crim. App. 1986).

k. Retardation does not in and of itself preclude the jury from finding that the defendant acted deliberately. *E.g.*, *Williams v. State*, 773 S.W. 2d 525, 538 (Tex. Crim. App. 1988); *Goodman v. State*, 701 S.W. 2d 850, 865-67 (Tex. Crim. App. 1985); *see also Penry v. State*, 691 S.W. 2d 636, 652 (Tex. Crim. App. 1985).

1. To prove that appellant acted deliberately, "the State was obligated to prove that appellant's conduct arose from a conscious decision, after at least brief consideration, to cause . . . death." *Narvaiz v. State*, 840 S.W. 2d 415, 424 (Tex. Crim. App. 1992).

E. A Definition Is Necessary To Insure Consideration Of Mitigating Circumstances

1. Various constitutional challenges have been made against the first special issue, the most compelling of which is that it fails to permit the consideration of mitigating circumstances, since deliberately and intentionally mean the same thing. Not surprisingly, the majority of the Texas court has rejected such a challenge, based on its belief that the two words are not linguistic equivalents. *See Motley v. State*, 773 S.W. 2d 283, 286-87 (Tex. Crim. App. 1989); *Stewart v. State*, 686 S.W. 2d 118, 121-22 (Tex. Crim. App. 1984); *Williams v. State*, 674 S.W. 2d 315, 321-22 (Tex. Crim. App. 1984); *but see Esquivel v. State*, 595 S.W. 2d 516 (Tex. Crim. App. 1980)(Clinton, J., dissenting).

2. In *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Court credited the defendant's argument that the jury was precluded from considering mitigating evidence by the trial court's failure to define "deliberately." "In the absence of jury instructions defining 'deliberately' in a way that would clearly direct the jury to consider fully Penry's mitigating evidence as it bears on his personal culpability, we cannot be sure that the jury was able to give effect to the mitigating evidence of Penry's mental retardation and history of abuse in answering the first special issue." *Id.* at 2949.

3. In *Boyd v. State*, 811 S.W.2d 105, 112 n.7 (Tex. Crim. App. 1991), the court found no error in the refusal to define deliberately but did note: "This case does not present us with a situation wherein a special definition of the term deliberate might present the jury with the opportunity to express its 'reasoned moral response' to mitigating evidence like that contemplated by the Supreme Court in *Penry*. . . ."; *see Draughon v. State*, 831 S.W.2d 331, 338 (Tex. Crim. App. 1992)(definition of deliberately not required to assure a fair understanding of mitigating evidence).

F. The Evidence Is Always Sufficient

1. The standard of review to determine the sufficiency of the evidence to prove that the defendant acted deliberately is found in *Green v. State*, 682 S.W. 2d 271, 288 (Tex. Crim. App. 1984):

The evidence must be reviewed in the light most favorable to the verdict to determine whether a rational trier of fact could have found the elements of Art. 37.071(b)(1) to have been proved beyond a reasonable doubt. Then we must determine whether *the same* evidence supports an inference other than that appellant's conduct which contributed to causing the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result. If it does, a trier of fact could not reasonably find "yes" on special issue number one, and the punishment must be reformed to life imprisonment.

Id. at 288(emphasis in original)(citations omitted); *accord, Fuller v. State*, 827 S.W.2d 919, 934 (Tex. Crim. App. 1992); *Harris v. State*, 784 S.W. 2d 5,10 (Tex. Crim. App. 1989); *Rector v. State*, 738 S.W. 2d 235, 241 (Tex. Crim. App. 1986); *Santana v. State*, 714 S.W. 2d 1, 7 (Tex. Crim. App. 1986); *see also Lane v. State*, 743 S.W. 2d 617, 630 (Tex. Crim. App. 1987)(court balances the

"evidence on both sides of this sufficiency question, considering the evidence at both stages of the trial").

2. In *Carter v. State*, 717 S.W. 2d 60 (Tex. Crim. App. 1986), the defendant contended that extraneous offense evidence, while admissible as to the second special issue, should not be considered in determining the sufficiency of the evidence as to the *first* special issue. The court indicated disagreement, but ultimately sidestepped the merits, holding that this issue was not preserved for appeal, in the absence of an objection at trial, or a request for limiting instructions. *Id.* at 66-67; *but see Santana v. State*, 714 S.W. 2d 1, 11 (Tex. Crim. App. 1986)(no error in refusing to instruct jury it could consider extraneous offenses only if it found defendant committed them beyond a reasonable doubt, "and then only insofar as they related to answering the second special issue"); *accord Lane v. State*, 822 S.W.2d 35, 40 (Tex. Crim. App. 1991)(evidence probative of the first special issue).

3. Despite the court's insistence that deliberately has a meaning distinct from intentionally, *to date, not a single case has been reversed because the court found the evidence insufficient to support an affirmative finding to special issue number one.* There is no stronger proof than this that the first special issue is meaningless. If there really was a principled distinction between "deliberately" and "intentionally," surely the court could have found at least one out of several hundred cases in which the evidence was legally insufficient. *Green v. State*, 682 S.W.2d 271, 287-289 (Tex. Crim. App. 1984) is a striking example of how little evidence is required to sustain an affirmative finding to issue number one.

4. In *Westley v. State*, 754 S.W. 2d 224 (Tex. Crim. App. 1988), the court rejected appellant's claim that the evidence was insufficient to prove he acted deliberately. *Id.* at 229-230. Even though the appellant lost this point, the case is somewhat interesting because of its language on deliberation in general: "perhaps a lack of deliberation would have been evident if the appellant had fled from the store after the initial round of gunfire." *Id.* at 230. This is about as far as the court has gone in questioning the sufficiency of deliberation evidence.

5. The state may not rely on evidence that appellant's party acted deliberately, "but rather, the jury must determine whether appellant's own culpable conduct which contributed to the decedent's death was committed deliberately and with the reasonable expectation that death would result." *Fuller v. State*, 827 S.W. 2d 919, 934 (Tex. Crim. App. 1992).

6. That appellant stabbed the deceased 63 times is alone enough to prove that he acted deliberately. *Narvaiz v. State*, 840 S.W. 2d 415, 424(Tex. Crim. App. 1992); *See Heiselbetz v. State*, 906 S.W. 2d 500, 507 (Tex. Crim. App. 1995)(killing by strangulation is a laborious and time consuming effort, and supports a conclusion of deliberateness).

7. 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 capital cases under the Texas Constitution. "We need not today decide whether or not this court should adopt a different standard of sufficiency review under the Texas Constitution because even under a factual sufficiency review, the overwhelming weight of the evidence would *not* dictate a finding that appellant's account was more believable than the State's, so as to find that appellant did *not* act deliberately. At best, appellant presented some evidence in contradiction of

the State's evidence, but it did not amount to *overwhelming* evidence that the State's case was incredible and not supportive of the verdict." *Id.* at 290.

G. Voir Dire

1. The trial court abuses its discretion in not permitting a defendant to inquire about a venireperson's interpretation, definition or understanding of the term "deliberately." *Ex parte McKay*, 819 S.W.2d 478, 485 (Tex. Crim. App. 1990). Harm is manifest where the court prohibits such inquiry of 35 venirepersons. *Id.* This type of error is cognizable on a writ of habeas corpus. *Id.*

H. Opinion Testimony

1. Dr. Grigson may characterize an offense as "deliberate intentional," based on a hypothetical. *Amos v. State*, 819 S.W.2d 156, 164 (Tex. Crim. App. 1991).

I. Relevant Evidence

1. Evidence contained in a confession in which the applicant asserts that he had to shoot the victim, because he was afraid he would take his gun away "was clearly relevant to the first special issue, bearing upon the deliberateness of applicant's conduct." *Ex parte Davis*, 866 S.W. 2d 234, 242 (Tex. Crim. App. 1993).

J. For Offenses Committed Before September 1, 1991

1. 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).

XIX. THE SECOND SPECIAL ISSUE (Pre- September 1, 1991)

A. Art. 37.071(b)(2)

The second special issue asks:

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(b)(2).

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. *Newton v. State*, ___ S.W. 2d __, __ No. 70,770 (Tex. Crim. App. June 17, 1992), slip op. 36.

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. 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).

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

4. "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).

5. 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 the 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.

D. Sufficiency Of The Evidence

1. The question on appeal is 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, as required by article 37.071(b)(2). *Burns v. State*, 761 S.W. 2d 353, 355-56 (Tex. Crim. App. 1988). In *Burns*, the defendant's participation in a robbery/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 kidnaping, 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 than a "mere modicum").

a. The 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." *Burns v. State*, 761 S.W. 2d at 356 n.4.

b. In *Delk v. State*, 855 S.W. 2d 700 (Tex. Crim. App. 1993), the court examined a long list of what it viewed mostly as "the least serious of the crimes of violence under our penal laws, *viz*: simple assault," but went on to find evidence sufficient anyway. "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." *Id.* at 708-709(emphasis supplied).

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 on-going 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*, ___ S.W. 2d ___, ___ No. 71,818 (Tex. Crim. App. May 22, 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. Unlike the case of the first special issue, 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).

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 (b) . . . 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*, ___ S.W. 2d ___ No. 71,818 (Tex. Crim. App. May 22, 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 slip op. 7-8. 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 slip op. 15 (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 slip op. 2 (Maloney, J., concurring and dissenting). Judge Maloney believes this opinion "renders article 37.071 a nullity." *Id.* at slip op. 8 (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. 1995). 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.

E. Definitions And The Second Special Issue

1. The movement to define "probability" has not attracted the support of the "deliberately" movement. 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 acceptance 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*, ___ S.W. 2d ___, ___ No. 71,404 (Tex. Crim. App. May 22, 1996), slip op. 17-18; *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 Chambers v. State*, 903 S.W. 2d 21, 35 (Tex. Crim. App. 1995); *Patrick v. State*, 906 S.W. 2d 481, 494 (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*, ___ S.W. 2d ___, ___ No. 71,557 (Tex. Crim. App. February 21, 1996), slip op. 61. 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*, 112 S.Ct. 1130, 1139 (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*, ___ S.W. 2d ___, ___ No. 71,557 (Tex. Crim. App. February 21, 1996), slip op. 53.

6. In *Arave v. Creech*, 113 S.Ct. 1534 (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 1542. 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.

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).

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).

F. No Limiting Instruction Is Necessary

1. 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. *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).

A. Article 37.071(b)(3)

1. The third special issue asks:

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. Crim. Code Proc. Ann. art. 37.071 (b)(3).

2. Practically speaking, this issue "rarely enters into the decision of the jury." *Penry v. Lynaugh*, 832 F.2d 915, 924 (5th Cir. 1987), *rev'd*, 109 S.Ct. 2934 (1989).

3. In *Evans v. State*, 601 S.W.2d 943 (Tex. Crim. App. 1980), the defendant stated in his confession that the store owner had fired on him first. Although the defendant had no legal right of self defense, since he was a robber, "his imperfect self-defense claim warranted submission of the provocation issue at the penalty phase." *Id.* at 946; *see also Jurek v. Texas*, 428 U.S. 262, 272 n.7 (1976); *Penry v. State*, 691 S.W.2d 636, 653 (Tex. Crim. App. 1985).

4. Defendant's written statement asserting that he had argued over a fare with a cab driver, then struggled over a gun produced by the driver, raised the issue of provocation. This statement was also supported by the physical evidence. *Turner v. State*, 805 S.W.2d 423, 428 (Tex. Crim. App. 1991).

5. The trial judge had no choice but to submit the third issue where "ample evidence was presented from the testimony of witnesses and from a written statement made by the appellant himself that the deceased had somehow managed to provoke his own death, by disobeying instructions from the appellant and his cohorts and, at one point, approaching appellant in a threatening manner." *Robinson v. State*, 851 S.W.2d 216, 231 (Tex. Crim. App. 1991).

6. Although language from defendant's confession that the victim shot at him first raised provocation, failure to object to the charge waives error in not submitting special issue number three. *Johnson v. State*, 629 S.W.2d 731, 733 (Tex. Crim. App. 1981).

7. Where the third issue is submitted, the state bears the burden of proving it beyond a reasonable doubt. *See Penry v. State*, 691 S.W.2d 636, 653 (Tex. Crim. App. 1985); *Green v. State*, 682 S.W.2d 271, 290 (Tex. Crim. App. 1984); *Smith v. State*, 676 S.W.2d 379, 393 (Tex. Crim. App. 1984); *but see Livingston v. State*, 739 S.W.2d 311, 340 (Tex. Crim. App. 1987)(defendant may not request submission of third issue, then complain that the evidence is insufficient).

8. On appeal, the court will "review the evidence in the light most favorable to the verdict to determine whether a rational trier of fact could have found a reasonable doubt that appellant's conduct was unreasonable in response to provocation by the deceased." *Harris v. State*, 784 S.W.2d 5,10 (Tex. Crim. App. 1989).

9. Like the first special issue, the court has not reversed for insufficient evidence on the third special issue. *E.g.*, *Rousseau v. State*, 855 S.W. 2d 666, 675 n.9 (Tex. Crim. App. 1993); *Turner v. State*, 805 S.W.2d 423, 428 (Tex. Crim. App. 1991); *Harris v. State*, 784 S.W.2d 5,10-11 (Tex. Crim. App. 1989); *Nichols v. State*, 754 S.W. 2d 185, 204 (Tex. Crim. App. 1988); *Duffy v. State*, 567 S.W. 2d 197, 209 (Tex. Crim. App. 1978); *Smith v. State*, 540 S.W. 2d 693, 697 (Tex. Crim. App. 1976).

10. No error is committed in refusing to submit the third issue in the absence of evidence raising it. *E.g.*, *Garcia v. State*, 919 S.W. 2d 370, 397 (Tex. Crim. App. 1996); *Johnson v. State*, 853 S.W. 2d 527, 538 (Tex. Crim. App. 1992); *Hathorn v. State*, 848 S.W. 2d 101, 116-117 (Tex. Crim. App. 1992); *Lucas v. State*, 791 S.W. 2d 35, 65 (Tex. Crim. App. 1989); *Westley v. State*, 754 S.W. 2d 224, 230 (Tex. Crim. App. 1988); *Marquez v. State*, 725 S.W.2d 217, 224 (Tex. Crim. App. 1987); *Landry v. State*, 706 S.W.2d 105, 113 (Tex. Crim. App. 1985); *Hernandez v. State*, 643 S.W.2d 397, 401 (Tex. Crim. App. 1982).

11. The third special issue focuses on provocation from the deceased rather than other persons. The defendant is not entitled to an instruction to the jury that it can consider provocation by persons acting "with" the deceased. *Havard v. State*, 800 S.W.2d 195, 206 (Tex. Crim. App. 1989). Such a rule does not limit the right of the jury to consider third party provocation as a mitigating circumstance, however, because this evidence "would necessarily bear on the jury's determination of future dangerousness." *Id.* at 206 n.6.

12. A robber has no right of self-defense against his victim, especially when the victim is justified in acting to recover his property, prevent the offense, or save another person. *Westley v. State*, 754 S.W. 2d 224, 230 (Tex. Crim. App. 1988). "Efforts to apprehend a would-be robber or prevent the completion of a robbery do not amount to provocation for purposes of the third special issue." *Adanandus v. State*, 866 S.W. 2d 210, 216 (Tex. Crim. App. 1993).

13. To raise provocation, there must be evidence of the deceased's conduct just prior to her death. Verbal statements are insufficient to constitute provocation where appellant creates the criminal episode, initiates the violence and assaults several unarmed individuals with a deadly weapon. *McBride v. State*, 862 S.W. 2d 600, 611 (Tex. Crim. App. 1993).

14. The presence of drugs alone is insufficient to raise the issue of provocation. *Moore v. State*, 882 S.W. 2d 844, 849 (Tex. Crim. App. 1994).

15. In *First v. State*, 846 S.W. 2d 836 (Tex. Crim. App. 1992), appellant was tried for capital murder because he had killed two persons in the same transaction. The third special issue was submitted only as to the first complainant named in the indictment. The court held that this violated the Eighth Amendment because it prevented the jury from considering all mitigating circumstances, namely provocation of the second complainant named in the indictment. *Id.* at 842; *but see Coble v. State*, 871 S.W. 2d 192, 207 n.20 (Tex. Crim. App. 1993)(arguing that the trial court erred in not submitting the third special issue does not "present" the same claim that was made in *First*); *cf. Norris v. State*, 902 S.W. 2d 428, 448 (Tex. Crim. App. 1995)(*First* inapplicable where there is no evidence of provocation on the part of either victim).

16. When a defendant is convicted of capital murder for killing more than one person,

the trial court should submit the third special issue only as to the deceased first named in the indictment. Although it is error to submit the second named individual, the error may be harmless. *Wheatfall v. State*, 882 S.W. 2d 829, 841 (Tex. Crim. App. 1994).

XXI. WHAT EVIDENCE IS ADMISSIBLE AT THE PUNISHMENT PHASE?

A. Evidence Against The Defendant

1. Article 37.071(a) authorizes presentation of evidence "as to any matter that the court deems relevant to sentence."

2. The following evidence has been held admissible against the defendant:

a. 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); 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*, ___ S.W. 2d ___, ___ No. 71,557 (Tex. Crim. App. February 21, 1996), slip op. 37; 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*, 109 S. Ct. 190, 190-91 (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).

b. Details of extraneous offenses. *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).

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

d. 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).

e. 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).

f. 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).

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

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

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

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

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

l. 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).

m. 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).

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

o. 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 life-time" is probative in a capital case, even though evidence this remote might not be admissible in a non-capital case).

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

q. 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).

r. 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); *cf. Dawson v. Delaware*, 112 S.Ct. 1093, 1098 (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).

s. 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).

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

u. 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.

v. 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."

w. 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).

x. 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).

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

z. 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).

aa. 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).

bb. 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).

cc. 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).

dd. 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).

ee. 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).

B. 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).

C. 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(a)(Vernon Supp. 1995). 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 adjudicated 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. It is never competent for the state in the first instance to prove that the deceased was peaceable and inoffensive. *Armstrong v. State*, 718 S.W.2d 686, 695 (Tex. Crim. App. 1985).

5. 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).

6. 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).

7. 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); *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, Adanandus v. State*, 866 S.W. 2d 210, 233 (Tex. Crim. App. 1993).

8. 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).

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

10. "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).

11. 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).

12. 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).

13. 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).

14. 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).

15. 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).

XXII. CONSIDERATION OF MITIGATING CIRCUMSTANCES: JUREK; LOCKETT; EDDINGS; FRANKLIN; PENRY

A. Jurek Through Eddings

1. In *Jurek v. Texas*, 428 U.S. 262 (1976), the Supreme Court considered and rejected a number of *facial* challenges to the Texas death penalty scheme. Among other things, the Court held that, based on the evidence then before it, it appeared that the Texas Court of Criminal Appeals was broadly interpreting the special issues to permit the consideration of particularized mitigating circumstances. *Id.* at 272.

2. Two years later, in *Lockett v. Ohio*, 438 U.S. 586 (1978), the Court held "that the Eighth Amendment and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604.

3. *Eddings v. Oklahoma*, 455 U.S. 104 (1982), made it clear that it is not enough simply to allow the defendant to present mitigating evidence to the jury. "*Lockett* requires the sentencer to listen." *Id.* at 115 n.10. That is, the jury must also be able to consider and give effect to that evidence when deciding between life imprisonment and the death penalty.

B. Texas Believed The Special Issues Were Enough

1. The Texas Court of Criminal Appeals, while always nominally acknowledging the existence of *Lockett* and *Eddings*, consistently held that the special issues were adequate, all by themselves, to allow for consideration of mitigating circumstances. *E.g.*, *Jurek v. State*, 522 S.W.2d 934, 939-940 (Tex. Crim. App. 1975), *aff'd*, 428 U.S. 262 (1976).

2. Accordingly, a majority of the court regularly rejected claims by defendants that some further instruction, beyond the bare special issues, was necessary to insure that the jury was considering all mitigating circumstances, as required by *Lockett* and *Eddings*.

The question then is whether the language of the special issue is so complex that an explanatory charge is necessary to keep the jury from disregarding the evidence properly before it. In *King v. State*, 553 S.W. 2d 105 (Tex. Crim. App. 1977), *cert. denied*, 434 U.S. 1088, 98 S.Ct. 1284, 55 L.Ed. 2d 793 (1978), this Court held that the questions in Art. 37.071 used terms of common understanding which required no special definition. The jury can readily grasp the logical relevance of mitigating evidence to the issue of whether there is a probability of future criminal acts of violence. No additional charge is required.

Quinones v. State, 592 S.W.2d 933, 947 (Tex. Crim. App.), *cert. denied*, 449 U.S. 893 (1980); *accord*, *Cordova v. State*, 733 S.W.2d 175, 190 (Tex. Crim. App. 1987); *Demouchette v. State*, 731 S.W.2d 75, 80 (Tex. Crim. App. 1986); *Clark v. State*, 717 S.W.2d 910, 920-921 (Tex. Crim. App. 1986), *cert. denied*, 107 S.Ct. 2202 (1987).

3. The curious attitude--that the jury must consider all mitigating evidence, but that there is no need to tell it to do so--is nowhere more curiously expressed than in *James v. State*, 772 S.W. 2d 84 (Tex. Crim. App. 1989):

This Court has repeatedly held that, although a capital murder defendant has a right to have certain evidence considered in mitigation of punishment, he is not entitled to jury instructions specifically informing the jury that certain evidence may be considered or how it may be applied.

Id. at 102.

C. The Minority View--Evidence Which Is At Once Damning And Mitigating

1. Three judges on the court of criminal appeals, however, long took issue with the conclusion that the narrow special issues are sufficient by themselves to guide the jury on mitigating evidence:

If we are to insure the constitutionality of 37.071, we must not only give lip service to broadly interpreting it; we must also apply it as interpreted. This could easily be effected by requiring a jury instruction on mitigating evidence. It is folly for the Court to first acknowledge a capital murder defendant's right to produce mitigating evidence, give the jury no guidance in its use, then presume these 12 laypersons know the holdings of

Lockett and *Eddings* until the defendant affirmatively proves the contrary.

Stewart v. State, 686 S.W.2d 118, 125-26 (Tex. Crim. App. 1984)(Clinton, J., joined by Teague and Miller, J.J., dissenting); *see also Johnson v. State*, 691 S.W.2d 619, 627 (Tex. Crim. App. 1984)(Clinton, joined by Miller, J., concurring).

2. The specific concern of the minority was that certain evidence by its very nature "is at once damning and mitigating." *Stewart v. State*, 686 S.W.2d at 125. As examples, the dissenters listed mental disease and childhood deprivation. Although such factors might be mitigating in that they may lead the jury to exercise mercy, at the same time they may establish a probability of future dangerousness, thus compelling an affirmative answer to the second issue. According to these judges, the narrow Texas procedure did not permit the jury to accord independent weight to all relevant mitigating circumstances, in violation of *Lockett v. Ohio*. To insure that Texas procedure complies with *Lockett*, the dissenters would require an instruction on mitigating evidence.

D. Franklin v. Lynaugh Portends Constitutional Trouble

1. The first indication, beyond the minority judges, that there might indeed be constitutional problems with the Texas system came in *Franklin v. Lynaugh*, 108 S. Ct. 2320 (1988). There, the defendant contended that the special issues deprived the jury of any procedure for considering and expressing the conclusion that the mitigating evidence called for a sentence less than death. A plurality of the Supreme Court rejected this claim, because it did not believe that the Texas special issue system "precluded jury consideration of any relevant mitigating circumstances *in this case*, or otherwise unconstitutionally limited the jury's discretion *here*." *Id.* at 2332 (emphasis supplied). As the emphasized language indicates, the *Franklin* decision was expressly limited to its facts. Franklin presented two mitigating circumstances--"residual doubt" about his guilt and his good behavior in prison. All nine justices rejected "residual doubt" as a constitutionally mandated mitigating circumstance. And, the majority found that since Franklin's prison record was fully considered by the jury when answering the second special issue, no further jury instruction was required. *Id.* at 2329.

2. Three justices dissented in *Franklin*, believing that the Texas system did indeed prevent the jury from considering and giving mitigating effect to the defendant's good record in prison. *Id.* at 2335 (Stevens, J., dissenting, joined by Brennan, J., and Marshall, J.).

3. Most significant about *Franklin* was the concurring opinion, authored by Justice O'Connor and joined by Justice Blackmun. The concurring justices expressed doubts that the Texas scheme could "constitutionally limit the ability of the sentencing authority to give effect to mitigating evidence relevant to a defendant's character or background or to the circumstances of the offense that mitigates against the death penalty." *Id.* at 2332. Justices O'Connor and Blackmun concurred in the judgment *only* because the prison-record evidence relied on by Franklin related solely to one of the special issue questions. This critical distinction, however, was raised:

If, however, petitioner had introduced mitigating evidence about his background or character or the circumstances of the crime that was not relevant to the special verdict questions, or that had relevance to the defendant's moral culpability beyond the scope of the special verdict questions, the jury instructions would have provided the jury with no vehicle for expressing its "reasoned moral response" to that evidence. If this were such a

case, then we would have to decide whether the jury's inability to give effect to that evidence amounted to an Eighth Amendment violation.

Id. at 2333.

E. Penry v. Lynaugh Proves The Minority Was Right

1. One week after *Franklin* was decided, the Court granted certiorari in *Penry v. Lynaugh*, 832 F. 2d 915 (5th Cir. 1987), *cert. granted*, 108 S.Ct. 2896 (1988). It turned out to be just the sort of case Justices O'Connor and Blackmun seemed to yearn for in *Franklin*.

2. Penry was mildly to moderately mentally retarded and had himself been the victim of extensive child abuse. *Penry v. Lynaugh*, 109 S.Ct. 2934, 2941-42 (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 2942-43.

3. Two questions were presented to the Supreme Court in *Penry*. The second question--whether the Eighth Amendment categorically prohibits the execution of the mentally retarded--will be discussed below. The first question--and the one which will have a profound effect on Texas capital jurisprudence for years to come--was whether Penry was "sentenced to death in violation of the Eighth Amendment because the jury was not adequately instructed to take into consideration all of his mitigating evidence and because the terms in the Texas special issues were not defined in such a way that the jury could consider and give effect to his mitigating evidence in answering them." *Id.* at 2943-44.

4. Penry argued 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 2948. Unlike in *Franklin*, Penry's particular circumstances had mitigating relevance beyond the purview of the three special issues.

5. In support of its conclusion, the Court carefully considered the relationship between Penry's mitigating evidence and the three special issues:

a. Although Penry's retardation was relevant to the deliberation inquiry posed by the first special issue, "it also 'had relevance to [his] moral culpability beyond the scope of the special verdict questio[n]. Personal culpability is not solely a function of a defendant's capacity to act 'deliberately.'" *Id.* at 2948-49 (citations omitted). "In the absence of jury instructions defining 'deliberately' in a way that would clearly direct the jury to consider fully Penry's mitigating evidence as it

bears on his personal culpability, we cannot be sure that the jury was able to give effect to the mitigating evidence of Penry's mental retardation and history of abuse in answering the first special issue. * * *

Thus, we cannot be sure that the jury's answer to the first special issue reflected a 'reasoned moral response' to Penry's mitigating evidence." *Id.* at 2949.

b. Evidence of Penry's retardation was relevant to the second special issue, but, since it rendered him unable to learn from his mistakes, "it is relevant only as an *aggravating* factor because it suggests a 'yes' answer to the question of future dangerousness. * * * Penry's mental retardation and history of abuse is thus a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future. * * * The second special issue, therefore, did not provide a vehicle for the jury to give mitigating effect to Penry's evidence of mental retardation and childhood abuse." *Id.* at 2949. A perfect example of a venireperson who perceived the two-edged value of potentially mitigating evidence occurred in *Cuevas v. State*, 742 S.W. 2d 331 (Tex. Crim. App. 1987). The defense lawyer asked venireperson Dunn whether he would consider as mitigating the fact that the hypothetical defendant had a limited mental capacity and was under the control and domination of the triggerman. Mr. Dunn said these factors would not necessarily be mitigating because "if one person could easily fall under the control and domination of another person that would lead to them committing a violent crime, that perhaps the probability of that occurring again could be high." *Id.* at 345. In this pre-*Penry* case, the court held there was no error in overruling defendant's challenge for cause to Mr. Dunn. "The law only requires that the defendant be permitted to introduce relevant mitigating evidence. Contrary to appellant's contention, the law does not require the jurors to consider his two hypothetical factors as mitigating." *Id.* at 346. As Justice O'Connor pointed out in *Penry*, however, the problem with Texas law is that some factors, like retardation, though potentially mitigating, can only be seen as aggravating under the narrow Texas special issues. In this way, Texas law precludes consideration of mitigating factors, in violation of the Constitution. *See Madden v. State*, 799 S.W.2d 683, 694 n.17 (Tex. Crim. App. 1990)(court notes the double edged nature of defendant's substantial mitigating evidence).

c. Nor did the third special issue require the jury to consider Penry's particular mitigating evidence. "Even if a juror concluded that Penry's mental retardation and arrested emotional development rendered him less culpable for his crime than a normal adult, that would not necessarily diminish the 'unreasonableness' of his conduct in response to 'the provocation, if any, by the deceased.' Thus, a juror who believed Penry lacked the moral culpability to be sentenced to death could not express that view in answering the third special issue if she also concluded that Penry's action was not a reasonable response to provocation." *Id.* at 2950.

6. The Court also rejected the state's contention that, the three special issues aside, Penry was free to introduce and argue the significance of his mitigating evidence to the jury. "In light of the prosecutor's argument, and in the absence of appropriate jury instructions, 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." *Id.* at 2950.

7. The Court also disagreed that sustaining Penry's request to permit the jury to render a "discretionary grant of mercy," or to say "no" to the death penalty based on his mitigating circumstances would return to the sort of unbridled discretion condemned in *Furman v. Georgia*. "In contrast to the carefully defined standards that must narrow a sentencer's discretion to *impose* the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that

might cause it to *decline to impose* the death sentence." *Id.* at 2951. Full consideration of mitigating circumstances insures that the sentence constitutes the "reasoned moral response" required by the Constitution. *Id.*

8. 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 2952.

F. Post-Penry Caselaw In Texas

1. Three Possible Mitigating Evidence Scenarios

a. The Texas Court of Criminal Appeals has been reluctant to grant relief based on *Penry*. There are three possible mitigating evidence scenarios, and two are bad for the defense: The first is where no mitigating evidence at all is presented to the jury. The second is where the only mitigating evidence presented is of a nature which may be given full mitigating effect by the narrow special issues. (*Franklin*-type evidence). The third is true *Penry*-type evidence, which requires some instruction beyond the narrow special issues. (True *Penry*-type evidence). See *Richardson v. State*, 886 S.W. 2d 769, 772 (Tex. Crim. App. 1991).

b. "[W]e have sustained "*Penry* claims" in only three situations. First, we held evidence of mental retardation falls beyond the scope of the statutory punishment issues. Second, mental illness may fall beyond the scope of the statutory punishment issues. Finally, we held the statutory punishment issues failed to provide the jury with a vehicle to consider and give effect to evidence of provocation by the second victim in a prosecution for capital murder under Tex. Penal Code Ann. § 19.03 (a) (6)." *Earhart v. State*, 877 S.W. 2d 759, 765 (Tex. Crim. App. 1994)(citations omitted).

c. The court will consider evidence introduced at the guilt/innocence stage of the trial in determining the need to give a *Penry* instruction. *Ex parte Kunkle*, 852 S.W. 2d 499, 502 (Tex. Crim. App. 1993).

d. "The special issues required by Article 37.071, V.A.C.C.P., allow the jury to consider and give effect to most types of mitigating evidence. However, defendants occasionally proffer mitigating evidence that is not relevant to the special issues or that has relevance to the defendant's moral culpability beyond the scope of the special issues. In such a case, the jury must be given a special instruction in order to allow it to consider and give effect to such evidence." *Mason v. State*, 905 S.W.2d 570, 576 (Tex.Crim. App. 1995)(citations omitted).

2. No Mitigating Evidence

a. Where the defendant presents *no* mitigating evidence *at all*, no extra instruction is required. *Hammond v. State*, 799 S.W.2d 741, 749-750 (Tex. Crim. App. 1990); *Kinnamon v. State*, 791 S.W.2d 84, 94 (Tex. Crim. App. 1990); *Pierce v. State*, 777 S.W.2d 399, 418 (Tex. Crim. App. 1989).

3. Franklin-Type Evidence

a. No additional instruction is required where the mitigating evidence is of the sort which can be fully comprehended by the special issues as they are written. *Franklin v. Lynaugh*, 108 S.Ct. 2320, 2329 (1988)(good prison record and residual doubt); *see Johnson v. Texas*, 113 S.Ct. 2658, 2670 (1993)(youth); *Graham v. Collins*, 113 S.Ct. 892, 902 (1993)(transient upbringing and positive character traits); *Garcia v. State*, 919 S.W. 2d 370, 399 (Tex. Crim. App. 1996)(drug use, alcoholism, and family background); *Chambers v. State*, 903 S.W. 2d 21, 35 (Tex. Crim. App. 1995)(youth and good behavior in prison); *Norris v. State*, 902 S.W. 2d 428, 448 (Tex. Crim. App. 1995)(evidence that the shooting was a crime of passion and that appellant was emotionally distraught; positive behavior following the crime; positive character traits); *Hughes v. State*, 897 S.W.2d 285, 289 (Tex. Crim. App. 1994)(positive character traits; good behavior in prison; youth; emotional instability as a result of divorce; financial troubles; disfellowship from the Jehovah's Witnesses); *Banda v. State*, 890 S.W. 2d 42, 63 (Tex. Crim. App. 1994)(youth, extreme intoxication and the state's alleged failure to prosecute a more culpable defendant are adequately taken into account by the special issues); *Mines v. State*, 888 S.W. 2d 816, 817 (Tex. Crim. App. 1994)(because appellant's mental disability -- bipolar disorder-- was not constant, but instead was subject to change, it can be adequately considered by the second special issue); *Ex parte Lucas*, 877 S.W. 2d 315, 317 (Tex. Crim. App. 1994)(youth is not a factor where defendant was 43 at time of offense); *Richardson v. State*, 886 S.W. 2d 769, 772-75 (Tex. Crim. App. 1991)(voluntary service, kindness to others, religious devotion, artistic and poetic talent, family ties); *Zimmerman v. State*, 881 S.W. 2d 360, 362 (Tex. Crim. App. 1994)(low I.Q., substance abuse problem; paranoid personality disorder; history of difficulties with others; anger; mistrustful; child abuse; adoption, metal plate in head; 25 is not youthful); *Earhart v. State*, 877 S.W. 2d 759, 766-67 (Tex. Crim. App. 1994) (positive character traits; undeveloped evidence of parental mistreatment; alcohol consumption; low ego strength, possible psychotic decompensation, nervous condition); *Burks v. State*, 876 S.W. 2d 877, 910 (Tex. Crim. App. 1994)(evidence of limited intellectual and mental capability; good behavior as a child; past good deeds; good prison record); *Butler v. State*, 872 S.W. 2d 227, 240-41 (Tex. Crim. App. 1994)(good character; youth); *Chambers v. State*, 866 S.W. 2d 9, 28 (Tex. Crim. App. 1993)(unhappy family life); *Adanandus v. State*, 866 S.W. 2d 210, 227 (Tex. Crim. App. 1993)(remorse); *Delk v. State*, 855 S.W. 2d 700, 709 (Tex. Crim. App. 1993)(disruptive or tragic family life); *Elliott v. State*, 858 S.W. 2d 478, 486 (Tex. Crim. App. 1993)(religious conversion, good behavior in jail, poor education, and single parent upbringing); *Beavers v. State*, 856 S.W. 2d 429, 433 (Tex. Crim. App. 1993)(history of blackouts, drug abuse and addiction, voluntary intoxication, possible child abuse, dysfunctional family, religious conversion, and good behavior in jail); *Zimmerman v. State*, 860 S.W. 2d 89, 102 (Tex. Crim. App. 1993)(abandonment as a child, some child abuse, positive character traits, history of head injury, low intelligence, and paranoid personality), *vacated*, 114 S.Ct. 374 (1993); *Gunter v. State*, 858 S.W.2d 430, 446-47 (Tex. Crim. App. 1993)(child abuse; hearing impairment; learning disorder, absent any proof of nexus); *Satterwhite v. State*, 858 S.W.2d 412, 426-28 (Tex. Crim. App. 1993)(disadvantaged childhood; limited intellectual and mental capability; and recent mental illness, absent nexus); *Rousseau v. State*, 855 S.W. 2d 666, 671-72 (Tex. Crim. App. 1993)(drug usage); *Ex parte Kunkle*, 852 S.W. 2d 499, 502-503 (Tex. Crim. App. 1993)(drug and alcohol use, depression, family's emotional problems, and youth); *Muniz v. State*, 851 S.W. 2d 238, 256 (Tex. Crim. App. 1993)(poverty, religious devotion, positive character traits, and artistic abilities); *Johnson v. State*, 853 S.W. 2d 527, 537 (Tex. Crim. App. 1992)(hardworking and non-violent); *Nelson v. State*, 848 S.W. 2d 126, 136-37 (Tex. Crim. App. 1992)(positive character traits, youth, family strife, history of drug abuse, good prison record, and child abuse); *Felder v. State*, 848 S.W. 2d 85, 100 (Tex. Crim. App. 1992)(good deeds and religious devotion); *Kemp v. State*, 846 S.W. 2d 289, 309 (Tex. Crim. App. 1992)(positive

character traits, sensitivity to others, religious devotion, childhood emotional difficulties, youth, mitigating circumstances in the extraneous offenses); *Newton v. State*, __ S.W.2d __, __ No. 70,770 (Tex. Crim. App. June 17, 1992), slip op. 34-35(youth, unwed mother, embarrassed by adulterous husband, married to cocaine and marijuana user, cooperative with authorities, churchgoing, member of large family); *Nobles v. State*, 843 S.W.2d 503, 506 (Tex. Crim. App. 1992)(abusive childhood, positive character traits, and voluntary intoxication); *Ex parte Jacobs*, 843 S.W. 2d 517, 520 (Tex. Crim. App. 1992)(troubled childhood, cooperation with the police, efforts to better his life, trustworthiness, love for family and friends, and good prison behavior); *Jones v. State*, 843 S.W.2d 487, 497 (Tex. Crim. App. 1992)(good prison record); *Cantu v. State*, 842 S.W.2d 667, 693-94 (Tex. Crim. App. 1992)(youth, father's alcoholism, appellant's voluntary intoxication and long term abuse of alcohol and drug abuse); *Rosales v. State*, 841 S.W. 2d 368, 383 n.14 (Tex. Crim. App. 1992)(good character traits and intoxication); *Ex parte Lucas*, 834 S.W.2d 339, 341-42 (Tex. Crim. App. 1992)(low intelligence, schizophrenia, memory and hearing problems, deprived and physically abusive childhood), *vacated*, 113 S.Ct. 3029 (1993); *Ex parte Kelley*, 832 S.W.2d 44, 45-47 (Tex. Crim. App. 1992)(reduced mental capacity, voluntary intoxication, history of drug abuse, youth, positive family background); *Draughon v. State*, 831 S.W.2d 331, 339 (Tex. Crim. App. 1992)(social and moral poverty of appellant's childhood); *Fuller v. State*, 827 S.W. 2d 919, 936-37 (Tex. Crim. App. 1992)(positive character traits, loss of some eyesight, and physical violence between parents); *Goss v. State*, 826 S.W.2d 162, 164-67 (Tex. Crim. App. 1992)(good character witnesses, troubled childhood, and voluntary intoxication); *Joiner v. State*, 825 S.W.2d 701, 707 (Tex. Crim. App. 1992)(emotional problems, current conflicts with spouse, state of mind, and absence of criminal record); *Miniel v. State*, 831 S.W.2d 310, 321 (Tex. Crim. App. 1992)(voluntary intoxication); *Gosch v. State*, 829 S.W.2d 775, 786 (Tex. Crim. App. 1991)(positive character traits, parental abandonment, and physical disfigurement from nitroglycerin experiment); *Moody v. State*, 827 S.W.2d 875, 896-97 (Tex. Crim. App. 1992)(difficult childhood, drug and alcohol abuse, positive character traits, good prison record, religious devotion); *Ex parte Harris*, 825 S.W.2d 120, 122 (Tex. Crim. App. 1991)(circumstances of offense, remorse and cooperation with police, youth and history of alcoholism); *Ex parte Boggess*, 855 S.W.2d 645, 647 (Tex. Crim. App. 1991)(health problems as young child, academic success, musical and artistic prowess, religious activities, employment, and good incarceration record); *Ex parte Bower*, 823 S.W.2d 284, 286-87 (Tex. Crim. App. 1991)(positive character traits and religious devotion); *Lane v. State*, 822 S.W.2d 35, 39 (Tex. Crim. App. 1991)(voluntary intoxication, hair trigger weapon, positive character traits, good disciplinary record, and mitigation regarding prior convictions); *Mooney v. State*, 817 S.W.2d 693, 705-706 (Tex. Crim. App. 1991)(good incarceration record and religious devotion); *Lackey v. State*, 819 S.W.2d 111, 136 (Tex. Crim. App. 1991)(voluntary intoxication and alcoholic blackout); *Black v. State*, 816 S.W.2d 350, 364-65 (Tex. Crim. App. 1991)(positive character traits); *Trevino v. State*, 815 S.W.2d 592, 620-22 (Tex. Crim. App. 1991)(disruptive and tragic family life, positive character traits, and youth); *Lewis v. State*, 815 S.W.2d 560, 567 (Tex. Crim. App. 1991)(child abuse and remorse); *Boyd v. State*, 811 S.W.2d 105, 108-112(Tex. Crim. App. 1991)(remorse, good employment record and good relations); *Ex parte Baldree*, 810 S.W.2d 213, 214-17 (Tex. Crim. App. 1991)(kindness and positive character traits); *Ex parte Ellis*, 810 S.W.2d 208, 209-212 (Tex. Crim. App. 1991)(drug problem, suicide attempt, lack of education and close family ties); *Lauti v. State*, 810 S.W. 2d 176, 177 (Tex. Crim. App. 1989)(good prison record).

4. True Penry-Type Evidence

a. In *Ex parte Ellis*, 810 S.W.2d 208 (Tex. Crim. App. 1991), the court made a point of saying that "[i]t is not determinative that applicant's mitigating evidence does not consist

of mental retardation and an abusive childhood background, as it did in the *Penry* case." *Id.* at 212. Unfortunately, since that time, the court has made it quite clear that the defendant loses unless his evidence is a *Penry* mirror image.

b. Very rarely, when the mitigating evidence is almost precisely the same character and quality as was *Penry's*, the court requires an additional instruction. *See Rios v. State*, 846 S.W. 2d 310, 315 (Tex. Crim. App. 1992)(mild mental retardation); *Richard v. State*, 842 S.W. 2d 279, 284 (Tex. Crim. App. 1992)(educable mental retardation and extensive history of physical and emotional abuse); *Ex parte Williams*, 833 S.W. 2d 150, 152 (Tex. Crim. App. 1992)(mental retardation); *Ex parte McGee*, 817 S.W.2d 77, 79-80 (Tex. Crim. App. 1991)(mental retardation and severe childhood abuse); *Ex parte Goodman*, 816 S.W.2d 383, 385-86 (Tex. Crim. App. 1991)(mental retardation); *Ramirez v. State*, 815 S.W.2d 636, 655-56 (Tex. Crim. App. 1991)(mental retardation and troubled childhood); *Gribble v. State*, 808 S.W.2d 65, 75-76 (Tex. Crim. App. 1990)(troubled childhood and psychosis).

c. In *Ex parte Harris*, 825 S.W.2d 120, 122 (Tex. Crim. App. 1991), the court had the following comment about youth: "While youthfulness may constitute a *Penry* issue in the proper case, we hold that it does not in the present case." The Supreme Court seems to have reached the opposite conclusion. *Johnson v. Texas*, 113 S.Ct. 2658, 2670 (1993)("youth, however, falls outside *Penry's* ambit").

d. Texas cases have consistently required some evidence of mental impairment, most often actual retardation, in order to raise a *Penry* issue. *Penry* itself, though, made it clear that both retardation and child abuse may merit an instruction beyond the special issues.

5. Facial Attacks Foreclosed

a. Where the appellant fails to cite to any mitigating evidence and argue how this evidence is relevant beyond the scope of the punishment issues, he makes a facial attack on the statute. The court of criminal appeals has rejected facial *Penry*-type challenges. *See McBride v. State*, 862 S.W. 2d 600, 611 (Tex. Crim. App. 1993); *see also Robertson v. State*, 871 S.W. 2d 701, 711 (Tex. Crim. App. 1993).

G. What Sort Of Instruction Is Required

1. For offenses committed on or after September 1, 1991, juries which have affirmatively answered the first two special issues must then answer the following 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 may be imposed.

Tex. Code Crim. Proc. Ann. art. 37.071 § 2(e)(Vernon Supp. 1995). Giving an instruction which essentially tracks the statutory language is not error. "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*, ___ S.W. 2d ___, ___ No. 71,818 (Tex. Crim. App. May 22, 1996), slip op. 11.

2. For offenses which occurred prior to September 1, 1991, there is no clear answer what sort of instruction is required where true *Penry*-type mitigating evidence is presented. There are a number of possibilities.

a. It is permissible for the trial court to submit a fourth special issue worded as follows, which is an appropriate response to *Penry*:

You are instructed that the term "mitigating evidence" is evidence about any aspect of the Defendant's background, his character, and the crime of which he was convicted that you believe, in fairness or mercy, calls for a sentence less than death. The purpose of this fourth special issue is to provide you the jury, if you deem it necessary, with a means of considering and giving effect to the mitigating evidence, if any, presented in this case. The sole question before you now is whether, considering all of the evidence, mitigating, if any, and otherwise, presented in both phases of this trial by either party, the death penalty is a reasoned moral response to the Defendant's background, his character, and to the crime of which he was convicted.

Now bearing in mind these instructions and definitions, you will answer the following special issue:

Do you find from the evidence, after considering fully the Defendant's mitigating evidence, if any, that the death penalty is a reasoned moral response to the Defendant's background, his character, and to the crime of which he was convicted?

State v. McPherson, 851 S.W. 2d 846, 847, 850 (Tex. Crim. App. 1992). See *Staley v. State*, 887 S.W.2d 885, 897 (Tex. Crim. App. 1994). See also *Garcia v. State*, 919 S.W. 2d 370, 397-98 (Tex. Crim. App. 1996).

b. In these cases, the court of criminal appeals held that *Penry* error was avoided by the following instructions:

I. *Fuller v. State*, 829 S.W.2d 191, 209 n.5 (Tex. Crim. App. 1992):

When you deliberate about the questions posed in the Special Issues, you are to consider any mitigating circumstances supported by the evidence presented in both phases of the trial. A mitigating circumstance may be any aspect of the defendant's character and record or circumstances of the crime which you believe makes a sentence of death inappropriate in this case. If you find there are any mitigating circumstances, you must decide how much weight they deserve and give them effect when you answer the Special Issues. If you determine, in consideration of this evidence, that a life sentence rather than a death sentence, is an appropriate response to the personal moral culpability of the defendant, you are instructed to answer at least one of the Special Issues under consideration "No."

See *Patrick v. State*, 906 S.W. 2d 481, 494 (Tex. Crim. App. 1995), slip op. 18 (approving "virtually identical instruction"); *Riddle v. State*, 888 S.W. 2d 1, 7 (Tex. Crim. App. 1994) (approving "nearly identical" instruction); *Emery v. State*, 881 S.W.2d 702, 712 (Tex. Crim. App. 1994) (approving "nearly

identical" instruction); *see also Heiselbetz v. State*, 906 S.W. 2d 500, 513 (Tex. Crim. App. 1995); *Rodriguez v. State*, 899 S.W. 2d 658, 664 (Tex. Crim. App. 1995); *Smith v. State*, 898 S.W. 2d 838, 854 (Tex. Crim. App. 1994).

ii. *Garcia v. State*, 887 S.W.2d 846, 860 (Tex. Crim. App. 1994):

You are instructed that you shall consider any evidence which, in your opinion, mitigates against the imposition of the death penalty. In making this determination you shall consider any aspects of the defendant's background, character or record and the facts and circumstances of the offense. If you believe from the evidence that the State has proven beyond a reasonable doubt that the answers to the Special Issues are "Yes," but you are further persuaded by the mitigating evidence that the defendant should not be sentenced to death in this case, or you have a reasonable doubt as to whether the death penalty should be imposed against the defendant, then you shall answer one or both of the Special Issues "No" in order to give effect to your belief that the death penalty should not be imposed in this case.

Mitigating circumstances are circumstances which do not constitute a justification or excuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability.

iii. *Coleman v. State*, 881 S.W.2d 344, 356 (Tex. Crim. App. 1994):

If you find that there are any mitigating circumstances in this case you must decide how much weight they deserve, and thereafter give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine when giving effect to the mitigating evidence, if any, that a life sentence rather than a death sentence is an appropriate response to the personal culpability of the defendant, then a negative finding should be given to one or more of the special issues under consideration.

iv. *Coble v. State*, 871 S.W.2d 192, 207 n.18 (Tex. Crim. App. 1993):

You are instructed that when you deliberate on the questions posed in the special issues, you are to consider the mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented *by the State or the Defendant*. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, and thereafter give effect and consideration to them in assessing the *defendant's personal culpability* at the time you answer the special issue. If you determine when giving effect to the mitigating evidence, if any, that a life sentence rather than a death sentence is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one or more of the special issues under consideration. *See Mason v. State*, 905 S.W.2d 570, 576 (Tex. Crim. App. 1995); *accord, Lewis v. State*, 911 S.W. 2d 1, 6 (Tex. Crim. App. 1995).

v. *Robertson v. State*, 871 S.W.2d 701, 710 (Tex. Crim. App. 1993):

You are instructed that you shall consider any evidence, which, in your opinion, is mitigating. Mitigating evidence is evidence that reduces the defendant's personal or moral culpability, or blameworthiness, and may include, but is not limited to an aspect of the defendant's character, record, background, or circumstances of the offense for which you have found him guilty. Our law does not specify what may or may not be considered as mitigating evidence. Neither does our law provide a formula for determining how much weight, if any, a mitigating circumstance deserves. You may hear evidence, which in your judgment, has no relationship to any of the special issues, but if you find such evidence is mitigating under these instructions, you shall consider the following instructions of the court. You and each of you, are the sole judges of what evidence, if any, is mitigating and how much weight, if any, the mitigating circumstances, if any, including those which have no relationship to any of the special issues, deserves.

You are instructed that some mitigating evidence, if any, may not be relevant to resolving the special issues but may be relevant in determining whether or not the defendant should be put to death.

In answering the Special Issues submitted to you herein, if you believe that the State has proved beyond a reasonable doubt that the answers to the Special Issues are "Yes," and you also believe from the mitigating evidence, if any, that the defendant should not be sentenced to death, then you shall answer at least one of the Special Issues "No" in order to give effect to your belief that the death penalty should not be imposed due to the mitigating evidence presented to you. In this regard, you are further instructed that the State of Texas must prove beyond a reasonable doubt that the death sentence should be imposed despite the mitigating evidence, if any, admitted before you.

vi. *Clark v. State*, 881 S.W. 2d 682, 700 (Tex. Crim. App. 1994):

When you deliberate about the questions posed in the Special Issues, you must consider any mitigating circumstances raised by the evidence present in both phases of the trial. You are instructed that any evidence which, in your opinion, mitigates against the imposition of the death penalty, may cause you to have a reasonable doubt as to whether or not the death penalty should be imposed in this case. Even if you find and believe beyond a reasonable doubt that the conduct of the defendant which caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased, [the named decedent], would result; and even if you find and believe 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; if you have a reasonable doubt based upon the mitigating evidence that has been presented in this case as to whether the death penalty should be imposed in this case, then you will answer the Special Issues propounded to you herein "No."

vii. *Wheatfall v. State*, 882 S.W. 2d 829, 840 n.11 (Tex. Crim. App. 1994):

You are instructed that when you deliberate on the questions posed in the special issues, you are

to consider all relevant mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the State or the Defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character, background, record, emotional instability, intelligence or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and thereafter, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, then a negative finding should be given to one of the special issues, regardless of what the jury found the answer to the special issue to be.

viii. *Penry v. State*, 903 S.W. 2d 715, 765 (Tex. Crim. App. 1995):

You are instructed that when you deliberate on the questions posed in the Special Issues, you are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the State or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.

ix. *See San Miguel v. State*, 864 S.W.2d 493, 495 (Tex. Crim. App. 1993)(nullification charge was sufficient).

c. The following charges were found *insufficient* to substitute for a proper *Penry* instruction.

I. *Richard v. State*, 842 S.W. 2d 279, 280-81 n.1 (Tex. Crim. App. 1992).

You are further instructed that *in determining each of these Special Issues, you may take into consideration* all of the evidence submitted to you in the full trial of the case, that is, all of the evidence submitted to you in the first part of this case wherein you were called upon to determine the guilt or innocence of the Defendant, and all of the evidence, including *evidence offered in mitigation of punishment*, if any, admitted before you in the second part of the trial wherein you are called upon to determine the answers to Special Issues hereby submitted to you.

ii. *Rios v. State*, 846 S.W.2d 310, 315-16 (Tex. Crim. App. 1992).

You are instructed that any evidence which, in your opinion, mitigates against the imposition of the Death Penalty, including any aspect of the defendant's reputation, character, or record, any of the circumstances of the commission of the offense which have been admitted in evidence before you, may be sufficient to cause you to have a reasonable doubt as to whether or not the true answer to any of the Special Issues is "Yes."

d. In *First v. State*, 846 S.W. 2d 836, 842 (Tex. Crim. App. 1992), the court instructed the jury that appellant had "proffered the following matters as evidence of mitigating facts or circumstances: (1) voluntary intoxication at the time of the offense, (2) sexual molestation of the defendant as a child, (3) lack of education, (4) the youthful age of the defendant." This instruction was erroneous, because, by limiting the jury's consideration to only those enumerated circumstances, it precluded consideration of another relevant mitigating circumstance, namely provocation by one of the complainants.

e. 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*, 114 S.Ct. 374 (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).

f. The defendant tried a novel approach in *Flores v. State*, 871 S.W. 2d 714 (Tex. Crim. App. 1993), where the court gave the following instruction:

During your deliberations and in answering the Special Issues presented to you, you shall consider mitigating circumstances supported by the evidence, if any presented by either party, that was admitted for your consideration in both phases of the trial. A mitigating circumstance may be any aspect of the Defendant's character, background or the circumstances of the crime for which you have found the Defendant guilty, which you believe makes a sentence of confinement for life appropriate.

If you find there are any mitigating circumstances, you must decide how much weight they deserve and give them that effect you believe to be appropriate when you answer the Special Issues.

If you believe from the evidence that the State has proven beyond a reasonable doubt that the answers to the Special Issues are 'Yes' but you are further persuaded by the mitigating evidence that the defendant should not be sentenced to death in this case, then you shall answer one or both of the Special Issues 'No' in order to give the effect to you belief that the death penalty should not be imposed in this case.

Id. at 723.

The defendant objected to *any* mitigating instruction, on strategic grounds. The court affirmed the conviction, nonetheless, finding that the instruction was beneficial, not harmful. Giving such an instruction when it is not required is not harmful. *Id.* at 723.

g. 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).

h. 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).

I. 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).

j. The court of criminal appeals found no need to reach the merits of appellant's claim that the trial court should have instructed on a non-unanimous verdict concerning mitigating evidence where appellant's mitigating evidence was not beyond the scope of the statutory special issues. *Chambers v. State*, 903 S.W. 2d 21, 35 (Tex. Crim. App. 1995).

k. 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 *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).

l. 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.

H. 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, Green v. State*, 912 S.W. 2d 189,195 (Tex. Crim. App. 1995); *see Penry v. State*, 903 S.W. 2d 715, 766 (Tex. Crim. App. 1995).

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*, ___ S.W. 2d ___, ___ No. 71,557 (Tex. Crim. App. February 21, 1996), slip op. 57. Indeed, the Supreme Court has intimated that this instruction is not only permissible, but perhaps mandatory. *Id.* at 57-58.

I. Nexus

1. In *Nobles v. State*, 843 S.W.2d 503, 506 (Tex. Crim. App. 1991), the court held that no *Penry* instruction is required where appellant offered no "testimony indicating a nexus between his childhood circumstances and the commission of the crime, helpful to the jury's consideration of the special issues or indicative of a lessened moral blameworthiness." *accord, Zimmerman v. State*, 881 S.W. 2d 360, 363 (Tex. Crim. App. 1994); *Gunter v. State*, 858 S.W. 2d 430, 447 (Tex. Crim. App. 1993).

2. In *Richard v. State*, 842 S.W. 2d 279, 283 (Tex. Crim. App. 1992), the court recognized prior decisions requiring proof of a nexus, and found that a sufficient nexus was shown between childhood circumstances and the commission of the crime. The court went on to state that, "[i]n any event, since *Nobles* was decided the Court has still not required an express showing of 'nexus' between evidence of mental defectiveness and the offense on trial." Does this mean that a nexus need not be shown where the mitigating evidence involves a mental defect? Apparently it need not, if the mental defectiveness amounts to mental retardation. *See Earhart v. State*, 877 S.W. 2d 759, 765 n.9 (Tex. Crim. App. 1994)("we do not require proof of a nexus when the defendant presents evidence of mental retardation"). If the mental defect is something other than retardation, however, a nexus is still required. In *Satterwhite v. State*, 858 S.W. 2d 412 (Tex. Crim. App. 1993), appellant put on evidence that he suffered from chronic paranoid schizophrenia at the time of trial. The court held that this did not require a *Penry* instruction, because the evidence did not attempt to explain the connection between appellant's recent mental illness and the offense. "Absent such a showing, the protections of *Penry* are not required, no special instruction was warranted, and we cannot conclude that appellant has been sentenced to death in contravention of the Eighth Amendment." *Id.* at 428; *See Richardson v. State*, 886 S.W.2d 769, 772 (Tex. Crim. App. 1994) (childhood abuse, and mental and emotional impairment); *Earhart v. State*, 877 S.W. 2d 759, 767 (Tex. Crim. App. 1994)(evidence of low ego strength score, possible psychotic decompensation and nervous condition, does not require *Penry* instruction absent proof of nexus).

3. In *Lackey v. State*, 819 S.W.2d 111, 135 n.10 (Tex. Crim. App. 1991), the court recognized "that a nexus requirement would seem to be in conflict *Lockett . . . and Eddings . . .*"

4. There is no Eighth Amendment error absent a nexus between the mitigating evidence and the commission of the offense which tends to excuse the commission of the offense. Here, "[a]ppellant has made no showing that, from the viewpoint of society as a whole, his alleged childhood experience of poverty, parental neglect, illiteracy, and a speech disorder tends to excuse his capital

crime." *Richardson v. State*, 879 S.W. 2d 874, 884 (Tex. Crim. App. 1993).

J. The Standard of Review

1. It is ordinarily deemed axiomatic that one is entitled to a jury instruction on an issue if there is *any* evidence which raise the issue. There seems to be an exception with regard to *Penry* issues. Here, the court will evaluate the evidence to see if it is of a kind as to "fairly" raise the issue. In *Nelson v. State*, 848 S.W. 2d 126, 137 (Tex. Crim. App. 1992), the court acknowledged that appellant produced evidence of child abuse, but found he provided far too little information to raise a *bona fide* issue that his fault was ameliorated by an impairment of conscience or character arising from it.

2. "[A] reviewing court must determine 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.' Although the reasonable likelihood standard does not require that the defendant prove that it was more likely than not that the jury was prevented from giving effect to the evidence, the standard requires more than a mere possibility of such a bar." *Johnson v. Texas*, 113 S.Ct. 2658, 2669 (1993)(no reasonable likelihood Texas jury was precluded from considering relevant aspects of defendant's youth)(citations omitted) .

K. Non-Record Penry Claims

1. The court will not consider evidence not offered before the jury in determining whether a *Penry* instruction should have been given. *See Ex parte Kunkle*, 852 S.W. 2d 499, 504 (Tex. Crim. App. 1993); *Ex parte Kelley*, 832 S.W.2d 44, 46 (Tex. Crim. App. 1992); *Ex parte Harris*, 825 S.W.2d 120, 122 (Tex. Crim. App. 1991); *see Ex parte Allridge*, 820 S.W.2d 152, 153 (Tex. Crim. App. 1991); *Ex parte Goodman*, 816 S.W.2d 383, 386 n.6 (Tex. Crim. App. 1991); *Ex parte Ellis*, 810 S.W.2d 208, 212 n.6 (Tex. Crim. App. 1991).

2. In determining whether the trial court properly instructed the jury in light of *Penry*, the court of criminal appeals will not consider evidence presented only at a pretrial suppression hearing. *Ex parte Lucas*, 834 S.W. 2d 339, 341 (Tex. Crim. App. 1992).

L. Due Course Of Law

1. *Penry*, of course, was decided under the Eighth Amendment of the federal constitution. In *Elliott v. State*, 858 S.W. 2d 478 (Tex. Crim. App. 1993), appellant was creative, raising a *Penry*-like claim under the due course of law provision of the Texas Constitution. The court overruled this contention, holding that due course of law was not implicated because the failure to give an instruction on mitigating evidence did not reduce the state's burden and there was no showing that punishment was not assessed by and through a trial in accordance with the law. *Id.* slip at 487-88.

M. Procedural Default

1. Between 1980 and 1989, the Texas Court of Criminal Appeals uniformly rejected every case which contended that some sort of instruction beyond the narrow special issues was necessary to give effect to mitigating evidence. Not surprisingly, many lawyers stopped bringing these claims in the trial court and on direct appeal. In *Black v. State*, 816 S.W.2d 350, 364 (Tex. Crim. App. 1991), the court recognized that, for cases tried before *Penry*, such an objection would have been futile. Accordingly, the court refused to fault appellants or their attorneys who failed to make a *Penry*-type objection in cases tried before *Penry* was decided.

N. Ineffective Assistance Of Counsel

1. The deliberate, strategic choice to withhold mitigating evidence at the punishment phase, based on a thorough and complete investigation of the facts, does not constitute ineffective assistance of counsel. *Ex parte Kunkle*, 852 S.W. 2d 499, 506 (Tex. Crim. App. 1993).

2. A claim that trial counsel was ineffective for not requesting a *Penry* charge and for not putting on more mitigating evidence will be rejected where there is no showing that the mitigating evidence proved had significance beyond the special issues, and where there is no explanation of what more mitigating evidence could have been proffered. *Narvaiz v. State*, 840 S.W. 2d 415, 434 (Tex. Crim. App. 1992).

3. Counsel was not ineffective for not requesting a jury instruction on the mitigating effect of his voluntary intoxication where he was not entitled to such an instruction. *Miniel v. State*, 831 S.W. 2d 310, 325 n.16 (Tex. Crim. App. 1992).

4. Counsel is not ineffective for failing to put on mitigating evidence of child abuse where appellant testified at trial, outside the presence of the jury, that he did not want such evidence put on. *McFarland v. State*, 845 S.W. 2d 824, 848 (Tex. Crim. App. 1993).

5. Neither counsel nor the trial court may override appellant's decision not to put on mitigating evidence. *Sonnier v. State*, 913 S.W. 2d 511, 522 (Tex. Crim. App. 1995).

O. What Is Mitigating Evidence?

1. 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:

a. Mental retardation and child abuse. *Penry v. Lynaugh*, 109 S.Ct. 2934, 2947 (1989).

b. Good behavior in prison or jail. *Franklin v. Lynaugh*, 108 S.Ct. 2320, 2328 (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).

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

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

e. 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").

f. 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).

g. 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).

h. 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).

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

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

k. 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.

l. Provocation by the victim. *Evans v. State*, 601 S.W. 2d 943, 946-47 (Tex.

Crim. App. 1980).

2. 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).

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

a. "Residual doubt" about the defendant's guilt is not mitigating. *Franklin v. Lynaugh*, 108 S.Ct. 2320, 2327 (1988).

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

c. 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).

d. 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).

e. 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).

f. 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).

g. 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).

h. 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).

I. Although evidence that the state offered appellant a life sentence might be minimally relevant, it is not admissible because the probative 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).

4. 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).

5. 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).

XXIII. 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*, *Wilkins v. State*, 847 S.W.2d 547, 554 (Tex. Crim. App. 1992); *see also Powell v. Texas*, 109 S.Ct. 3146, 3148 (1989); *Estelle v. Smith*, 451 U.S. 454, 468 (1981).

B. Reversals In Texas 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. *Wilkins 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).

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 warn-

ings "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*, 109 S.Ct. 3146, 3148 (1989); *Wilkins 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).

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.

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*, 107 S.Ct. 2906, 2918-2919 (1987)(neither Fifth nor Sixth Amendment violated when prosecution rebuts defendant's psychological evidence with reports from an examination requested by the defendant).

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*, 108 S.Ct. 2891 (1988), *aff'd on remand*, 767 S.W. 2d 759 (1989), *rev'd*, 109 S.Ct. 3146 (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*, 109 S.Ct. 3146, 3150 (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 3150 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. *Wilkins 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.*

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*, 108 S.Ct. 1792 (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*, 108 S.Ct. 1792, 1798-99 (1988); *accord*, *Wilkins 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*).

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. In *Bradford v. State*, 873 S.W. 2d 15 (Tex. Crim. App. 1993), appellant called a psychiatric expert to testify concerning future dangerousness, and the state objected on the grounds that an expert of its choosing had not been allowed to examine. The trial court held that the appellant's expert would not be allowed to testify unless the appellant submitted himself to the state's expert. Appellant agreed only over objection. This was error, in violation of both the Sixth Amendment, and the self-incrimination clause of the Fifth Amendment. *Id.* at 20.

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.

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.

XXIV. 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*, 107 S.Ct. 1676 (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 1688.

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-triggerman, 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*, ___ S.W. 2d ___, ___ No. 71,557 (Tex. Crim. App. February 21, 1996), slip op. 46-47.

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.

C. The Law of Parties is Not Applicable at Punishment

1. "The law of parties may not be applied to the three special issues in the punishment phase of a capital murder trial. That is, the State may not rely on evidence that another with whom the defendant was acting acted deliberately and with a reasonable expectation that death would result. The jury must determine whether appellant's own culpable conduct which contributed to the deceased's death was committed deliberately and with the reasonable expectation that death would result." *Rector v. State*, 738 S.W. 2d 235, 241 (Tex. Crim. App. 1986). "Therefore, the jury is required to make their determination based solely on the behavior and perceived intent of appellant and *not* the actions or intent of his co-defendant." *Green v. State*, 840 S.W. 2d 394, 409 (Tex. Crim. App. 1992).

2. "Upon request by a capital murder defendant or the State, the jury is to be instructed at the punishment phase that only the conduct of the defendant can be considered at the punishment phase, and that the instructions pertaining to the law of parties given at the guilt stage cannot be considered." *Green v. State*, 682 S.W.2d 271, 287 n.4 (Tex. Crim. App. 1984).

a. This instruction is required only when the jury has been instructed on parties at the guilt phase of the trial. *Marquez v. State*, 725 S.W.2d 217, 225 (Tex. Crim. App. 1987).

b. A timely and proper objection is necessary to preserve error, unless the error is egregious and deprives defendant of a fair trial. *Westley v. State*, 754 S.W. 2d 224, 232 (Tex. Crim. App. 1988); *cf. Johnson v. State*, 853 S.W. 2d 527, 536 (Tex. Crim. App. 1992)(anti-parties charge is not required, absent an objection).

c. The viability of the *Green* limiting instruction was questioned in *Cuevas v. State*, 742 S.W. 2d 331, 351 (Tex. Crim. App. 1987), where the court noted that the relevant language in *Green* was *dicta* and not a judicial holding. The *Cuevas* court, however, found no need to determine whether such an instruction is required, because any error in that case was harmless under the facts, since the "jury could not have been misled into believing that the law of parties applied to the special issues." *Id.* at 351-53.

3. Any entitlement to the so-called "anti-parties" charge was further watered down in *Belyeu v. State*, 791 S.W.2d 66 (Tex. Crim. App. 1989). Although the court professed concern, reversal was not required because there was no danger the jury was misled, and, in any event, the error was harmless. *Id.* at 73.

4. No special language is required to constitute an anti-parties charge. *Martinez v. State*, 899 S.W. 2d 655, 657 (Tex. Crim. App. 1994). In *Martinez*, the court held the following charge sufficient to insure that the jury's sentencing deliberations were based solely on appellant's conduct:

"You are further instructed that in answering the issues submitted to you, you will confine yourselves, in answering the following issue to the conduct of the defendant standing alone." *Id.*

5. An important distinction must be noted here. Although the state cannot rely on the law of parties to answer the special issues, the law does not absolutely forbid the execution of a non-triggerman who might be guilty only as a party. That is, even though the defendant himself does not actually cause the death of the victim, he can still be convicted of capital murder and assessed the death penalty if he is guilty of capital murder as a party, and if the evidence supports affirmative findings to the special issues, based on his individual conduct. *See Losada v. State*, 721 S.W. 2d 305, 314 (Tex. Crim. App. 1986); *Green v. State*, 682 S.W. 2d 271, 287 (Tex. Crim. App. 1984); *see also Cuevas v. State*, 742 S.W. 2d 331, 344 (Tex. Crim. App. 1987)(discussing hypothetical situation of getaway driver who planned a robbery but hoped that no one would be killed); *see generally Andrews v. State*, 744 S.W. 2d 40, 52 (Tex. Crim. App. 1987).

D. Article 37.071 § 2(b)(2)(Post-September 1, 1991)

1. The "new" second special issue, the so-called "anti-parties" issue, [Tex. Code Crim. Proc. Ann. art. 37.071 § 2(b)(2)] effective September 1, 1991, says that the court shall submit the following to the jury:

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.

2. 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.

3. The court has indicated that the anti-parties charge may no longer be necessary under the new statute, because article 37.071 § 2(b)(2), which focuses on what the defendant himself did, "adequately serves the same purpose." *McFarland v. State*, ___ S.W. 2d ___, ___ No. 71,557 (Tex. Crim. App. February 21, 1996), slip op. 46-47.

XXV. MISCELLANEOUS ISSUES RELATING TO THE PUNISHMENT PHASE

A. Victim Impact Evidence

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' 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*, 111 S.Ct. 2597 (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 2609. 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 2611 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*, ___ S.W. 2d ___, ___ No. 71,404 (Tex. Crim. App. May 22, 1996), slip op. 23.

4. "[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).

5. 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.

6. 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.

7. 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).

8. Failure to object to *Booth* error--if there is such a thing-- can result in waiver of the issue in state court, and a procedural default on federal habeas review. *See Thompson v. Lynaugh*, 821 F. 2d 1080, 1081 (5th Cir. 1987); *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); accord, *McFarland v. State*, ___ S.W. 2d ___, ___ No. 71,557 (Tex. Crim. App. February 21, 1996), slip op. 34.

9. In *Goff v. State*, ___ S.W. 2d ___ No. 71,404 (Tex. Crim. App. May 22, 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 slip op. 25. "Furthermore, we do not believe that *Payne* contemplates the instant type of 'reciprocal-victim impact' evidence." *Id.* at slip op. 26.

B. 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*, 110 S.Ct. 2822 (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*, 110 S.Ct. 2822, 2833 (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 sense of responsibility for imposing the death penalty. *Antwine v. Delo*, ___ F. 2d ___, ___ No. 94-1890WM (8th Cir. May 12, 1995).

C. The Law Of Parole At The Punishment Phase

1. For offenses committed before September 1, 1991, a defendant under a death sentence is not eligible for parole. Under the former statute, one sentenced to life imprisonment is eligible for consideration for parole after he has served 15 years imprisonment. Tex. Code Crim. Proc. Ann. art. 42.18 § 8(b)(1).

2. For offenses committed after September 1, 1991, but before September 1, 1993, one sentenced to life imprisonment for capital murder must serve at least 35 calendar years before becoming eligible for parole. For offenses committed after September 1, 1993, a minimum of 40 calendar years must be served. Tex. Code Crim. Proc. Ann. art. 42.18 § 8(b)(2) (Vernon Supp. 1995).

3. The Texas Court of Criminal Appeals has consistently held that the defendant is 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).

4. The United States Court of Appeals for the Fifth Circuit has 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.

5. The court of criminal appeals believes 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.*

6. 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 harmless." *Id.* at 498.

7. 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).

8. 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).

9. 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).

10. 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).

11. 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.

12. In Texas it is improper for the state to ask the jury to consider the law of parole when assessing punishment.

a. This error may be harmless in light of the entire record. *McKay v. State*, 707 S.W. 2d 23, 38 (Tex. Crim. App. 1985).

b. The defendant may "open the door" to improper remarks by the state, thus negating any error. *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).

13. In *Simmons v. South Carolina*, 114 S.Ct. 2187, 2190 (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."

14. 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?

15. 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, Martinez v. State*, ___ S.W. 2d ___, ___ No. 71,818 (Tex. Crim. App. May 22, 1996), slip op. 9; *McFarland v. State*, ___ S.W. 2d ___, ___ No. 71,557 (Tex. Crim. App. February 21, 1996), slip op. 60; *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.

16. Recently, some members of the court have noted that minimum parole eligibility

might be constitutionally mitigating, if the defense can demonstrate a 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).

17. In *Campbell v. State*, ___ S.W. 2d ___ No. 71,491 (Tex. Crim. App. June 14, 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 slip op. 8.

18. 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.

D. 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. The *DeGarmo* doctrine is alive and well. 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).

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 defen-

dant 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).

E. When The Jury Cannot Agree

1. Tex. Code Crim. Proc. Ann. art. 37.071(g) (Vernon Supp. 1995) 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."

2. 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 *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).

3. 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.

4. 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.

5. *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.

6. 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 re-

fused 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).

7. 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, *Lawton v. State*, 913 S.W. 2d 542, 558-59 (Tex. Crim. App. 1995).

8. 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 *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).

9. "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).

10. 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, *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).

11. "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).

F. Callins v. Collins

1. In *Callins v. Collins*, 114 S. Ct. 1127 (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. *Id.* at 1129.

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. at 1130.

2. The court of criminal appeals refused to adopt Justice Blackmun's dissenting opinion, preferring instead "them more authoritative holdings of *Gregg*, . . . *Jurek*, . . . and . . . *Tuilaepa*. . . ." *Lawton v. State*, 913 S.W. 2d 542, 558 (Tex. Crim. App. 1995)

XXVI. EXECUTION OF THE MENTALLY INFIRM

A. Ford v. Wainwright: Execution Of The Insane Is Prohibited

1. In *Ford v. Wainwright*, 477 U.S. 399 (1986), the Supreme Court recognized that the Eighth Amendment categorically forbids the execution of the insane. *Id.* at 410. The Court went on to condemn the procedure used in Florida to determine the condemned prisoner's sanity prior to his pending execution, finding at least three flaws. First, the procedure did not permit the prisoner to present material relevant to his sanity. Second, the prisoner had no opportunity to challenge or impeach the opinions of the state-appointed psychiatrists. Third, the ultimate decision was in the hands of the governor who, as "commander of the State's corps of prosecutors cannot be said to have the neutrality that is necessary for reliability in the factfinding proceeding." *Id.* at 415-416. In light of the inadequacy of the Florida state procedures, the Court found that the defendant was entitled to a *de novo* evidentiary hearing in federal court "on the question of his competence to be executed." *Id.* at 418. The Court left it to the states to develop "appropriate ways to enforce the constitutional restriction its execution of sentences." *Id.* at 416-417.

B. Texas Procedures After Ford

1. *Ex parte Jordan*, 758 S.W. 2d 250, 252 (Tex. Crim. App. 1988), noted "the alarming lack of any Texas statute specifying the procedures to be followed in raising and determining a defendant's execution competency and in the treatment and periodic reassessment of competency following an incompetency finding."

Presently, and especially in light of *Ford*, there is a grave need for the reenactment of a more specific and directive version of the old statute. We find five procedural issues presented for immediate legislative resolve: (1) how possible incompetency is to be brought to the court's attention; (2) what fact-finding procedures are necessary to determine incompetency; (3) what is the proper legal test of incompetency for execution; (4) upon a finding of incompetency, what treatment is necessitated and where such treatment is to take place; and (5) how and upon what intervals is the possibility of re-

gained competency to be brought to the court's attention. We leave the task of constructing an appropriate statute to the Legislature and invite them to do so at the earliest opportunity.

Id. at 253.

2. In *Jordan* the trial court fashioned, without the aid of statutory guidelines, procedures to be followed. Once it became aware of Jordan's incompetency, the court appointed an independent psychologist to examine him. Thereafter, Jordan was afforded a full adversarial hearing, with counsel and an opportunity to be heard, to present evidence, and to cross-examine witnesses. The district judge made the ruling on competency, deciding whether Jordan was capable of comprehending the nature, pendency and purpose of his execution. Following the determination that Jordan was presently incompetent, the court ordered re-evaluations every 90 days. The court of criminal appeals found that these procedures comport with the constitutional requirements established in *Ford*. *Id.* at 254.

3. Jordan requested a transfer to Rusk State Hospital for treatment. The court of criminal appeals noted that, although his treatment at Rusk would be "more intensive and thus preferable," Texas law specifically prohibits such transfer of persons under a death sentence. The court seemed alarmed by the idea that treatment was necessary to restore Jordan to the status of competent to be executed, yet efficacious treatment was excluded by statute. In lieu of such efficacious treatment at Rusk, the court recommended available in-house psychiatric treatment "with the purpose of such treatment being that he regain competency." *Id.* at 254-55. The opinion ends with another invitation for legislative action. *Id.* at 255.

C. Execution Of The Retarded Is Not Prohibited

1. *Ford* was concerned with execution of the insane. In *Penry v. Lynaugh*, 109 S.Ct. 2934 (1989), the Court held that the Eighth Amendment does not categorically prohibit execution of the mentally retarded. Rather, retardation is a factor that may be considered by the jury in determining defendant's culpability. "So long as sentencers can consider and give effect to mitigating evidence of mental retardation in imposing sentence, an individualized determination of whether 'death is the appropriate punishment' can be made in each particular case." *Id.* at 2958; see *Penry v. State*, 903 S.W. 2d 715, 766 (Tex. Crim. App. 1995)(it is not cruel and unusual punishment to execute one who is mentally retarded and who was brain damaged and who had been abused as a child); *Goodman v. State*, 701 S.W. 2d 850, 867 (Tex. Crim. App. 1985)(it is not cruel and unusual punishment to execute a mildly mentally retarded person); accord, *Ramirez v. State*, 815 S.W.2d 636, 655 (Tex. Crim. App. 1991).

2. The majority did not rule out the possibility that execution of the mentally retarded may someday be deemed absolutely barred by the Eighth Amendment. "While a national consensus against execution of the mentally retarded may someday emerge reflecting the 'evolving standards of decency that mark the progress of a maturing society,' there is insufficient evidence of such a consensus today." *Penry v. Lynaugh*, 109 S.Ct. at 2958.

XXVII. EXECUTION OF JUVENILES

A. Texas Law: 17 Year Olds May Be Executed

1. In Texas, persons 15 and 16 years old at the time of the offense can be certified as adults and tried for capital murder, but cannot receive the death penalty. *Beck v. State*, 648 S.W. 2d 7, 9 (Tex. Crim. App. 1983); Tex. Penal Code Ann. § 8.07 (Vernon Supp. 1995); Tex. Family Code Ann. § 54.02 (Vernon Supp. 1995).

B. Constitutional Law: 16 Year Olds May Die, But Not 15 Year Olds

1. The question presented in *Thompson v. Oklahoma*, 108 S.Ct. 2687 (1988), was whether it is cruel and unusual punishment to execute one who was 15 years old when he committed capital murder. *Id.* at 2689-90. A plurality of the Court first examined legislative enactments by the states and jury determinations, and determined that contemporary standards of human decency militate against the death penalty in such cases. *Id.* at 2691-98. Next, the plurality determined that a 15 year old's culpability should not be measured by the same standards as an adult's and that the application of the death penalty in such a case would not measurably contribute to the goals the death penalty is intended to achieve. *Id.* at 2698-2700. Accordingly, the Court held that the execution of a 15 year old is cruel and unusual punishment. The Court refused to "draw a line" and consider the propriety of executing juveniles in general. *Id.* at 2700.

2. The line was brightly drawn on June 26, 1989, however, when the Court ruled that the Eighth Amendment does not forbid the execution of 16 and 17 year olds. *Stanford v. Kentucky & Wilkins v. Missouri*, 109 S.Ct. 2969, 2980 (1989).

XXVIII. JEOPARDY

A. Is There Death After Life?

1. In *Bullington v. Missouri*, 451 U.S. 430 (1981), the petitioner was assessed a life sentence at his first trial for capital murder. Thereafter, his conviction was reversed and he was scheduled to be tried again for capital murder. The state announced its intention to seek the death penalty at the subsequent trial but this action was barred by the trial court. Appeal was taken to the Supreme Court, which agreed with the trial court and the petitioner. "Having received 'one fair opportunity to offer whatever proof it could assemble,' . . . the State is not entitled to another. * * * Because the sentencing proceeding at petitioner's first trial was like the trial on the question of guilt or innocence, the protection afforded by the Double Jeopardy Clause to one acquitted by a jury also is available to him, with respect to the death penalty, at his retrial." *Id.* at 446; *accord, Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)(Court declines invitation to overrule *Bullington*); *see also Sanne v. State*, 609 S.W. 2d 762, 767 (Tex. Crim. App. 1980).

2. The defendant in *Ex parte Sorola*, 769 S.W. 2d 920 (Tex. Crim. App.), *cert. denied*, 110 S.Ct. 569 (1989), had been tried for capital murder once before and sentenced to life imprisonment. On appeal his case was reversed because the trial court erred in discharging the jury and assessing a life sentence. Prior to his retrial, defendant claimed that double jeopardy barred the state from seeking the death penalty because the previous imposition of a life sentence, even though erroneous, was an implied finding of acquittal regarding the special issues. The court disagreed. There was no evidence that the trial court expressly or impliedly made favorable findings on the special issues when it gave defendant his first life sentence. *Id.* at 926-28.

3. In *Padgett v. State*, 717 S.W. 2d 55 (Tex. Crim. App. 1986), the defendant robbed and killed three persons in the same transaction. In 1983 he was tried and convicted of the capital murder of one of the victims, McClafin. The jury answered the first and third issues affirmatively, but could not answer the second issue; accordingly, defendant was sentenced to life imprisonment. The state then attempted to try defendant for the capital murder of Thompson, one of the other victims, and defendant filed a pre-trial writ of habeas corpus, contending that the McClafin jury's failure to answer the second issue constituted an express negative finding that collaterally estopped the state from relitigating the same issue in the Thompson trial. *Id.* at 56. The court of criminal appeals disagreed. Presuming, without deciding, that the doctrine of collateral estoppel applies to the punishment phases of different capital trial, the court went on to find that the McClafin jury's inability to answer the second issue "was not an actual determination of that issue. Without such a determination, the State is not collaterally estopped from relitigating that issue by trying appellant for the capital murder of Shirley Thompson [and] seeking the death penalty in that cause." *Id.* at 58. The court expressly decided this issue on federal constitutional grounds. *Id.* at 56 n.2.

4. In *State ex rel. Curry v. Gray*, 726 S.W. 2d 125 (Tex. Crim. App. 1987), defendant Battie was separately indicted for the capital murders of Hester and Robinson during the robbery of Hester. The evidence showed that Hester and Robinson were killed seconds apart by separate bullets during the same robbery. Battie was first tried and sentenced to death for the capital murder of Hester. After this conviction, he entered a plea bargain with the state, and pled guilty to the murder of Robinson, in exchange for a sentence of 30 years imprisonment. Thereafter, his conviction for the capital murder of Hester was reversed in federal court. On remand, the state proposed to retry Battie for the capital murder of Hester, and again seek the death penalty. The defendant filed a plea of collateral estoppel, asserting that retrial for the capital murder of Hester was barred by the state's dismissal of the capital murder indictment and decision to prosecute for murder in the Robinson killing. The trial court agreed with the defendant and granted the motion for collateral estoppel. *Id.* at 125-26. The state filed a petition for writ of mandamus. On original submission, the court of criminal appeals reversed, holding that collateral estoppel did not apply because the subsequent dismissal of the Robinson capital murder indictment did not constitute the litigation of any ultimate issue of fact. *Id.* at 127. The court then granted a motion for rehearing, and, withdrew its original decision. Without addressing the merits of the defendant's collateral estoppel claim, the court held that the state had no right to the extraordinary remedy of mandamus. "The question is not whether [the trial court] made an incorrect decision regarding the motion. The question is did [the trial court] have the *authority* to rule in any way he believed proper. In the case before us, [the trial court] had the jurisdiction and the complete authority to consider and rule upon the motion presented by Battie regarding collateral estoppel, regardless of the propriety of the actual ruling made." *Id.* at 128-29.

5. That the defendant received a life sentence pursuant to a plea bargain in one county does not collaterally estop the state from obtaining the death penalty against him in another county for an unrelated capital murder. *Bogess v. State*, 855 S.W. 2d 656, 664 (Tex. Crim. App. 1989).

6. In *Ex parte Mathes*, 830 S.W.2d 596 (Tex. Crim. App. 1992), defendant had been separately indicted for killing two different persons in the course of a robbery. He was first tried for the murder/robbery of Davis, and he was sentenced to life imprisonment after the jury answered the second special issue "no." The state then sought to try him and to impose the death sentence for the second robbery/killing. The court held that this was forbidden by collateral estoppel. The first jury "acquitted" defendant on an essential ultimate fact determinative of the death penalty, and this barred the

state from relitigating this issue in another trial. *Id.* at slip op. 4. The court indicated that its holding might be different if additional facts on the question of future dangerousness "*have not occurred* or have not been discovered despite the exercise of due diligence." *Id.* at 599 n.4. Here, though, the state stipulated it would offer "exactly the same evidence" at the second trial. *Id.* at 597 n.2.

B. No Collateral Estoppel Without Final Judgment

1. In *Garcia v. State*, 768 S.W. 2d 726 (Tex. Crim. App. 1987), the defendant fired a single shotgun blast which killed officer Serna and did not hit officer Ayala. He was initially indicted and tried for the capital murder of Serna, but was convicted of the lesser included offense of voluntary manslaughter. He was then indicted for the attempted capital murder of Ayala. Prior to trial on the second indictment, he filed a writ of habeas corpus, contending that the first verdict for the lesser included offense collaterally estopped the state from proceeding in the second trial. According to the defendant, the first jury determined that he had acted out of sudden passion arising from an adequate cause, and that in light of this final decision, the issue could not be litigated again in a second trial for attempted capital murder. The court of appeals agreed, and ordered the second indictment dismissed. The court of criminal appeals disagreed, and reversed. The court noted that, prior to its decision, the defendant had appealed and reversed his first conviction for voluntary manslaughter, and that case had been remanded for a new trial. Accordingly, the first conviction did not constitute a final conviction. "A claim of collateral estoppel cannot flow from an invalid judgment of conviction which is not final." *Id.* at 729.

C. Multiple Trials Following Acquittal

1. In *Herrera v. State*, 754 S.W.2d 795 (Tex. App.--El Paso, 1988, no pet.), the defendant was indicted for deadly assault upon a peace officer. Later, the officer died and defendant was indicted for capital murder. The trial court gave the prosecutor the option of which indictment to try first, and he chose the deadly assault case. Defendant was acquitted, after which the state sought trial for capital murder. The trial court and the court of appeals held that the second trial was barred by double jeopardy and collateral estoppel. *Id.* at 795-97.

D. Sufficiency Review Of The First Trial

1. In *Thompson v. State*, 691 S.W. 2d 627 (Tex. Crim. App. 1984), defendant's first conviction for capital murder had been reversed for *Smith* error, after which he was retried, and again convicted and sentenced to death. In his second appeal, he contended that the evidence at his first trial had been insufficient, and that therefore, jeopardy barred both a conviction and an affirmative answer to the special issues at his second trial. The court pointed out that the defendant had not challenged the sufficiency of the special issue evidence in his first appeal and that the court had rejected his argument that the evidence of guilt was insufficient. The court also noted that defendant had not filed a plea of former jeopardy before the second trial, and had not included the record of his first trial. Nevertheless, the court addressed the jeopardy contention in the second trial, and rejected it on its merits. *Id.* at 632-33.

E. Retrial Following Acquittal Of Greater Offense

1. Appellant may be retried for the lesser included offense of murder after his conviction for capital murder was reversed for insufficiency of the evidence, since the jury was instructed on the

lesser at the first trial. *Granger v. State*, 850 S.W. 2d 513, 520 (Tex. Crim. App. 1993); *State v. Rice*, 862 S.W. 2d 619, 621 (Tex. App. -- Tyler 1993, pet. ref'd).

F. Bail

1. The state is not collaterally estopped from seeking the death penalty after a court has found that proof is not evident for purposes of bail. *Ex parte Lane*, 806 S.W.2d 336, 340 (Tex. App.-Fort Worth 1991, no pet.).

G. Mistrial Before Jury Sworn

1. In *Jones v. State*, 843 S.W. 2d 487 (Tex. Crim. App. 1992), after having been selected, juror Godfrey came forward and told the judge she could not answer the special issues. The state's challenge for cause was granted, and then, appellant's motion for mistrial was granted. Jeopardy did not bar the subsequent trial, because jeopardy does not attach until the jury is impaneled and sworn. "Because only eight of the jurors at appellant's first trial were selected before the mistrial was declared the jury was not impaneled." *Id.* at 494-95.

H. Unadjudicated Offenses At Punishment

1. The use of an unadjudicated extraneous offense as evidence in the punishment phase of a capital murder trial, where the death penalty was assessed, does not bar the subsequent prosecution of that offense under either the federal or state double jeopardy clauses. *Broxton v. State*, 888 S.W. 2d 23, 25-28 (Tex. Crim. App. 1994); *see Smith v. State*, 842 S.W. 2d 401, 404 (Tex. App. -- Fort Worth 1992, pet. ref'd).

I. Retrial Following Hung Jury

1. In *Ex parte Zavala*, 900 S.W. 2d 867 (Tex. App.--Corpus Christi 1995), appellant argued that she could not be retried for capital murder because her previous jury had acquitted her of capital murder, but had hung on the lesser included offense of murder. The court of appeals held that retrial was not barred. First, the record showed that at least two jurors never intended to unconditionally vote "not guilty." *Id.* at 870. Second, the court believed that that the jury had not decided the issue submitted to it until it declared the accused guilty of one of the offenses or not guilty of them all. *Id.*

XXIX. DIRECT APPEAL**A. Who Has Jurisdiction**

1. "The appeal of all cases in which the death penalty *has been assessed* shall be to the Court of Criminal Appeals." TEX. CONST. art.V, § 5(emphasis supplied); *see also* Tex. Code Crim. Proc. Ann. art. 4.04, § 2 (Vernon Supp. 1996). The direct appeal only goes to the court of criminal appeals if the death penalty has actually been assessed. All other criminal cases are appealed to the courts of appeals. Tex. Code Crim. Proc. Ann. art. 4.03 (Vernon Supp. 1996). Thus, capital cases where the state elects not to seek the death penalty are appealable to the courts of appeals.

a. Where the appellant in a capital case complains prior to trial that bail is excessive, or has been denied altogether, appeal is to the court of appeals. *Beck v. State*, 648 S.W.2d 7, 10 (Tex. Crim. App. 1983). Since the death penalty has not actually been assessed, the court of criminal appeals lacks jurisdiction. See *Primrose v. State*, 725 S.W.2d 254, 256 (Tex. Crim. App. 1987).

b. A pre-trial appeal based on double jeopardy is to the court of appeals. See generally *Ex parte Lane*, 806 S.W.2d 336, 337 (Tex. App.--Fort Worth 1991, no pet.).

c. In *Callins v. State*, 726 S.W. 2d 555 (Tex. Crim. App. 1986), appellant was simultaneously tried and convicted of one count of capital murder and two counts of aggravated robbery. Appellant appealed the aggravated robbery convictions to the court of appeals, which dismissed, holding that these should have been appealed to the court of criminal appeals, since they were tried with a capital murder case. The court of criminal appeals disagreed. The death penalty conviction was properly appealed to the court of criminal appeals. The aggravated robbery cases were properly appealed to the court of appeals, since the death penalty was not assessed in these cases. *Id.* at 558.

B. Appeal Is Automatic

1. "The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals." Tex. Code Crim. Proc. Ann. art. 37.071(h) (Vernon Supp. 1996).

C. Even Handed, But Not Proportional

1. Unlike virtually every other capital punishment state, Texas does not conduct a proportionality review on appeal. See *Pulley v. Harris*, 465 U.S. 37, 51 (1984); *McKay v. State*, 707 S.W. 2d 23, 39 (Tex. Crim. App. 1985).

2. In *Hughes v. State*, 897 S.W. 2d 285, 294 (Tex. Crim. App. 1994), the court refused to decide whether a proportionality review is required *under the Texas Constitution*, because, even if such a review were employed, the mitigating evidence did not overwhelmingly outweigh the state's evidence in support of the special issues.

3. The court of criminal appeals does recognize a duty, however, to assure "the even-handed application of the ultimate punishment . . ." *Vigneault v. State*, 600 S.W.2d 318, 330 (Tex. Crim. App. 1980). Accordingly, the court will review the record on its own motion for sufficiency of the evidence to support the special issues. *Id.* Again, however, this is a sufficiency, not a proportionality, review. Reversals for insufficient punishment evidence are exceedingly rare.

D. Relaxation of Procedural Rules

1. Do the courts grant any special treatment to appellants or their lawyers in death penalty appeals? Occasionally the United States Supreme Court has generously construed the Eighth Amendment, and then justified this construction by noting that death is different. *E.g., Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985)("the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination"); *Coker v. Georgia*, 433 U.S. 584, 598 (1977)(death penalty "unique in its severity and irrevocability"). Certiorari

was granted in *Kyles v. Whitley*, 115 S. Ct. 1555 (1995), to examine a *Brady* claim, "[b]ecause '[o]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case . . .'" *Id.* at 1560.

2. The court of criminal appeals has also, on occasion, relaxed its usually strict procedural rules in death cases. *E.g.*, *Hicks v. State*, 860 S.W. 2d 419, 422 (Tex. Crim. App. 1993)(hybrid representation); *Draughon v. State*, 831 S.W. 2d 331, 337 (Tex. Crim. App. 1992)(permitting both appellant and his attorney to file supplemental briefs); *Modden v. State*, 721 S.W.2d 859, 861 n.2 (Tex. Crim. App. 1986) (review of multifarious grounds of error and issues raised *pro se*); *Moore v. State*, 700 S.W.2d 193, 207 (Tex. Crim. App. 1985)(hybrid representation); *Lackey v. State*, 638 S.W.2d 439, 4471 (Tex. Crim. App. 1982); *see also Hernandez v. State*, 819 S.W.2d 806, 820 (Tex. Crim. App. 1991); *Boyd v. State*, 811 S.W.2d 105, 109 (Tex. Crim. App. 1991); *but see Patrick v. State*, 906 S.W. 2d 481, 498 (Tex. Crim. App. 1995); *Lockhart v. State*, 847 S.W. 2d 568, 569 n.1 (Tex. Crim. App. 1992); *Black v. State*, 816 S.W.2d 350, 356 n.11 (Tex. Crim. App. 1991); *Farris v. State*, 819 S.W.2d 490, 493 n.1 (Tex. Crim. App. 1990); *Rosales v. State*, 841 S.W.2d 368, 383 (Tex. Crim. App. 1992).

3. In *Cuevas v. State*, 742 S.W. 2d 331, 335 n.4 (Tex. Crim. App. 1987), the court warned that appellant risked rejection for multifariousness by complaining of 14 cause challenge denials in a single point of error. Calling it a "close question," the court nevertheless addressed the point of error.

4. The court has refused to review matters presented to it in a *pro se* brief, because appellant is not entitled to hybrid representation. *Turner v. State*, 805 S.W.2d 423, 425 n.1 (Tex. Crim. App. 1991); *accord, Miniell v. State*, 831 S.W.2d 310, 313 n.1 (Tex. Crim. App. 1992).

5. "Given the nature of applicant's claim and the heightened need for due process standards to meet in death penalty cases, we hold that appellant's claim is cognizable via an application for writ of habeas corpus." *Ex parte McKay*, 819 S.W.2d 478, 485 (Tex. Crim. App. 1990).

6. The relaxation of standards of review, however, is largely illusory. *Harris v. State*, 784 S.W.2d 5 (Tex. Crim. App. 1989), is a good illustration. In one place in the opinion the court notes an arguable procedural default, but reviews the point of error anyway "given the severity of the penalty assessed." *Id.* at 21 n.21. The court rejected the point on its merits. In other places in the opinion the court makes no mention of its earlier relaxed standard of review, and rules against appellant purely on the basis of a procedural default. *See id.* at 24, 24 n.24, 26-27, 27 n.29. Could it be that court only relaxes when it is able to find from the merits that no reversible error was committed? Despite those isolated death-is-different cases, prudent counsel should not expect any special treatment from present-day appellate courts. In fact, a better rule to live by might be, "bad cases make bad law."

E. Reformation

1. The court of criminal appeals shall reform a death sentence to life imprisonment if it finds the evidence insufficient to support an affirmative answer to an issue submitted under article 37.071 § 2(b), or article 37.0711 § 3(b), or a negative answer to an issue submitted under article 37.071 § 2(e), or article 37.0711, § 3(e). Tex. Code Crim. Proc. Ann. art. 44.251(a) (Vernon Supp. 1996).

2. For reversible error occurring at the punishment phase, but *not* involving

insufficiency of the punishment evidence, the court of criminal appeals shall reform the sentence of death to one of life imprisonment if: "within 30 days after the date on which the opinion is handed down, the date the court disposes of a timely request for rehearing, or the date that the United States Supreme Court disposes of a timely filed petition for writ of certiorari, whichever date is later, the prosecuting attorney files a motion requesting that the sentence be reformed to confinement for life." Tex. Code Crim. Proc. Ann. art. 44.251(b) (Vernon Supp. 1996).

3. If the court of criminal appeals finds reversible error affecting only the punishment stage, which does not involve insufficiency of the punishment evidence, and the state does not file a motion for reformation of sentence in the 30 day time period described above, a new trial shall be granted as detailed in article 44.29(c) of the Texas Code of Criminal Procedure. Tex. Code Crim. Proc. Ann. art. 44.251(c) (Vernon Supp. 1996).

4. Tex. Code Crim. Proc. Ann. art. 44.29(c) provides as follows:

If any court sets aside or invalidates the sentence of a defendant convicted of an offense under Section 19.03, Penal Code, and sentenced to death on the basis of any error affecting punishment only, the court shall not set the conviction aside but rather shall commence a new punishment hearing under Article 37.071 or Article 37.0711 of this code, as appropriate, as if a finding of guilt had been returned. The court shall empanel a jury for the sentencing stage of the trial in the same manner as a jury is to be empaneled by the court in other trials before the court for offenses under Section 19.03, Penal Code. At the new punishment hearing, the court shall permit both the state and the defendant to introduce evidence as permitted by Article 37.071 or Article 37.0711 of this code.

5. If the appellant establishes a *Witt* violation, the conviction itself need not be reversed. Rather, the court need only remand for a new punishment proceeding. "We hold that voir dire error regarding a subject that a jury would consider only during the punishment phase of a trial is 'error affecting punishment only,' unless the defendant produces evidence showing that the error necessarily produced a jury biased against the defendant on the issue of guilt." *Ransom v. State*, 920 S.W. 2d 288, 298 (Tex. Crim. App. 1996); *accord, Clark v. State*, ___ S.W. 2d ___, ___ No. 71,462 (Tex. Crim. App. May 22, 1996), slip op. 7.

6. Where habeas relief is granted due to the improper admission of a psychiatrist's testimony at the punishment phase of the trial, appellant is not entitled to a full retrial, but only to a new punishment hearing. *Purtell v. State*, 910 S.W. 2d 145, 146-47 (Tex. App.--Eastland 1995).

7. The court of criminal appeals does not have authority to reform the judgment of conviction to reflect a conviction for the lesser offense of murder based on insufficiency. *Urbano v. State*, 837 S.W. 2d 114, 117 (Tex. Crim. App. 1992); *cf. Bigley v. State*, 865 S.W. 2d 26, 27-28 (Tex. Crim. App. 1993)(the *intermediate* courts of appeals, however, do have such authority); *see Watkins v. State*, 880 S.W. 2d 16, 18 (Tex. App. -- Tyler 1993, no pet)(because the evidence was insufficient to prove remuneration, and therefore capital murder, the court reformed the judgment to reflect a conviction for murder, and remanded the case for a punishment determination only).

F. Life Sentence Moots Punishment Complaints

1. Where the punishment is assessed at life, any appellate complaints about the sentencing portion of the trial are moot. *E.g.*, *Phelps v. State*, 594 S.W.2d 434, 437 (Tex. Crim. App. 1980); *Marini v. State*, 593 S.W.2d 709, 716 (Tex. Crim. App. 1980); *White v. State*, 591 S.W.2d 851,858 (Tex. Crim. App. 1979).

G. Waiver

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).

2. 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).

3. The *DeGarmo* doctrine is alive and well. 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).

4. Error that occurs at punishment is *not* waived. Also, the court must carefully examine the elements of the offense to ensure that a judicial confession was, in fact, given. *McGlothlin v. State*, 896 S.W. 2d at 188.

5. 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.*

H. Inaccurate Records

1. The court of criminal appeals may abate the appeal and remand to the trial court to correct an inaccurate record. See *James v. State*, 745 S.W. 2d 28, 28 (Tex. Crim. App. 1988); *Black v. State*, 745 S.W. 2d 27, 27 (Tex. Crim. App. 1988).

I. Standing

1. A fellow inmate may lack standing to challenge the validity of a death sentence of a capital defendant who himself has elected to forego his right to direct appeal. *Whitmore v. Arkansas*, 495 U.S. 149, 151 (1990).

J. Special Rules Of Appellate Procedure In Capital Cases

1. The Texas Rules of Appellate Procedure "govern procedure . . . in direct appeals of death penalty cases to the Court of Criminal Appeals from district courts." Tex. R. App. Proc. 1(a).

2. In most cases, there are no special procedural rules for death penalty appeals. Listed below are the exceptions:

a. In non-death penalty cases, appeal is perfected by a timely, written notice of appeal. "[I]t is unnecessary to give notice of appeal in death penalty cases." Tex. R. App. Proc. 40(b)(1).

b. "Appropriate provisions in Rule 74 shall govern preparation and filing of briefs in a case in which the death penalty has been assessed, except that a brief may exceed fifty pages and an original and ten copies of it shall be filed." Tex. R. App. Proc. 210(b).

c. The court of criminal appeals "shall sit en banc for hearing appeals in death penalty cases" Tex. R. App. Proc. 222(a).

K. Arguing The State Constitution

1. In *Heitman v. State*, 815 S.W. 2d 681 (Tex. Crim. App. 1991), the court recognized that Texas courts are empowered to interpret the State Constitution more protectively than the United States Supreme Court has interpreted the Federal Constitution. Lawyers seeking a more protective interpretation, however, must proffer argument and authority as to how State protection differs from Federal protection. "State and federal constitutional claims should be argued in separate grounds, with separate substantive analysis or argument provided for each ground." *Muniz v. State*, 851 S.W. 2d 238, 251 (Tex. Crim. App. 1993). Otherwise, the court will not address the Texas constitutional claims. *Id.*; *accord*, *Narvaiz v. State*, 840 S.W. 2d 415, 432 (Tex. Crim. App. 1992); *but see Arnold v. State*, 873 S.W. 2d 27, 29 n.2; 33 n.4 (Tex. Crim. App. 1993)(early on in the opinion, the court addresses the merits of appellant's various state and federal constitutional claims, despite the fact of their "incomplete and multifarious nature," contrary to the dictates of *Heitman*; later, in the same opinion, the court cites *Heitman* as justification for not addressing insufficiently briefed points).

2. In *Lawton v. State*, 913 S.W. 2d 542 (Tex. Crim. App. 1995), appellant believed it "particularly noteworthy" that the state constitution prohibits "cruel *or* unusual punishment" while the federal constitution refers to cruel *and* unusual punishment. "The noteworthiness of the distinction is not self-evident to us. Appellant offers no arguments or authority explaining why the difference is noteworthy; his briefing regarding this point is inadequate. To adequately brief a state constitutional issue appellant must proffer specific arguments and authorities supporting his contentions under the state constitution. Otherwise his contentions are inadequately briefed." *Id.* at 558; *see also McFarland v. State*, ___ S.W. 2d ___, ___ No. 71,557 (Tex. Crim. App. February 21, 1996), slip op. 55(a mere claim that the Texas Constitution provides broader protection, without "substantive citation or authority" will be rejected).

L. Prosecutorial Vindictiveness

1. In this case the court of appeals found prosecutorial vindictiveness when the state

retried appellant on a charge of capital murder after the court had reversed his conviction for murder. The court reformed the conviction from capital murder to murder and reversed the judgment imposing punishment and remanded the case for another punishment hearing. *Doherty v. State*, 892 S.W. 2d 13, 17 (Tex. App.--Houston [1st Dist.] 1994, pet. ref'd).