CAPITAL MURDER: WRIT OF HABEAS CORPUS

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I. SCOPE OF PAPER

The purpose of this paper is to discuss the litigation of writs of habeas corpus in state court following a conviction for capital murder in which the death penalty was assessed. Practice in federal court is not discussed, but relevant federal statutes can be found at the end of the paper.

II. A DISCUSSION OF ARTICLE 37.071

A. Application to Death Penalty Case

1. *Text: Article 11.071 §1*

"Notwithstanding any other provision of this chapter, this article establishes the procedures for an application for a writ of habeas corpus in which the applicant seeks relief from a judgment imposing a penalty of death." TEX. CODE CRIM. PROC. ANN. art. 11.071, § 1 (Vernon Supp. 1998).

2. *What is habeas corpus?*

a. "A writ of habeas corpus is an order from a judge commanding a party, who is alleged to be restraining the applicant in some way, to appear before the court with the object of alleged restraint and explain the reasons for the restraint." *Ex parte Hargett*, 819 S.W. 2d 866, 868 (Tex. Crim. App. 1991). "The purpose of the writ of habeas corpus is simple--it is a process utilized to determine the lawfulness of confinement." *Ex parte Adams*, 768 S.W. 2d 281, 287 (Tex. Crim. App. 1989).

b. "The writ of habeas corpus is the remedy to be used when any person is restrained in his liberty. It is an order issued by a court or judge of competent jurisdiction, directed to any one having a person in his custody, or under his restraint, commanding him to produce such person, at a time and place named in the writ, and show why he is held in custody or under restraint." TEX. CODE CRIM. PROC. ANN. Ann. art. 11.01 (Vernon 1977).

c.. "Because of the unique nature of the remedy, habeas corpus relief is underscored by elements of fairness and equity." *Ex parte Drake*, 883 S.W. 2d 213, 215 (Tex. Crim. App. 1994).

3. *The constitutionality of article 11.071*

a. The court of criminal appeals has rejected several constitutional challenges to article 11.071 including that it violates the separation of powers clause of the state constitution; the provision of the state constitution that prohibits suspension of the writ of habeas corpus; the provision of the state constitution prohibiting ex post facto laws; the federal and state constituitional guarantees of equal protection and due process and due course of law; the federal and state constitutional guarantees of effective assistance of counsel, and the state constitutional provision guaranteeing open courts. *Ex parte Davis*, 947 S.W. 2d 216, 218-221 (Tex. Crim. App. 1996).

4. *Exclusive procedures*

a. It appears that a majority of the court of criminal appeals believes that "Article 11.071 now contains the *exclusive* procedures for the exercise of this Court's original habeas corpus jurisdiction in death penalty cases." *Ex parte Davis*, 947 S.W. 2d 216, 224 (Tex. Crim. App. 1996)(McCormick, P.J., concurring)(emphasis in original). Judge McCormick's concurring opinion was joined by Judges White, Meyers, Keller and Mansfield. *Id*. at 231, 235. *See also Ex parte Smith*, 1998 WL 210613 *1 (Tex. Crim. App. April 22, 1998).

b. Judge Baird concurred in the court's judgment in *Davis* which found article 11.071 constitutional. Judge Baird disagrees that this statute provides the exclusive procedures for habeas corpus jurisdiction in capital cases, believing instead that Article V, § 5 of the Texas Constitution empowers the court with "general original jurisdiction to issue writs of habeas coprus." *Ex parte Davis*, 947 S.W. 2d at 232(Baird, J., concurring); *see Ex parte Smith*, 1998 WL 210613 *2 (Tex. Crim. App. April 22, 1998)(Judge Baird would treat this petition, which was untimely under article 11.071, as one invoking the original jurisdiction of the court under the Texas Constitution).

B. Representation by Counsel

1. *Text: Article 11.071 §2*

"(a) An applicant shall be represented by competent counsel unless the applicant has elected to proceed pro se and the convicting trial court finds, after a hearing on the record, that the applicant's election is intelligent and voluntary.

(b) If a defendant is sentenced to death on or after September 1, 1995, the convicting court, immediately after judgment is entered under Article 42.01, shall determine if the defendant is indigent and, if so, whether the defendant desires appointment of counsel for the purpose of a writ of habeas corpus. If a defendant is sentenced to death, does not have an initial application for a writ of habeas corpus under Article 11.07 pending on September 1, 1995, and has not been denied relief by the court of criminal appeals in an initial habeas corpus proceeding under Article 11.07, the convicting court, as soon as practicable, shall determine whether the defendant is indigent and, if so, whether the defendant desires the appointment of counsel for the purpose of a writ of habeas corpus.

(c) Immediately after the convicting court makes the findings required under Subsections (a), (b), and (i), the clerk of the convicting court shall forward to the court of criminal appeals:

(1) a copy of the judgment;

(2) a list containing the name, address, and telephone number of each counsel of record for the applicant at trial and on direct appeal; and

(3) if the applicant elects to proceed pro se, any findings made by the convicting court on the voluntariness of the applicant's election.

(d) Unless an applicant elects to proceed pro se or is represented by retained

counsel, the court of criminal appeals shall, under rules and standards adopted by the court, appoint competent counsel at the earliest practicable time after receipt of the documents under Subsection (c).

(e) The court of criminal appeals may not appoint an attorney as counsel under this section if the attorney represented the applicant at trial or on direct appeal, unless:

(1) the applicant and the attorney request the appointment on the record; or

(2) the court finds good cause to make the appointment.

(f) If counsel is the same person appointed as counsel on appeal under Article 26.052, the court of criminal appeals shall appoint a second counsel to assist in the preparation of the appeal and writ of habeas corpus.

(g) If the court of criminal appeals denies an applicant relief under this article, an attorney appointed under this section to represent the applicant shall, not later than the 15th day after the date the court of criminal appeals denies relief or, if the case is filed and set for submission, the 15th day after the date the court of criminal appeals issues a mandate on the initial application for a writ of habeas corpus under this article, move to be appointed as counsel in federal habeas review under 21 U.S.C. Section 848(q) or equivalent provision or, if necessary, move for the appointment of other counsel under 21 U.S.C. Section 848(q) or equivalent provision.

(h) The court of criminal appeals shall reasonably compensate an attorney appointed by the court under this section from state funds. The court shall appoint and reasonably compensate an attorney for representation in a subsequent or untimely application for a writ of habeas corpus, if the court determines that the requirements of Section 5 allowing consideration of the application have been satisfied.

(i) If an attorney is representing an inmate under a sentence of death for an initial application for a writ of habeas corpus under Article 11.07 pending on September 1, 1995, the attorney may request that the convicting court determine if the defendant is indigent and, if so, whether the defendant desires appointment of counsel for the purpose of the writ of habeas corpus." TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2 (Vernon Supp. 1998).

2. "*Shall be represented by competent counsel"*

a. In *Ex parte Martinez*, ___ S.W. 2d ___, ___ No. 36,840-01 (Tex. Crim. App. April 29, 1998)(Baird, J., dissenting), slip op. 1, Judge Baird dissented, noting that appointed counsel's habeas application was five and a half pages long, raised four points of error and cited three cases. "Under these circumstances, the merits of the application should not be reached. Instead, this matter should be remanded to the habeas court to determine whether applicant has received effective assistance of counsel. Because the majority does not, I dissent." *See also Ex parte Wolfe*, ___ S.W. 2d ___, ___ No. 35,681-01 (Tex. Crim. App. May 20, 1998), slip op. 1(where the application was really a discovery application, this matter should be remanded to the habeas court to determine whether applicant has been afforded effective assistance of counsel on this habeas application as required by Tex. Code

Crim. Proc. Ann. art. 11.071 §2).

b. In *Ex parte Kerr*, ___ S.W. 2d ___ No. 35,065-02 (Tex. Crim. App. February 23, 1998)(Overstreet, J., dissenting), appointed habeas counsel filed a writ with a single ground of error, challenging the constitutionality of article 11.071. The majority of the court denied this writ. Judge Overstreet dissented, on the grounds that the writ lawyer was ineffective.

> Must applicant suffer the ultimate punishment, death, because of his attorney's mistake? According to a majority of this Court, yes, he must.
>
> For this Court to approve of such and refuse to stay this scheduled execution is a farce and travesty of applicant's legal right to apply for habeas relief. It appears that this Court, in approving such a charade, is punishing applicant, rewarding the State, and perhaps even encouraging other attorneys to file perfunctory "non-applications." Such a "non-application" certainly makes it easier on everyone - no need for the attorney, the State, or this Court to consider any potential challenges to anything that happened at trial. Nevertheless, the Legislature has provided convicted capital defendants with the right to make such challenges by habeas corpus application.
>
> I do not know what the majority thinks is going to happen to applicant, but he does have an imminent execution date set. If applicant is executed as scheduled, this Court is going to have blood on its hands for allowing it to go forward without applicant being permitted to raise claims by Texas state habeas corpus application. By this dissent, I wash my hands of such repugnance.

Id.

c. 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).

3. *When counsel is appointed prior to the effective date of article 11.071*

a. 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*, 931 S.W. 2d 537, 537 (Tex. Crim.App. 1996).

4. *Guidelines Concerning Compensation*

Subsection (h) requires that the court of criminal appeals reasonably compensate counsel appointed to represent indigents during capital habeas litigation. A copy of the *Guidelines And Rules For Attorneys' Fees And/Or Expenses Pursuant To Tex. Code Crim. Proc. Ann. Art. 11.071 Appointment* is attached to this paper as Appendix A.

5. *Self-representation*

a. In *Faretta v. California*, 422 U.S. 806 (1975), the Supreme Court held that persons accused of crime have a right to represent themselves under the Sixth Amendment. *Id.* at 807. *E.g., Scarbrough v. State*, 777 S.W.2d 83, 92 (Tex. Crim. App.1989); *Johnson v. State*, 676 S.W.2d 416, 418 (Tex. Crim. App. 1984); *Blankenship v. State*, 673 S.W.2d 578, 582 (Tex. Crim. App. 1984). Clearly, the Texas legislature believes that a capital habeas applicant should also have the right of self-representation, if this choice is exercised intelligently and voluntarily.

b. *Faretta* requires that the court make the trial defendant aware of the dangers and disadvantages of self-representation. Presumably this would also have to be done in order to insure that the habeas applicant waived his right to counsel "intelligently and voluntarily," as required by article 11.071 § 2(a). In *Scarbrough v. State*, 777 S.W. 2d 83 (Tex. Crim. App. 1989), the court of criminal appeals wrote the following:

> In order competently and intelligently to invoke his Sixth Amendment right to represent himself, an accused "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" As we have shown *ante*, appellant in this cause was provided an extensive awareness of problems in the undertaking so that his decision would not be lightly made. However, "a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation[.]" "[N]either the defendant's technical legal training nor his ability to conduct an adequate defense are requisites for self-representation." While the choice must be knowingly and intelligently made, it need not be wise. Indeed, the accused must be permitted to "conduct his own defense ultimately to his own detriment," if that is his informed decision. Whether he is competent to represent himself is immaterial; the appropriate question is whether he is competent to choose the endeavor. Moreover, that its exercise may cause some inconvenience or even disruption in the trial proceedings, so long as it is not a calculated obstruction, cannot deprive the accused of the right, once asserted.

Id. at 92(citations omitted).

c. There is no requirement that the court engage in "formulaic questioning." *Burgess v. State*, 816 S.W. 2d 424, 428 (Tex. Crim. App. 1991). "It is required only that the record contain proper admonishments concerning pro se representation and any necessary inquiries of the defendant so that the trial court may make 'an assessment of his knowing exercise of the right to defend himself.'" *Id.* In *Burgess*, the trial court advised appellant that the rules of evidence that applied to lawyers would also apply to him; the court informed appellant that it would treat his objections in exactly the same manner as a lawyer's objections; it admonished appellant that he would be under the same rules of procedure and conduct required of a lawyer; it warned appellant that it would not cut him any "slack" and that it would hold him completely to the same standard it would hold a lawyer to, and it cautioned him that the appellate court would do the same. *Id.* at 427. This admonishment was sufficient to insure that appellant chose to represent himself "with his 'eyes open.'" *Id.* at 428.

d. The code of criminal procedure requires that a trial court advise one who wishes to represent himself of the dangers and disadvantages of doing so. If the court finds that the

defendant's waiver is voluntary and intelligent, it shall provide a statement for the defendant's signature, substantially in the following form:

> "I have been advised this ___ day of _____, 19__, by the (name of court) Court of my right to representation by counsel in the trial of the charge pending against me. I have been further advised that if I am unable to afford counsel, one will be appointed for me free of charge. Understanding my right to have counsel appointed for me free of charge if I am not financially able to employ counsel, I wish to waive that right and request the court to proceed with my case without an attorney being appointed for me. I hereby waive my right to counsel. (signature of the defendant)."

TEX. CODE CRIM. PROC. ANN. art. 1.051(g)(Vernon Supp. 1998).

6. *Appointment in federal court*

a. If applicant loses in the court of criminal appeals, article 11.071 § 2(g) requires counsel to move to be appointed as counsel in federal court within 15 days, pursuant to 21 U.S.C. § 848(q).

b. Section 848(q) provides, in pertinent part:

> (4)(B) In any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).
>
> (5) If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court.
>
> (6) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.
>
> (7) With respect to paragraph (5) and (6), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.
>
> (8) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings,

including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United Stated, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings for executive or other clemency as may be available to the defendant.

(9) Upon finding that investigative, expert, or other services are reasonable necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant, and, if so authorized, shall order the payment of fees and expenses therefor under paragraph (10). No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

(10) (A) Compensation shall be paid to attorneys appointed under this subsection at a rate of not more than $125 per hour for in-court, and out-of-court time. Not less than 3 years after April 24, 1996, the Judicial Conference is authorized to raise the maximum for hourly payment specified in the paragraph up to the aggregate of the overall average percentages of the adjustments in the rates of pay for the General Schedule made pursuant to section 5305 of Title 5 on or after such date. After the rates are raised under the preceding sentence, such hourly range may be raised at intervals of not less than one year, up to the aggregate of the overall average percentages of such adjustments in the rates of pay for the General Schedule made pursuant to section 5305 of Title 5 on or after such date. After the rates are raised under the preceding sentence, such hourly range may be raised at intervals of not less than one year, up to the aggregate of the overall average percentages of such adjustments made since the last raise under this paragraph.

(B) Fees and expenses paid for investigative, expert, and other reasonably necessary services authorized under paragraph (9) shall not exceed $7,500 in any case, unless payment in excess of that limit is certified by the court, or by the United States magistrate judge, if the services were rendered in connection with the case disposed of entirely before such magistrate judge, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active circuit judge.

(C) The amounts paid under this paragraph for services in any case shall be disclosed to the public, after the disposition of the petition.

21 U.S.C. § 848(q).

C. Investigation of Grounds for Application

1. *Text: Art. 11.071 § 3*

"(a) On appointment, counsel shall investigate expeditiously, before and after the appellate record is filed in the court of criminal appeals, the factual and legal grounds for the filing of an application for a writ of habeas corpus.

(b) Not later than the 30th day before the date the application for a writ of habeas corpus is filed with the convicting court, counsel may file with the court of criminal appeals an ex parte, verified, and confidential request for prepayment of expenses, including expert fees, to investigate and present potential habeas corpus claims. The request for expenses must state:

(1) the claims of the application to be investigated;

(2) specific facts that suggest that a claim of possible merit may exist; and

(3) an itemized list of anticipated expenses for each claim.

(c) The court shall grant a request for expenses in whole or in part if the request for expenses is timely and reasonable. If the court denies in whole or in part the request for expenses, the court shall briefly state the reasons for the denial in a written order provided to the applicant.

(d) Counsel may incur expenses for habeas corpus investigation, including expenses for experts, without prior approval by the court of criminal appeals. On presentation of a claim for reimbursement, which may be presented ex parte, the court shall order reimbursement of counsel for expenses, if the expenses are reasonably necessary and reasonably incurred. If the court denies in whole or in part the request for expenses, the court shall briefly state the reasons for the denial in a written order provided to the applicant. The applicant may request reconsideration of the denial for reimbursement.

(e) Materials submitted to the court under this section are a part of the court's record." TEX. CODE CRIM. PROC. ANN. art. 11.071, § 3 (Vernon Supp. 1998).

2. *Practice Tips*

a. Expeditious investigation, factual and legal, is mandated by the statute.

(i) Get a competent investigator appointed. Article 11.071 §3(b) permits you to request prepayment of investigative expenses, no later than 30 days prior to filing the application for writ of habeas corpus, by a confidential, verified and ex parte motion, which states "the claims of the application to be investigated; specific facts that suggest that a claim of possible merit may exist; and an itemized list of anticipated expenses for each claim." Or, you can incur expenses without prior approval and seek reimbursement by an ex parte motion for all reasonable and necessary expenses. *See* TEX. CODE CRIM. PROC. ANN. art. 11.071, § 3 (d) (Vernon Supp. 1998).

(ii) Visit your client. To see men, you must call the warden's office at the Ellis Unit by 3:30 p.m. the day before your visit at (409) 295-5756. To visit women at the Mountainview Unit, call (254) 865-7226 by 3:00 p.m. the day before. Bring photo identification and

your bar card. Also bring with you anything that require your client's signature, such as releases.

(iii) Visit your client's family.

(iv) Read the entire trial record.

(v) Request permission from the prosecutor to view their file.

(vi) Talk to the trial and appellate attorneys and investigators. The client's files belong to the client. Get them.

(vii) Talk to counsel for co-defendants, if any, and, if permitted, to the co-defendants themselves.

(viii) Get every record of your client's that you can think of, including birth certificates, school records, medical records, military records, employment records, juvenile records, jail records, prison records, probation records, parole records, rap sheets, etc.

(ix) Interview witnesses who were called at the trial, or who should have been called by competent trial counsel, or who can otherwise provide useful information.

(x) Interview jurors who heard the trial.

(xi) Seek the appointment, under § 3, of all necessary experts.

(xii) Do the necessary legal research.

b. For some very helpful suggestions on the investigation necessary for the preparation of a writ in a death penalty case, see: Lynn B. Lamberty, *State Capital Writs: A View From The Applicant's Perspective*, *in* STATE BAR OF TEXAS, TEXAS CRIMINAL APPELLATE MANUAL K-31-39 (1996). Mr. Lamberty's "Investigative Source List," contained in Appendix I of his article, is particularly useful.

D. Filing of Application

1. *Text: Art. 11.071 § 4*

"(a) An application for a writ of habeas corpus, returnable to the court of criminal appeals, must be filed in the convicting court not later than the 180th day after the date the court of criminal appeals appoints counsel under Section 2 or not later than the 45th day after the date the appellee's original brief is filed on direct appeal with the court of criminal appeals. If an applicant who was convicted before September 1, 1995, does not have an initial application for a writ of habeas corpus under Article 11.07 pending on September 1, 1995, and has not previously filed an application under Article 11.07, the applicant's initial application must be filed not later than the 180th day after the date the court of criminal appeals appoints counsel under Section 2 or not later than the 45th day after the date the appellee's original brief is filed on direct appeal, whichever is later.

(b) An application filed after the filing date that is applicable to the applicant under Subsection (a) is presumed untimely unless the applicant establishes good cause by showing particularized justifying circumstances.

(c) If counsel has been appointed and a timely application is not filed on or before the applicable filing date under Subsection (a), the convicting court shall, before the 11th day after the applicable filing date under Subsection (a), conduct a hearing and determine if good cause exists for either the untimely filing of an application or other necessary action.

(d) If the convicting court finds the applicant failed to establish good cause for the delay, the court shall:

(1) make appropriate findings of fact;

(2) enter an order to that effect;

(3) direct the clerk of the court to enter a notation that the petition is untimely; and

(4) send a copy of the petition, findings, and notation to the court of criminal appeals as provided by Section 5.

(e) If the convicting court finds that the applicant has established good cause for the delay, the convicting court shall proceed as if the application was timely filed.

(f) Notwithstanding Subsection (b), (c), or (e), an applicant cannot establish good cause for the untimely filing of an application filed after the 91st day after the applicable filing date under Subsection (a).

(g) A failure to file an application before the 91st day after the filing date applicable to the applicant under Subsection (a) constitutes a waiver of all grounds for relief that were available to the applicant before the last date on which an application could be timely filed, except as provided by Section 5.

(h) If an amended or supplemental application is not filed within the time specified under Subsection (a), the court shall treat the application as a subsequent or untimely application for a writ of habeas corpus under Section 5, unless the applicant:

(1) establishes good cause by showing particularized justifying circumstances for not raising in the initial application the facts or claims contained in the amended or supplemental application; and

(2) the amended or supplemental application is filed before the 91st day after the filing date applicable to the applicant under Subsection (a)." TEX. CODE CRIM. PROC. ANN. art. 11.071, § 4 (Vernon Supp. 1998).

2. *The time deadlines are strict*

a. The deadlines established by article 11.071 are strict. The court dismissed the application in *Ex parte LaRoyce Lathair Smith*, ___ S.W. 2d ___ No. 36,512-01 (Tex. Crim. App. April 22, 1998), because it was filed 129 days late. Judge Baird dissented to the dismissal. He believed that, although the court could properly dismiss the late application under article 11.071, § 5, "where the application was untimely filed by counsel appointed by this Court, we should invoke our original jurisdiction," pursuant to Article V, § V of the Texas Constitution. *Id*. at slip. op. 2(Baird, J., dissenting). There appears to be a tension between §2(a), which requires the court to appoint "competent counsel," and §5, which requires dismissal if the appointed counsel files the application late. Judge Baird believed that the court "unwisely" chose which provision it would adhere to strictly, and which it would adhere to loosely. *Id*. at slip op. 2 n.2. Judge Overstreet also dissented, noting that the dismissal "borders on barbarism." *Id*. at slip op.1(Overstreet, J., dissenting). "Must the indigent Texas Death Row inmate suffer the ultimate punishment of death without benefit of State habeas review because of his lawyer's tardiness?" *Id*. Judge Womack concurred in the dismissal, and disagreed with both Judges Baird and Overstreet. "The law is clear; this court shall dismiss this application because it was filed late. If the law is barbarous, the legislature should repeal it or the governor should commute or pardon those who are subjected to it. In the meantime, we must follow it." *Id*. at slip op. 3(Womack, J., concurring).

b. *Ex parte Galvan*, 770 S.W. 2d 822 (Tex. Crim. App. 1989), was decided long before article 11.071 was enacted. Even so, it has some interesting language. There applicant waited six years after his conviction to complain in his writ that he had been denied the right to appeal.

> This Court has consistently and properly held that we have no desire to impose upon defendants the requirement that claims for relief be asserted within a specified period of time. *Such a rule would be arbitrary and probably unconstitutional*.

Id. at 824(emphasis supplied)(citations omitted).

3. *Requisites of the application*

a. Article 11.071 itself is silent on the form of the application.

b. Article 11.14 of the Texas Code of Criminal Procedure, captioned "Requisites of petiton," provides the following:

> The petition must state substantially:
>
> 1. That the person for whose benefit the application is made is illegally restrained in his liberty, and by whom, naming both parties, if their names are known, or if unknown, designating and describing them;
>
> 2. When the party is confined or restrained by virtue of any writ, order or process, or under color of either, a copy shall be annexed to the petition, or it shall be stated that a

copy cannot be obtained;

3. When the confinement or restraint is not by virtue of any writ, order or process, the petition may state only that the party is illegally confined or restrained in his liberty;

4. There must be a prayer in the petition for the writ of habeas corpus; and

5. Oath must be made that the allegations of the petition are true, according to the belief of the petitioner.

TEX. CODE CRIM. PROC. ANN. art. 11.14 (Vernon 1977).

4. *The applicant must plead and prove facts entitling him to relief*

a. "In a postconviction collateral attack, the burden is on the applicant to allege and prove facts which, if true, entitle him to relief." *Ex parte Maldonado*, 688 S.W. 2d 114, 116 (Tex. Crim. App. 1985). In *Maldonado*, the applicant contended that he was confined in violation of due process. The only factual support for this legal conclusion was that: "Although he was indicted for aggravated robbery, the jury was improperly instructed for an offense other than aggravated robbery and the defendant was later adjudged [sic] guilty of aggravated robbery and then sentenced as such." *Id*. at 115-116. The court dismissed the application, finding that it "utterly fails to allege facts which, if true, entitle the applicant to collateral relief." *Id*. at 116.

> "[I]t is not sufficient that the petition allege the denial of a fair and impartial trial or due process of law, which are mere conclusions of law; neither is it adequate to allege the bare fact that the court's charge was somehow erroneous.
>
> Rather, the applicant must allege the reasons a given error in the charge, in light of the trial as a whole, so infected the procedure that the applicant was denied a fair and impartial trial. Once alleged, the burden on the applicant to prove such a denial is heavy and cannot be carried by merely attaching a certified copy of the court's charge to the application for writ of habeas corpus, as was done here.

Id.

b. The burden of alleging facts which entitle the applicant to relief cannot be overstated. John Jasuta, Chief Staff Attorney of the Texas Court of Criminal Appeals, calls this "the first rule of habeas corpus." John G. Jasuta, *Post Conviction Remedies Pursuant To Article 11.07, V.A.C.C.P., in* STATE BAR OF TEXAS, TEXAS CRIMINAL APPELLATE MANUAL J-11 (1996). To this end, it is recommended that you attach to your application affidavits which support your factual assertions whenever possible:

> While it can be argued that cases . . . do not set a requirement of inclusion of proof within the application, the author believes these cases should be consulted and considered in deciding how much, if any, proof to offer. Those cases and the statute

> point out that the State need not even file an answer to join the issues. Since the Applicant's sworn allegations of fact are deemed insufficient even to overcome a presumption of regularity it is hard to believe that those allegations are sufficient to overcome the State's answer. I would advise Applicants to offer some proof by affidavit or otherwise demonstrating to the Court what you are capable of proving.

Id. at J-12.

c. Where a contemporaneous objection is required to preserve error in order to obtain collateral relief under article 11.07, the applicant must allege in his petition that this objection was made. And, he must allege facts which show in the context of his trial why the error he complains of was not harmless beyond a reasonable doubt. *Ex parte Dutchover*, 779 S.W. 2d 76, 77-78 (Tex. Crim. App. 1989); *accord Ex parte Barber*, 879 S.W. 2d 889, 891-92 (Tex. Crim. App. 1994)("applicant must plead and prove that the error complained of did in fact contribute to his conviction or punishment").

5. *The application must be verified*

a. The application must be verified. At one time, the oath had to be unqualified. That is, it was insufficient to merely swear that the allegations were true to the best of the petitioner's belief. That is no longer true. Now, the so-called "qualified" oath provided by the code of criminal procedure is sufficient. "Oath must be made that the allegations of the petition are true, according to the belief of the petitioner." TEX. CODE CRIM. PROC. ANN. art. 11.14(5)(Vernon 1977). "We . . . hold that a petition for writ of habeas corpus is not required to contain sworn allegations of fact or be made upon an unqualified oath, but rather the qualified oath of Art. 11.14(5) is required and legally sufficient for verification of a petition for writ of habeas corpus." *Johnson v. State*, 811 S.W. 2d 93, 97 (Tex. Crim. App. 1991).

b. Section 132.003 of the Civil Practice and Remedies Code, applicable to persons incarcerated in TDCJ allows for a "declaration," substantially in the following form:

> "I, (insert name and inmate identifying number from Texas Department of Corrections or county jail), being presently incarcerated in (insert Texas Department of Corrections unit name or county jail name) in _____, County, Texas, declare under penalty of perjury that the foregoing is true and correct. Executed on (date). (signature)"

TEX. CIVIL PRAC. & REM. CODE ANN. art. 132.003 (Vernon 1997). This is a proper verification pursuant to article 11.14(5). *Johnson v. State*, 811 S.W. 2d 93, 97 (Tex. Crim. App. 1991).

c. In *Ex parte Burns*, 635 S.W. 2d 744, 745 (Tex. Crim. App. 1982), the state argued that the application was not properly verified because it was sworn to by counsel rather than applicant himself. The court of criminal appeals disagreed. "These applications were properly verified; there is no impropriety in the verification's being made by counsel--or any other person--rather than the applicant." The petition may be signed and presented by any other person. *Id*. The court noted that it would be unwise to require that the petition be sworn to by the applicant, since oftentimes this is the

person who, because of the restraint complained of in the petition, would be least able to execute a sworn application. *Id.*

6. *Copy of the judgment*

a. "When the party is confined or restrained by virtue of any writ, order or process, or under color of either, a copy shall be annexed to the petition, or it shall be stated that a copy cannot be obtained." TEX. CODE CRIM. PROC. ANN. art. 11.14(2)(Vernon 1977).

7. *Illustrative formats*

For suggestions on and illustrations of the format of an application, *see* Lynn B. Lamberty, *State Capital Writs: A View From The Applicant's Perspective*, *in* STATE BAR OF TEXAS, TEXAS CRIMINAL APPELLATE MANUAL K-40-43 & Appendix M (1996); 7A MICHAEL J. MCCORMICK, THOMAS D. BLACKWELL & BETTY BLACKWELL, TEXAS CRIMINAL FORMS AND TRIAL MANUAL § 86.29 (Texas Practice 1995).

E. Subsequent or Untimely Application

1. *Text: Art. 11.071 § 5*

"(a) If an initial application for a writ of habeas corpus is untimely or if a subsequent application is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent or untimely initial application unless the application contains sufficient specific facts establishing that:

(1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable:

(A) on the date the applicant filed the previous application; or

(B) if the applicant did not file an initial application, on or before the last date for the timely filing of an initial application;

(2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or

(3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071 or 37.0711.

(b) If the convicting court receives a subsequent application or an untimely initial application, the clerk of the court shall:

(1) attach a notation that the application is a subsequent or untimely initial application;

(2) assign to the case a file number that is ancillary to that of the conviction being challenged; and

(3) immediately send to the court of criminal appeals a copy of:

(A) the application;

(B) the notation;

(C) the order scheduling the applicant's execution, if scheduled; and

(D) any order the judge of the convicting court directs to be attached to the application.

(c) On receipt of the copies of the documents from the clerk, the court of criminal appeals shall determine whether the requirements of Subsection (a) have been satisfied. The convicting court may not take further action on the application before the court of criminal appeals issues an order finding that the requirements have been satisfied. If the court of criminal appeals determines that the requirements have not been satisfied, the court shall issue an order dismissing the application as an abuse of the writ under this section.

(d) For purposes of Subsection (a)(1), a legal basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date.

(e) For purposes of Subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date." TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5 (Vernon Supp. 1998).

2. *Constitutionality*

a. In *Ex parte Davis*, 947 S.W. 2d 216, 218-221 (Tex. Crim. App. 1996), the court rejected several constitutional challenges to article 11.071 including that it violates the separation of powers clause of the state constitution; the provision of the state constitution that prohibits suspension of the writ of habeas corpus; the provision of the state constitution prohibiting ex post facto laws; the federal and state constituitional guarantees of equal protection and due process and due course of law; the federal and state constitutional guarantees of effective assistance of counsel, and the state constitutional provision guaranteeing open courts.

b. *See* James C. Harrington & Anne More Burnham, *Texas's New Habeas*

Corpus Procedure for Death Row Inmates: Kafkaesque--And Probably Unconstitutional, 27 ST. MARY'S L.J. 69 (1995).

F. Issuance of Writ

1. *Text: Art. 11.071 § 6*

"(a) If a timely application for a writ of habeas corpus is filed in the convicting court, a writ of habeas corpus, returnable to the court of criminal appeals, shall issue by operation of law.

(b) If the convicting court receives notice that the requirements of Section 5 for consideration of a subsequent or untimely application have been met, a writ of habeas corpus, returnable to the court of criminal appeals, shall issue by operation of law.

(c) The clerk of the convicting court shall:

(1) make an appropriate notation that a writ of habeas corpus was issued;

(2) assign to the case a file number that is ancillary to that of the conviction being challenged; and

(3) send a copy of the application by certified mail, return receipt requested, to the attorney representing the state in that court.

(d) The clerk of the convicting court shall promptly deliver copies of documents submitted to the clerk under this article to the applicant and the attorney representing the state." TEX. CODE CRIM. PROC. ANN. art. 11.071, § 6 (Vernon Supp. 1998).

G. Answer to Application

1. *Text: Art. 11.071 § 7*

"(a) The state shall file an answer to the application for a writ of habeas corpus not later than the 30th day after the date the state receives notice of issuance of the writ. The state shall serve the answer on counsel for the applicant or, if the applicant is proceeding pro se, on the applicant. The state may request from the convicting court an extension of time in which to answer the application by showing particularized justifying circumstances for the extension.

(b) Matters alleged in the application not admitted by the state are deemed denied." TEX. CODE CRIM. PROC. ANN. art. 11.071, § 7 (Vernon Supp. 1998).

H. Findings of Fact Without Evidentiary Hearing

1. *Text: Art. 11.071 § 8*

"(a) Not later than the 20th day after the last date the state answers the application, the convicting court shall determine whether controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist and shall issue a written order of the determination.

(b) If the convicting court determines the issues do not exist, the parties shall file proposed findings of fact and conclusions of law for the court to consider on or before a date set by the court that is not later than the 30th day after the date the order is issued.

(c) After argument of counsel, if requested by the court, the convicting court shall make appropriate written findings of fact and conclusions of law not later than the 15th day after the date the parties filed proposed findings or not later than the 45th day after the date the court's determination is made under Subsection (a), whichever occurs first.

(d) The clerk of the court shall immediately send to:

(1) the court of criminal appeals a copy of the:

(A) application;

(B) answer;

(C) orders entered by the convicting court;

(D) proposed findings of fact and conclusions of law; and

(E) findings of fact and conclusions of law entered by the court; and

(2) counsel for the applicant or, if the applicant is proceeding pro se, to the applicant, a copy of:

(A) orders entered by the convicting court;

(B) proposed findings of fact and conclusions of law; and

(C) findings of fact and conclusions of law entered by the court." TEX. CODE CRIM. PROC. ANN. art. 11.071, § 8 (Vernon Supp. 1998).

I. Hearing

1. *Text: Art. 11.071 § 9*

"(a) If the convicting court determines that controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist, the court shall enter an order, not later than the 20th day after the last date the state answers the application, designating the issues of fact to be resolved and the manner in which the issues shall be resolved. To resolve the issues, the court

may require affidavits, depositions, interrogatories, and evidentiary hearings and may use personal recollection.

(b) The convicting court shall allow the applicant and the state not less than 10 days to prepare for an evidentiary hearing. The parties may waive the preparation time. If the state or the applicant requests that an evidentiary hearing be held within 30 days after the date the court ordered the hearing, the hearing shall be held within that period unless the court states, on the record, good cause for delay.

(c) The presiding judge of the convicting court shall conduct a hearing held under this section unless another judge presided over the original capital felony trial, in which event that judge, if qualified for assignment under Section 74.054 or 74.055, Government Code, may preside over the hearing.

(d) The court reporter shall prepare a transcript of the hearing not later than the 30th day after the date the hearing ends and file the transcript with the clerk of the convicting court.

(e) The parties shall file proposed findings of fact and conclusions of law for the convicting court to consider on or before a date set by the court that is not later than the 30th day after the date the transcript is filed. If the court requests argument of counsel, after argument the court shall make written findings of fact that are necessary to resolve the previously unresolved facts and make conclusions of law not later than the 15th day after the date the parties file proposed findings or not later than the 45th day after the date the court reporter files the transcript, whichever occurs first.

(f) The clerk of the convicting court shall immediately transmit to:

(1) the court of criminal appeals a copy of:

(A) the application;

(B) the answers and motions filed;

(C) the court reporter's transcript;

(D) the documentary exhibits introduced into evidence;

(E) the proposed findings of fact and conclusions of law;

(F) the findings of fact and conclusions of law entered by the court;

(G) the sealed materials such as a confidential request for investigative expenses; and

(H) any other matters used by the convicting court in resolving issues of fact; and

(2) counsel for the applicant or, if the applicant is proceeding pro se, to the applicant, a copy of:

(A) orders entered by the convicting court;

(B) proposed findings of fact and conclusions of law; and

(C) findings of fact and conclusions of law entered by the court.

(g) The clerk of the convicting court shall forward an exhibit that is not documentary to the court of criminal appeals on request of the court." TEX. CODE CRIM. PROC. ANN. art. 11.071, § 9 (Vernon Supp. 1998).

2. *The burden of proof*

a. The burden of proof in a post-conviction habeas corpus proceeding is on the petitioner. *Ex parte Alexander*, 598 S.W. 2d 308, 309 (Tex. Crim. App. 1980)(that neither petitioner nor his attorney remember whether an examining trial was held is not proof that it was not). Applicant must prove his factual allegations by a preponderance of the evidence. *Ex parte Adams*, 768 S.W. 2d 281, 287-88 (Tex. Crim. App. 1989).

3. *The court of criminal appeals is not bound by the trial court's findings*

a. The court of criminal appeals is "not bound by the trial judge's conclusions . . . if not supported by the record." *Ex parte McKay*, 819 S.W. 2d 478, 480 (Tex. Crim. App. 1990); *Ex parte Adams*, 768 S.W. 2d 281, 288 (Tex. Crim. App. 1989). "[A]lthough this Court has the ultimate power to decide matters of fact in habeas proceedings, generally if the trial court's findings are supported by the record, they should be accepted by this Court." *Ex parte Brandley*, 781 S.W.. 2d 886, 887-888 (Tex. Crim. App. 1989).

4. *Discovery*

a. The habeas statute makes no provision for discovery prior to filing the petition. In *Ex parte Patrick*, ___ S.W. 2d ___ No. 23,159-03 (Tex. Crim. App. April 22, 1998), the defendant complained that he had been denied the effective assistance of counsel because the habeas judge would not order discovery of the state's file. Judge Baird, in a concurring opinion, noted that the prudent course would be for the state to allow the defense access to its files. Exculpatory information, of course, must be disclosed. "And this disclosure may be accomplished by court order, even though the statute contains no express provisions controlling post-conviction discovery." *Id*. at slip op. 1.

J. Rules of Evidence

1. *Text: Art. 11.071 § 10*

"The Texas Rules of Criminal Evidence apply to a hearing held under this article." TEX. CODE CRIM. PROC. ANN. art. 11.071, § 10 (Vernon Supp. 1998).

K. Review by Court of Criminal Appeals

1. *Text: Art. 11.071 § 11*

"The court of criminal appeals shall expeditiously review all applications for a writ of habeas corpus submitted under this article. The court may set the cause for oral argument and may request further briefing of the issues by the applicant or the state. After reviewing the record, the court shall enter its judgment remanding the applicant to custody or ordering the applicant's release, as the law and facts may justify." TEX. CODE CRIM. PROC. ANN. art. 11.071, § 11 (Vernon Supp. 1998).

III. COGNIZABLE ISSUES IN STATE COURT IN GENERAL

A. What Is Cognizability?

1. A claim that can be a proper ground for relief on habeas corpus is said to be "cognizable." *Ex parte McCullough*, 966 S.W. 2d 529, 531 (Tex. Crim. App. 1998).

2. "Traditionally, habeas corpus is available only to review jurisdictional defects . . . or denials of fundamental or constitutional rights." *Ex parte Banks*, 769 S.W. 2d 539, 540 (Tex. Crim. App. 1989)(the improper exclusion of jurors on statutory grounds does not involve jurisdictional or fundamental constitutional considerations, and will therefore not be considered for the first time in an application for writ of habeas corpus). *But cf. Ex parte Bravo*, 702 S.W. 2d 189, 190 (Tex. Crim. App. 1982)(court will consider constitutional error in excluding venirepersons in violation of the Sixth Amendment and the *Witherspoon* and *Adams* cases, even though this was not raised on direct appeal).

3. "[A] writ of habeas corpus should not be used to litigate matters which should have been raised on direct appeal." *Ex parte Goodman*, 816 S.W. 2d 383, 385 (Tex. Crim. App. 1991).

4. "Although habeas corpus should generally not be used to re-litigate matters which were addressed on appeal . . . a previously litigated issue is subject to collateral attack where our prior judgment is subsequently rendered void or where we have decided to apply relief retroactively after a subsequent change in the law." *Ex parte Drake*, 883 S.W. 2d 213, 215 (Tex. Crim. App. 1994).

5. Do not confuse cognizability with jurisdiction. "Certain claims may not be cognizable on habeas corpus, i.e., they may not be proper grounds for habeas corpus relief. However, if the district court denies relief, regardless of the underlying claims for the relief sought, the applicant may appeal." *Ex parte McCullough*, 966 S.W. 2d at 531.

B. State Constitutional Claims

1. Claims premised on the Texas Constitution which are subject to a harm analysis are at best voidable, and are therefore not cognizable in a post-conviction writ of habeas corpus. *Ex parte Dutchover*, 779 S.W. 2d 76, 77 (Tex. Crim. App. 1989)(erroneous admission of videotape in violation of Article I, § 10 of the Texas Constitution); *accord Ex parte McKay*, 819 S.W. 2d 478, 481 (Tex. Crim. App. 1990)("although a habeas corpus application may be predicated on violations of state constitutional rights, the claim may not be cognizable via habeas corpus when the alleged error, if

committed, is nevertheless subject to a harm analysis").

2. In *Ex parte McKay*, 819 S.W. 2d 478 (Tex. Crim. App. 1990), the court that applicant's claim was cognizable even though it was based on the state constitution. "The trial judge committed error in denying the requested voir dire questioning; the error was of a Texas constitutional dimension; this is a capital murder case where the death penalty was imposed; and the error went to the heart of the decision making process used in arriving at the death penalty; thus, in this instance, this type of error is cognizable by writ of habeas corpus." *Id*. at 485.

IV. SOME COGNIZABLE ISSUES IN CAPITAL CASES: A NON-EXHAUSTIVE LIST

A. Effective Assistance Of Counsel

1. *Strickland v. Washington*

a. *Strickland v. Washington*, 466 U.S. 668 (1984), establishes the two-prong test for determining ineffectiveness of counsel.

> 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.

b. 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).

2. *Difficult to win*

a. "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).

b. *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).

c. *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.

(i) 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).

(ii) 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.

(iii) In *McFarland v. State*, 928 S.W. 2d 482 (Tex. Crim. App. 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 508. 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 505 n. 20.

(iv) The deliberate, strategical 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).

(v) 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).

(vi) 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).

(vii) 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).

(viii) 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).

(ix) "[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).

(x) 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).

(xi) 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).

d. *Ex parte Guzmon*, 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.*

3. *Some successful non-capital cases*

Although it has been virtually impossible for defendants to prevail under *Strickland* in death penalty cases in the Texas Court of Criminal Appeals, there are a number of success stories in non-capital cases.

a. Inadequate investigation. *Ex parte Hill*, 863 S.W. 2d 488, 489 (Tex. Crim. App. 1993); *Ex parte Welborn*, 785 S.W. 2d 391, 393 (Tex. Crim. App. 1990); *Ex parte Walker*, 777 S.W. 2d 427, 431 (Tex. Crim. App. 1989); *Butler v. State*, 716 S.W. 2d 48, 54 (Tex. Crim. App. 1986); *Jackson v. State*, 857 S.W. 2d 678, 683 (Tex. App.--Houston [14th Dist.] 1993, no pet.); *Haynes v. State*, 790 S.W. 2d 824, 827 (Tex. App.--Austin 1990, no pet.); *Doherty v. State*, 781 S.W. 2d 439, 442 (Tex. App.--Houston [1st Dist.] 1989, no pet.).

b. The failure to object to indictment, jury charge and jury argument. *Ex parte Drinkert*, 821 S.W. 2d 953, 956 (Tex. Crim. App. 1991).

c. The failure to timely inform defendant of a plea bargain. *Randle v. State*, 847 S.W. 2d 576, 580-81 (Tex. Crim. App. 1993).

d. The failure to file pre-trial motions. *Ex parte Walker*, 777 S.W. 2d 427, 431 (Tex. Crim. App. 1989).

e. Inadequate voir dire. *Miles v. State*, 644 S.W. 2d 23, 24 (Tex. App.--El Paso 1982, no pet.); *see also Ex parte Welborn*, 785 S.W. 2d 391, 392-394 (Tex. Crim. App. 1990); *Winn v. State*, 871 S.W. 2d 756, 763 (Tex. App.--Corpus Christi 1993, no pet.); *San Roman v. State*, 681 S.W. 2d 872, 874 (Tex. App.--El Paso 1984, pet. ref'd).

f. Failure to preserve error concerning the denial of a challenge for cause. *Winn v. State*, 871 S.W. 2d 756, 762-63 (Tex. App.--Corpus Christi 1993, no pet.).

g. The failure to object to inadmissible oral statements. *Mitchell v. State*, 762 S.W. 2d 916, 920 (Tex. App.--San Antonio 1988, pet. ref'd); *Boyington v. State*, 738 S.W. 2d 704, 707-708 (Tex. App.--Houston [1st Dist.] 1985, no pet.); *Sanders v. State*, 715 S.W. 2d 771, 774-776 (Tex. App.--Tyler 1986, no pet.).

h. The failure to secure expert testimony regarding physical evidence. *Winn v. State*, 871 S.W. 2d 756, 761 (Tex. App.--Corpus Christi 1993, no pet.).

i. The failure to object to inadmissible extraneous offenses. *Jackson v. State*, 857 S.W. 2d 678, 683 (Tex. App.--Houston [14th Dist.] 1993, no pet.); *Wenzy v. State*, 855 S.W. 2d 52, 58 (Tex. App.--Houston [14th Dist.] 1993, pet. ref'd); *Riascos v. State*, 792 S.W. 2d 754, 758 (Tex. App.--Houston [14th Dist.] 1990, pet. ref'd); *Doles v. State*, 786 S.W. 2d 741, 746 (Tex App.--Tyler 1989, no pet.).

j. The elicitation, by the defense, of inadmissible and prejudicial extraneous offenses. *Ex parte Walker*, 777 S.W. 2d 427, 432 (Tex. Crim. App. 1989); *Brown v. State,* 1998 WL 252111 *5 (Tex. App.--San Antonio 1998, pet. filed); *Green v. State*, 899 S.W. 2d 245, 249 (Tex. App.--San Antonio 1995, no pet.); *Montez v. State*, 824 S.W. 2d 308, 310 (Tex. App.--San Antonio 1992, no pet.); *Strickland v. State*, 747 S.W. 2d 59, 61 (Tex. App.--Texarkana 1988, no pet.); *Hutchinson v. State*, 663 S.W. 2d 610, 614 (Tex. App.--Houston [1st Dist.] 1983, pet. ref'd).

k. The failure to exclude an inadmissible prior conviction. *Ex parte Menchaca*, 854 S.W. 2d 128, 133 (Tex. Crim. App. 1993).

l. The failure to investigate the constitutional validity of a 1959 Louisiana conviction in which applicant had been indigent and unrepresented by counsel. *Ex parte Jordan*, 879 S.W. 2d 61, 62 (Tex. Crim. App. 1994); *see Ex parte Langley*, 833 S.W. 2d 141, 143 (Tex. Crim. App. 1992)(failure to investigate availability of non-final conviction); *Ex parte Felton*, 815 S.W. 2d 733, 734-35 (Tex. Crim. App. 1991)(failure to investigate prior conviction with invalid jury waiver); *Ex parte Pool*, 738 S.W. 2d 285, 285 (Tex. Crim. App. 1987)(failure to investigate validity of prior convictions used for enhancement).

m. The failure to object to improper comments on post-arrest silence. *Brown v. State,* 1998 WL 252111 *5 (Tex. App.--San Antonio 1998, pet. filed); *Thomas v. State*, 812 S.W. 2d 346, 350 (Tex. App.--Dallas 1991, pet. ref'd); *San Roman v. State*, 681 S.W. 2d 872, 875 (Tex. App.--El Paso 1984, pet. ref'd); *see also Winn v. State*, 871 S.W. 2d 756, 763 (Tex. App.--Corpus Christi 1993, no pet.)(failure to object to refusal to consent to search).

n. The failure to object, on the record, to witnesses who were improperly allowed to give their opinion about the complainant's truthfulness. *Garcia v. State*, 712 S.W. 2d 249, 253 (Tex. App.--El Paso 1986, pet. ref'd).

o. The failure to request a jury instruction concerning the statutory defense of necessity where that defense was raised by the evidence. *Vasquez v. State*, 830 S.W. 2d 948, 951 (Tex. Crim. App. 1992); *see Green v. State*, 899 S.W. 2d 245, 248 (Tex. App.--San Antonio 1995, no pet.)(counsel ineffective for failure to request instruction on the only defense applicable in his case); *Watrous v. State*, 842 S.W. 2d 792, 794 (Tex. App.--El Paso 1992, no pet.)(counsel was ineffective for failure to request medical purpose defense in aggravated sexual assault case); *Banks v. State*, 819 S.W. 2d 676, 682 (Tex. App.--San Antonio 1991, pet. ref'd)(failure to object to jury charge which improperly instructed the jury that injury to a child was not a result oriented crime).

p. The failure to request an instruction on accomplice witness testimony where this was raised by the evidence. *Ex parte Zepeda*, 819 S.W. 2d 874, 877 (Tex. Crim. App. 1990).

q. The failure to request an instruction that the jury disregard evidence it believed to have been seized in violation of article 38.23. *Sanchez v. State*, 931 S.W. 2d 331, 336 (Tex. App.--San Antonio 1996, pet. ref'd).

4. *Denial of counsel is presumptively prejudicial*

a. There is another standard--besides *Strickland* --for reviewing error when counsel has been completely denied. In *United States v. Cronic*, 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*. "*Cronic'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").

b. 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.

5. *Prejudice is presumed from conflict of interest*

a. Finally, prejudice is presumed when counsel actively represents conflicting interests. *United States v. Cronic,* 466 U.S. at 661 n.28.

b. 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.

c. 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.

d. *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).

6. *Ineffective assistance on appeal*

a. 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).

b. Appellate counsel in a non-capital case was ineffective for failing to argue that the trial court erred in denying a timely request for a jury shuffle. *Ex parte Daigle*, 848 S.W. 2d 691, 692 (Tex. Crim. App. 1993). *See also Ex parte Dietzman*, 790 S.W. 2d 305, 306 (Tex. Crim. App. 1990)(appellate attorney failure to present many grounds of error for review).

c. 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.

d. 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).

e. 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).

f. Appellate counsel is not prohibited from raising ineffectiveness just because he was the second chair at the trial. *Paulsel v. State*, 784 S.W. 2d 417, 417 (Tex. Crim. App. 1990).

7. *Self-representation*

a. 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).

b. In *Daniels v. State*, 921 S.W. 2d 377 (Tex. App.--Houston [1st Dist.] 1996, pet. ref'd), 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 382. This was a capital case, but unlike *Dunn*, it was not one in which the state sought the death penalty.

c. The right to self-representation must be timely asserted, "namely, before the jury is impaneled." *McDuff v. State*, 939 S.W. 2d 607, 619 (Tex. Crim. App. 1997)(no error in not permitting appellant to represent himself when appellant first made the request at the beginning of the punishment phase).

d. Any defendant may dispense with counsel and make his own defense if he decides to do so competently, knowingly and intelligently and voluntarily. "The record reflects that, before the trial court granted appellant's request to proceed *pro se*, it first elicited from him the fact that he had a general equivalency degree (G.E.D.), i.e., the equivalent of a high school diploma. It then explained to him that, because of his indigence, he had the right to have counsel appointed to represent him. The court also explained to him that there were technical rules of evidence and procedure that applied at trial, that he would not be granted any special consideration with respect to those rules, and that as a result he might be disadvantaged both at trial and in any appeal that might follow. The trial court further explained the charges against appellant, the fact that lesser included offenses might be submitted to the jury, and the possible range of punishment. Finally, the record reflects that the trial court tried repeatedly to impress upon appellant the extreme gravity of his request to proceed *pro se* and the likelihood that it was a serious mistake. On this record, then, we cannot say that appellant's decision to proceed *pro se* was anything less than knowing and intelligent. Nor can we find anything in the record indicating that appellant's decision was anything less than voluntary." *Collier v. State*, 959 S.W. 2d 621, 626 (Tex. Crim. App. 1997).

8. *When should ineffectiveness be raised?*

a. Ineffective assistance, of course, can be raised by writ of habeas corpus. *Ex parte McCullough*, 966 S.W. 2d 529, 532 n. 1 (Tex. Crim. App. 1998).

b. Although this issue can also be raised on direct appeal, it has been suggested that this is ill-advised. One problem with raising such issues on direct appeal is that the record is not adequately developed. 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).

B. The Duty Of The State To Pay For Expert Assistance Required By Indigent Capital Defendants

1. *Article 26.05(a)*

a Article 26.05(a) of the Texas Code of Criminal Procedure requires that

appointed counsel, including counsel appointed for habeas hearings, "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).

2. *The holding in Ake v. Oklahoma*

a. 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.

3. *The implications of Ake*

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

(i) Although *Ake* itself was concerned with psychiatric assistance, "*Ake* is not limited to psychiatric experts." *Moore v. State*, 935 S.W. 2d 124, 130 (Tex. Crim. App. 1996). Due process requires "the opportunity to participate meaningfully in a judicial proceeding," *Ake v. Oklahoma*, 470 U.S. 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 investigatorial 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).

(ii) *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. In *Williams v. State*, 958 S.W. 2d 186 (Tex. Crim. App. 1997), the trial court denied appellant his right to proceed *ex parte*, and compelled him to provide a copy of his motion requesting appointment of an expert to the state. This was error. Many times a defendant will have to provide affidavits or evidence in support of his *Ake* motion. "The problem with requiring this showing to be shared with the State at the pretrial stage is that it compels a defendant to disclose to the State his defensive theories or 'work product.'" *Id*. at 193.

> In essence, if an indigent defendant is not entitled to an *ex parte* hearing on his *Ake* motion, he is forced to choose between either forgoing the appointment of an expert or disclosing to the State in some detail his defensive theories or theories about weaknesses in the State's case. This is contrary to *Ake's* concern that an indigent defendant who is entitled to expert assistance have 'meaningful access to justice,' and undermines the work product doctrine. We decline to hold that in order for an indigent defendant to avail himself of one of the 'basic tools of an adequate defense,' he may be compelled to disclose defensive theories to the prosecution. We hold that an indigent defendant is

entitled, upon proper request, to make his *Ake* motion *ex parte*.

Id. at 193-94. *But see Mosley v. State*, ___ S.W. 2d ___ No. 72,281 (Tex. Crim. App. July 1, 1998), slip op. at 32-33(no constitutional violation where appellant was permitted to submit written arguments *ex parte*, but not oral arguments).

(iii) *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 hypertechnical 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. *Cf. Mosley v. State*, ___ S.W. 2d ___ No. 72,281 (Tex. Crim. App. July 1, 1998), slip op. at 32(failure to make requisite showing).

4. *The disinterested expert in Texas*

a. 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. 1998). *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*?

b. 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).

c. "[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.'" *Rey v. State*, 897 S.W. 2d 333, 343 (Tex. Crim. App. 1995).

d. 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); *see Cantu v. State*, 939 S.W. 2d 627, 638 (Tex. Crim. App. 1997)(trial court did not err in refusing to provide appellant funds to hire a scholar to study whether Texas jurors are capable of understanding the special punishment issues because appellant showed no particularized need for such a study); *Matchett v. State*, 941 S.W. 2d 922, 939 (Tex. Crim. App. 1996)(every lawyer able to ask questions has the expertise, without an expert, to determine whether the jury understands the law); *Moore v. State*, 935 S.W. 2d 124, 130 (Tex. Crim. App. 1996)(appellant's request for expert assistance to select a jury was properly denied where he "offered nothing but undeveloped assertions that the requested assistance would be beneficial").

e. "An expert appointed pursuant to *Ake* . . . is an agent of defense counsel for purposes of the work product doctrine." *Skinner v. State*, 956 S.W. 2d 532, 538 (Tex. Crim. App. 1997).

f. A court appointed expert can potentially serve two purposes. "First, an expert can play a partisan role in the defense, providing defense counsel with the 'tools' to challenge the State's case. In this context, due process, at a minimum, requires expert aid in an evaluation of a defendant's case in an effort to present it in the best possible light to the jury. Second, if his expert opinion supports the defense theory, an expert can testify in support of that defense. *Taylor v. State*, 939 S.W. 2d 148, 153 (Tex. Crim. App. 1996)(citations omitted). The conclusions of a defense expert are work product and should not be disclosed to the state. *Id*. at 152.

5. *Ake error cannot be harmless*

a. 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).

b. In *Williams v. State*, 958 S.W. 2d 186, 194-95 (Tex. Crim. App. 1997), the court of criminal appeals held that the trial court errs in not permitting appellant to make an *Ake* motion *ex parte*, but it further held that this sort of sub-*Ake* error is subject to a harm analysis under Rule 44.2(b) of the Texas Rules of Appellate Procedure. The court held that appellant was not harmed at the first phase of the trial, but that the state did not prove beyond a reasonable doubt that appellant was not harmed at the punishment phase. Because of the premature disclosure of the matters about which the expert testified, the state was more prepared to cross-examine than it would have been without the earlier insight. *Id*. at 195. The case was therefore reversed for a new punishment hearing.

C. 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 overbroad 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 overghesbroad 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); *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); *see Cantu v. State*, 939 S.W. 2d 627, 648 (Tex. Crim. App. 1997).

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); *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. The statute is not unconstitutional for failing “to provide any mechanism by which the jurors could give recognition to the balance between the aggravating and mitigating factors involved in [the instant] case.” *Soria v. State*, 933 S.W. 2d 46, 67 (Tex. Crim. App. 1996).

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); *accord Jones v. State*, 944 S.W. 2d 642, 655 (Tex. Crim. App.

1996)*; Matchett v. State*, 941 S.W. 2d 922, 934 (Tex. Crim. App. 1996)*; Skinner v. State*, 956 S.W. 2d 532, 546 (Tex. Crim. App. 1997); *see also Cantu v. State*, 939 S.W. 2d 627, 639 (Tex. Crim. App. 1997); *Morris v. State*, 940 S.W. 2d 610, 616 (Tex. Crim. App. 1996); *Bell v. State*, 938 S.W. 2d 35, 54 (Tex. Crim. App. 1996); *Anderson v. State*, 932 S.W. 2d 502, 509 (Tex. Crim. App. 1996).

ee. Article 37.071 is not unconstitutional because it gives the jury unfettered discretion in determining what circumstances are mitigating. *McFarland v. State*, 928 S.W. 2d 482, 510-11 (Tex. Crim. App. 1996); *Curry v. State*, 910 S.W. 2d 490, 496 (Tex. Crim. App. 1995).

ff. The statute is not unconstitutional because considerations required by *Penry* contradict the "structured discretion" mandated by *Furman*. *McFarland v. State*, 928 S.W. 2d 482, 520 (Tex. Crim. App. 1996).

gg. Appellant's death sentence is not unconstitutional because it is based on the jury's application of the vague and indefinite term, "probability." *Lagrone v. State*, 942 S.W. 2d 602, 618 (Tex. Crim. App. 1997).

hh. The trial court did not err in denying a motion to set aside the indictment on the grounds that the special issues are not properly understood by the jurors. *Cantu v. State*, 939 S.W. 2d 627, 638 (Tex. Crim. App. 1997).

ii. Article 37.071 § 2(e) is not unconstitutional for not requiring the jury to consider mitigating evidence. According to the court, this provision requires the jury to consider *all* evidence. "We note initially that Article 37.071 does not objectively define 'mitigating evidence,' leaving all such resolutions to the subjective standards of the jury." *Cantu v. State*, 939 S.W. 2d 627, 639-40 (Tex. Crim. App. 1997).

jj. The statute is not unconstitutional because it limits mitigation to factors which render appellant less morally blameworthy. *Cantu v. State*, 939 S.W. 2d 627, 648-49 (Tex. Crim. App. 1997).

kk. The Texas scheme is not unconstitutional because statistics show that racial minorities who kill whites are more likely to get the death penalty. *Cantu v. State*, 939 S.W. 2d 627, 649 (Tex. Crim. App. 1997); *see also Bell v. State*, 938 S.W. 2d 35, 51 (Tex. Crim. App. 1996)(evidence insufficient to show that decision makers in his case acted with any racially discriminatory intent).

ll. Appellant provided insufficient evidence to support his claim that the future dangerousness special issue is inherently racially biased because white jurors are more likely to perceive African Americans as future threats to society. *Bell v. State*, 938 S.W. 2d 35, 51 (Tex. Crim. App. 1996).

mm. Appellant failed to provide sufficient evidence to support his contention that the death penalty was arbitrarily applied in his case because, had his crime been committed in a poorer county than Jefferson County, he would have had a better chance of escaping the death penalty. *Bell v. State*, 938 S.W. 2d 35, 55 (Tex. Crim. App. 1996).

nn. The statute is not unconstitutional because the operative terms of article 37.071 are vague and lead to the arbitrary application of the death sentence. *Matchett v. State*, 941 S.W. 2d 922, 938 (Tex. Crim. App. 1996).

oo. Appellant was not denied various constitutional rights because two inconsistent versions of article 37.071 (House Bill 9 and Senate Bill 880) were in effect at the time of his trial. The court of criminal appeals does not believe these versions were inconsistent. *Rhoades v. State*, 934 S.W. 2d 113, 121-22 (Tex. Crim. App. 1996).

pp. The trial court did not err in refusing to give appellant an evidentiary hearing on whether the death penalty is administered in Texas in a racially discriminatory way. "Appellant's argument is purely based on existing statistical studies allegedly showing that, in Texas, the death penalty is more likely to be assessed when the victim is white than when the victim is a member of a racial minority. Appellant offers no evidence specific to his own case that would support an inference that racial consideration played a part in his sentence. This argument has been addressed and rejected by both this Court and the United States Supreme Court and, without more, we will not revisit it here." *Raby v. State*, ___ S.W. 2d ___, ___ No. 71,938 (Tex. Crim. App. March 4, 1998), slip op. 6.

qq. The statute is not unconstitutional because of the many different schemes which have been in effect in Texas since 1989. *Raby v. State*, ___ S.W. 2d ___, ___ No. 71,938 (Tex. Crim. App. March 4, 1998), slip op. 15.

D. Defects In Charging Instruments

1. Ordinarily, a defendant waives defects of form or substance in the charging instrument by not raising them by written motion, prior to commencement of trial. TEX. CODE CRIM. PROC. ANN. art. 1.14(b)(Vernon Supp. 1998). *See generally Studer v. State*, 799 S.W. 2d 263 (Tex. Crim. App. 1990).

2. A charging instrument which is so defective that it does not charge a person with an offense as required by Article V, § 12 of the Texas Constitution, is constitutionally invalid, and may be challenged by writ of habeas corpus. *Ex parte Patterson*, 902 S.W. 2d 487, 488 (Tex. Crim. App. 1995).

E. Voir Dire--*Wainwright v. Witt*: Exclusion For Cause Because Of Views On Death Penalty

1. *Witt, not Witherspoon, is the law*

a. 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.

b. 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).

c. *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).

d. "[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.

2. *Post-Witt reversals on direct appeal*

a. Although reversible error is almost inconceivable after *Witt*, a few direct appeal cases suggest a narrow possibility for success. 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 301 n.4.

b. 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.

c. 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*, 929 S.W.2d 5, 7 (Tex. Crim. App. 1996). 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*. "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 8.

> 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. Her 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 9(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.

d. *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 Colella v. State*, 915 S.W. 2d 834, 842 (Tex. Crim. App. 1995)*; Broxton v. State*, 909 S.W. 2d 912, 917 (Tex. Crim. App. 1995); *but cf. Clark v. State*, 929 S.W. 2d 5, 9-10 (Tex. Crim. App. 1996)(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).

e. In *Howard v. State*, 941 S.W. 2d 102 (Tex. Crim. App. 1996), venireperson Durling said she could never answer the first special issue affirmatively without evidence that the accused had committed a prior murder. She was not asked, however, whether she would refuse to answer "yes" absent a prior murder even if other evidence were sufficient to convince her beyond a reasonable doubt that appellant would commit future acts of violence constituting a continuing threat to society. "Thus the record does not disclose whether or not Durling's assertion was merely a prediction that without evidence of a prior murder she would not likely be convinced of future dangerousness beyond a reasonable doubt, or a categorical refusal to answer 'yes' even if other evidence could convince here of appellant's future dangerousness to that level of confidence. Only in the later event has she shown herself susceptible to a challenge for cause." *Id*. at 127. The state failed to carry its burden here to show that her refusal was predicated upon something other than her understanding of proof beyond a reasonable doubt. *Id*. Mere disagreement with the criteria for death eligibility, without also showing an inability to follow the law, does not suffice to establish a challenge for cause. *Id*. at 128. "A venireman who requires evidence of a prior murder has not demonstrated an inability to abide by the law if his requirement is predicated upon his personal threshold of reasonable doubt. The State must show more, *viz*: that the venireman's insistence on evidence of a prior murder will prevent him from honestly answering the special issue *regardless* of whether he was otherwise convinced beyond a reasonable doubt of future dangerousness, before it can be said it has met its burden to demonstrate the venireman cannot follow the law." *Id*. at 129.

3. *Collateral attack*

a. 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*).

b. 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).

4. *Trial court's ruling is not presumptively correct in Texas*

a. When a *federal* court is reviewing juror bias on *federal habeas corpus*, it must accord a presumption of correctness to the state court's findings. *Witt*, however, does not require a *state* appellate court to accord this presumption of correctness when reviewing trial court rulings on jury bias. *Greene v. Georgia*, 117 S. Ct. 578, 579 (1996).

b. 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).

5. *The remedy for a Witt violation*

a. 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*, 929 S.W. 2d 5, 10 (Tex. Crim. App. 1996).

F. Voir Dire--*Batson v. Kentucky*: Racially Discriminatory Use Of Peremptory Challenges

1. *The holding in Batson*

a. 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.

b. *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.

c. 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).

2. *Opposition to the death penalty may be a neutral reason*

a. The courts have frequently overruled *Batson*-type challenges where the venireperson expresses some sort of antipathy to the death penalty. *E.g., Pondexter v. State*, 942 S.W. 2d 577, 581-82 (Tex. Crim. App. 1996)*; Williams v. State*, 937 S.W. 2d 479, 485 (Tex. Crim. App. 1996); *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).

3. *Batson error can be raised on habeas*

a. *Batson* error can be raised on habeas corpus. *Mathews v. State*, 768 S.W. 2d 731, 732 n.2 (Tex. Crim. App. 1989).

G. Scope Of Voir Dire

1. 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).

2. Denying, in a capital case, the defense its right to ask 35 venirepersons whether they would automatically find at the punishment phase that the defendant acted "deliberately" after having found him guilty of intentionally committing capital murder was constitutional error, cognizable on habeas corpus. *Ex parte McKay*, 819 S.W. 2d 478, 482-87 (Tex. Crim. App. 1990).

H. 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).

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. 1998).

I. 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).

5. It is a violation of federal due process, cognizable on habeas corpus, for the jury to see the defendant in jail clothes and handcuffs. *Ex parte Clark*, 545 S.W. 2d 175, 177 (Tex. Crim. App. 1977).

J. Failure to Disclose Exculpatory Evidence

1. *Brady v. Maryland and* *United States v. Bagley*

a. In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

b. The issue in *United States v. Bagley*, 473 U.S. 667 (1985), concerned the standard of materiality to be applied to determine whether a conviction should be reversed for failure to disclose impeachment evidence. In rendering its decision, the Court clarified several things about discovery:

(i) the adversary system is still the primary means of discovering the truth. The *Brady* rule, however, which is founded on due process, is meant to insure that a miscarriage of justice does not occur. "Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." *Id*. at 675.

(ii) "Impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule." *Id*. at 676. The Court makes no distinction between impeachment evidence and exculpatory evidence. *Id*.

(iii) Reversal is not automatic for a *Brady* violation. Instead, "the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." *Id*. at 678.

(iv) Finally, the Court determined the standard of materiality applicable to undisclosed evidence. Previously, the Court had recognized at least three different standards, depending on the nature of the evidence, and the type of request made by defendant. In *Bagley*, the Court decided that only one test for materiality is required. "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id*. at 682. The judgment in *Bagley* was reversed and remanded to the court of appeals for a determination whether, had the impeachment evidence been disclosed to the defense, there is a reasonable probability that the result of the trial would have been different. *Id*. at 684.

2. *Brady/Bagley reversals in capital habeas cases*

a. The state had a duty to disclose the statement of an eyewitness which contained assertions which were "diametrically opposite" to her trial testimony. *Ex parte Adams*, 768 S.W. 2d 281, 290-91 (Tex. Crim. App. 1989);

b. The use of an investigative procedure which, judged by the totality of circumstances, results in a deprivation of due process by suppressing favorable evidence and by creating false testimony and inherently unreliable testimony, is cognizable on habeas corpus. *Ex parte Brandley*, 781 S.W. 2d 886, 894 (Tex. Crim. App. 1989).

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 ordinary 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.

c. Jury charge error which, in light of the trial as a whole, so infected the procedure that the applicant was denied a fair and impartial trial, is cognizable on habeas. *Ex parte Maldonado*, 688 S.W. 2d 114, 116 (Tex. Crim. App. 1985).

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. 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. *Moore v. State*, ___ S.W. 2d ___, ___ No. 72,543 (Tex. Crim. App. June 10, 1998), slip op. 15; *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. *Moore v. State*, ___ S.W. 2d ___, ___ No. 72,543 (Tex. Crim. App. June 10, 1998), slip op. 9; *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).

L. Sufficiency Of The Guilt/Innocence Evidence

1. In any number of cases, the Texas Court of Criminal Appeals has held that sufficiency is not a cognizable issue on habeas corpus. *E.g.*, *Ex parte Brown*, 757 S.W. 2d 367, 368 (Tex. Crim. App. 1988)(legal sufficiency may not be challenged collaterally in Texas) *see generally Ex parte Williams*, 703 S.W. 2d 674 (Tex. Crim. App. 1986).

2. The court has recognized that an applicant may complain on habeas, however, not that the evidence against him was legally insufficient, but instead, that there was *no* evidence to support the verdict. *Ex parte Moffett*, 542 S.W. 2d 184, 186 (Tex. Crim. App. 1976)(due process violation).

3. The United States Supreme Court does permit sufficiency inquiries into state court convictions on federal habeas corpus. The standard of review for determining the legal 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).

M. Sufficiency Of The Punishment Evidence

1. *Habeas*

Since the Texas court does not recognize sufficiency challenges on habeas corpus regarding guilt/innocence evidence, it will probably not readily recognize such challenges concerning the punishment evidence. Even so, in order to attempt to preserve any such challenges for later federal review, they should be included at the state level. Since there are as yet no reported habeas cases, we can only examine direct appeal cases as instructive.

2. *Direct appeals*

a. In *Tuttle v. State*, ___ S.W. 2d ___ No. 72,387 (Tex. Crim. App. November 5, 1997), appellant asked the court to conduct both a factual and a legal sufficiency review of the evidence supporting the future dangerousness issue. A plurality of the court recognized that, when reviewing the evidence of future dangerousness, it conducts neither a legal nor a factual sufficiency analysis, but instead a hybrid "type of analysis which includes aspects of both legal and factual review." *Id*. at slip op. 5. In doing so, the court reviews all the facts and circumstances in the record, both those favoring and those against the defendant, but in a light most favorable to the verdict, and within a *Keeton*-type framework. *Id*. at slip op. 6.

> In accordance with *Jackson v. Virginia*, after considering all the evidence, we ask whether any rational trier of fact could have found beyond a reasonable doubt that there was a probability that appellant would commit further acts of violence that would constitute a continuing threat to society. However, we also ask whether the jury's decision is "against the *great* weight of the evidence presented at trial so as to be *clearly wrong and unjust*."

Id. at slip. op 6(emphasis in original). The plurality recognized that such a comprehensive fact-specific review might be constitutionally necessary to insure meaningful appellate review. *Id*. at slip op. 7. The court went on to find the evidence in *Tuttle* to be "both legally and factually sufficient to support the jury's finding that there is a probability that appellant would commit criminal acts of violence that would constitute a continuing threat to society." *Id*. at slip op. 14.

b. 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).

c. Not just any evidence will prove future dangerousness:

(i) 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.

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

(iii) The Texas Court of Criminal Appeals has reversed several cases on direct appeal 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).

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

(v) In *Martinez v.State*, 924 S.W. 2d 693 (Tex. Crim. App. 1996), the twenty year old appellant stabbed a store clerk during the course of a robbery. He testified that he had been drinking and that the robbery was impulsive. He turned himself in almost immediately, and had no prior adjudicated extraneous offenses. This is about as thin a punishment case as you will see. Nonetheless, the court found the evidence sufficient. "Given the brutal facts of the stabbing itself, including the fact that the majority of the knife thrusts were into the back of an already fallen victim; the conflicting testimony as to why appellant decided to commit a robbery; the number of lies that he told

the police; and his apparent disregard for the law and authority; we conclude that a rational jury could have determined beyond a reasonable doubt that appellant would be a continuing threat to society." *Id*. at 697-98. The court was careful to distinguish the *Smith* case, discussed above, because the two cases are very similar, factually. Indeed, the casual observer would likely to think the state had a far stronger case in *Smith*. Judge Baird, dissenting, criticized the court for not following the *Keeton* factors. "The majority opinion will only serve to encourage the sparse, selective and spotty application of capital punishment in Texas. In light of the majority opinion, there is no longer any assurance that the death penalty will not be wantonly or freakishly imposed." *Id*. at 706 (Baird, J., concurring and dissenting). Judge Maloney, joined by Judge Overstreet, observed that "[t]his opinion will probably set precedent ensuring that never again will there be facts that this Court will find insufficient to support an affirmative answer to the second special issue." *Id*. at 706 (Maloney, J., concurring and dissenting). Judge Maloney believes this opinion "renders article 37.071 a nullity." *Id*. at 711 (Maloney, J., concurring and dissenting).

N. Actual Innocence

1. Because the incarceration of an innocent person violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution, claims of actual innocence are cognizable in postconviction habeas corpus proceedings. *Ex parte Elizondo*, 947 S.W. 2d 202, 205 (Tex. Crim. App. 1996). "Consequently, if applicant can prove by clear and convincing evidence to this Court, in the exercise of its habeas corpus jurisdiction, that a jury would acquit him based on his newly discovered evidence, he is entitled to relief." *Id*. at 209.

O. Involuntary Guilty Plea

1. Although rare, it is possible for a defendant to plead guilty to capital murder, and allow the jury to decide his punishment. *E.g., Morin v. State*, 682 S.W. 2d 265, 268 (Tex. Crim. App. 1985).

2. If applicant can establish that his plea was involuntary, he has established a due process violation which is cognizable on habeas in Texas. *See Ex parte McCullough*, 966 S.W. 2d 529, 532 n. 1 (Tex. Crim. App. 1998).

P. Incompetency To Stand Trial

1. Where the trial court fails to conduct a separate hearing to determine competency even though a bona fide doubt as to competency was raised, the matter is cognizable on habeas corpus. *Ex parte Johnston*, 587 S.W. 2d 163, 165 (Tex. Crim. App. 1979). *But cf*. *Ex parte Tuttle*, 445 S.W. 2d 194, 198 (Tex. Crim. App. 1969)(that applicant was insane at the time of the offense is not cognizable on a writ).

2. Where the same jury that determined applicant's guilt also determined his competence to stand trial the issue is cognizable on habeas corpus. *Ex parte Ridley*, 658 S.W. 2d 177, 177 (Tex. Crim. App. 1983).

3. Where the jury charge is inadequate for a proper determination of applicant's competence to stand trial the issue is cognizable on habeas corpus. *Ex parte McKenzie*, 582 S.W. 2d 153, 154 (Tex. Crim. App. 1979).

Q. The Failure To Provide An Interpreter

1. The failure to provide an interpreter to one who does not understand English may be raised by writ of habeas corpus. *Ex parte Nanes*, 558 S.W. 2d 893, 894 (Tex. Crim. App. 1977).

R. Trial Before A Disqualified Judge

1. Trial before a judge disqualified because he had previously prosecuted applicant in a prior conviction used for enhancement can be raised by habeas corpus. *Ex parte Washington*, 442 S.W. 2d 391, 392-93 (Tex. Crim. App. 1969).

2. Trial before a judge who was related to the applicant, even though the judge was unaware of the relationship, and the applicant did not object, can be raised by habeas corpus. *Ex parte Vivier*, 699 S.W. 2d 862, 863 (Tex. Crim. App. 1985).

S. Vague Aggravating Factors

1. The court of criminal appeals has consistently held that the terms, "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 Patrick v. State*, 906 S.W. 2d 481, 494 (Tex. Crim. App. 1995); *Chambers v. State*, 903 S.W. 2d 21, 35 (Tex. Crim. App. 1995); *Clark v. State*, 881 S.W. 2d 682, 698, 699 (Tex. Crim. App. 1994); *Earhart v. State*, 877 S.W. 2d 759, 768 (Tex. Crim. App. 1994); *Burks v. State*, 876 S.W. 2d 877, 910-911 (Tex. Crim. App. 1994); *Robertson v. State*, 871 S.W. 2d 701, 713 (Tex. Crim. App. 1993; *Coble v. State*, 871 S.W. 2d 192, 207 (Tex. Crim. App. 1993); *Camacho v. State*, 864 S.W. 2d 524, 536 (Tex. Crim. App. 1993); *Corwin v. State*, 870 S.W. 2d 23, 36 (Tex. Crim. App. 1993); *Zimmerman v. State*, 860 S.W. 2d 89, 101 (Tex. Crim. App. 1993), *vacated on other grounds*, 114 S.Ct. 374 (1993); *Rousseau v. State*, 855 S.W. 2d 666, 687 (Tex. Crim. App. 1993); *Goss v. State*, 826 S.W. 2d 162, 171 (Tex. Crim. App. 1992). This may be constitutional error.

2. "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*, 928 S.W. 2d 482, 520 (Tex. Crim. App. 1996).

3. 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. *E.g., Cantu v. State*, 939 S.W. 2d 627, 643-44 (Tex. Crim. App. 1997).

T. The Anti-Parties Special Issue

1. *Text: Article 37.071 § 2(b)(2)*

> 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. 1998).

2. *Case law: Direct appeal*

a. In *Lawton v. State*, 913 S.W. 2d 542 (Tex. Crim. App. 1995), appellant complained that article 37.071 § 2(b)(2) violated the principles set forth in *Tison v. Arizona* and *Enmund v. Florida* because it permits a death penalty upon the mere finding that appellant anticipated that a human life would be taken. The court disagreed, noting that appellant could not even have been convicted of capital murder unless the jury had already found that he harbored the specific intent to promote or assist the commission of intentional murder. "In short, that the jury may have found that appellant only anticipated that death would result under Article 37.071 is inconsequential to *Enmund* and *Tison* concerns; the jury had already found that appellant intended to at least promote or assist in the commission of *an intentional murder*." *Id*. at 555 (emphasis in original); *accord Cantu v. State*, 939 S. W. 2d 627, 645 (Tex. Crim. App. 1997).

U. The Mitigation Special Issue

1. *Text: Article 37.071 § 2(e)*

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. 1998).

2. *Text: Article 37.071 § 2(f)(4)*

The jury is also instructed that it "shall consider mitigating evidence to be

evidence that a juror might regard as reducing the defendant's moral blameworthiness." TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(f)(4)(Vernon Supp. 1998).

3. *Burden of proof: Mitigating circumstances*

a. A frequent challenge leveled at the new statute is that it is unconstitutional because it does not assign a burden of proof regarding mitigating evidence. The court has rejected this challenge on direct appeal. *E.g.*, *Raby v. State*, ___ S.W. 2d ___, ___ No. 71,938 (Tex. Crim. App. March 4, 1998), slip op. 18-19; *Cantu v. State*, 939 S.W. 2d 627, 641 (Tex. Crim. App. 1997); *Shannon v. State*, 942 S.W. 2d 591, 600 (Tex. Crim. App. 1996); *Matchett v. State*, 941 S.W. 2d 922, 936 (Tex. Crim. App. 1996); *Morris v. State*, 940 S.W. 2d 610, 614 (Tex. Crim. App. 1996); *Anderson v. State*, 932 S.W. 2d 502, 508 (Tex. Crim. App. 1996) *McFarland v. State*, 928 S.W. 2d 482, 497 (Tex. Crim. App. 1996); *Eldridge v. State*, 940 S.W. 2d 646, 654 (Tex. Crim. App. 1996).

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

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

d. The statute is not unconstitutional because it does not inform the jury that the state has the burden of proving the existence of any aggravating factors considered in answering the mitigation special issue. *Tuttle v. State*, ___ S.W. 2d ___, ___ No. 72,387 (Tex. Crim. App. November 5, 1997), slip op. 22.

4. *Burden of proof: Aggravating circumstances*

a. The statute *does*, however, explicitly place the burden on the prosecution

to prove aggravating factors contained in the first two special issues. *McFarland v. State*, 928 S.W. 2d 482, 518 (Tex. Crim. App. 1996).

b. In *Williams v. State*, 937 S.W. 2d 479 (Tex. Crim. App. 1996), the court rejected appellant's argument that the mitigation special issue is unconstitutional because it fails to place on the state the burden of proving aggravating circumstances. "Because Texas law imposes the burden of proof upon the State to prove certain prescribed aggravating elements, a burden of proof need not be prescribed for aggravating circumstances that might be considered in conjunction with Texas' open-ended mitigation issue." *Id*. at 491.

5. *The need to further define mitigating evidence*

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

b. In *Lawton v. State*, 913 S.W. 2d 542 (Tex. Crim. App. 1995), appellant complained that the definition of mitigating evidence in article 37.071 § 2(f)(4) unconstitutionally excluded evidence of appellant's character, history and the circumstances of the offense. The court disagreed, finding that Texas's statutory definition of mitigating evidence "is congruent with that of the United States Supreme Court." *Id*. at 555-56; *accord Tuttle v. State*, ___ S.W. 2d ___, ___ No. 72,387 (Tex. Crim. App. November 5, 1997), slip op. *20; Bell v. State*, 938 S.W. 2d 35, 54 (Tex. Crim. App. 1996).

c. The trial court does not err in refusing to instruct the jury that it must consider youth and mental health testimony as mitigating. *Cantu v. State*, 939 S.W. 2d 627, 640 (Tex. Crim. App. 1997). The trial court does not err in refusing to instruct the jury that it may not consider mitigating evidence in aggravation of punishment. "It is for the jury to determine what evidence, if any, constitutes mitigating evidence, and how much weight it should be given." *Pondexter v. State*, 942 S.W. 2d 577, 588 (Tex. Crim. App. 1996).

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

6. *Sufficiency review*

a. "Because the weighing of 'mitigating evidence' is a subjective determination undertaken by each individual juror, we decline to review that evidence for 'sufficiency.'" *McFarland v. State*, 928 S.W. 2d 482, 498 (Tex. Crim. App. 1996); *accord Nenno v. State*, ___ S.W. 2d ___, ___ No. 72,313 (Tex. Crim. App. June 24, 1998), slip op. 3; *McGinn v. State*, 961 S.W. 2d 161, 166 (Tex. Crim. App. 1998)*; Morris v. State*, 940 S.W. 2d 610, 614 (Tex. Crim. App. 1996)*; Moore v. State*, 935 S.W. 2d 124, 128 (Tex. Crim. App. 1996)*; Green v. State*, 934 S.W. 2d 92, 106 (Tex. Crim. App. 1996)*; Colella v. State*, 915 S.W. 2d 834, 845 (Tex. Crim. App. 1995). Because appellant is the beneficiary of mitigating evidence, he bears the burden of production. If the jury verdict is against him, he "can only argue that the verdict was against the great weight and preponderance of the evidence." *McFarland v. State*, 928 S.W. 2d at 497 n. 9. Appellant did not make this argument in this case. *Accord Eldridge v. State*, 940 S.W. 2d 646, 652 n. 9 (Tex. Crim. App. 1996). In *Bell v. State*, 938 S.W. 2d 35, 43-44 (Tex. Crim. App. 1996), though, the court held that it could not review mitigation evidence either *de novo or for factual sufficiency* "because it is a subjective determination left exclusively to the jury." (emphasis supplied).

b. As just noted, the court from time to time in the past has hinted that the mitigation issue might be subject to a *factual* sufficiency review. In *Tuttle v. State*, ___ S.W. 2d ___, ___ No. 72,387 (Tex. Crim. App. November 5, 1997), slip op. 2, the court clarified this ambiguity, holding that "factual sufficiency analysis is equally unfeasible."

c. In *Lawton v. State*, 913 S.W. 2d 542 (Tex. Crim. App. 1995), appellant argued on appeal that the evidence was insufficient to support the jury's negative answer to the mitigation special issue. The court of criminal appeals rejected this argument, finding that appellate review of a negative answer regarding mitigating evidence was "neither constitutionally required nor possible under our current law." *Id*. at 556. "We decline to declare any evidence mitigating as a matter of law or to usurp the jury's role of discerning the credibility and weight of evidence." *Id*. *See Tuttle v. State*, ___ S.W. 2d ___, ___ No. 72,387 (Tex. Crim. App. November 5, 1997), slip op. 21*; Pondexter v. State*, 942 S.W. 2d 577, 587 (Tex. Crim. App. 1996) *Matchett v. State*, 941 S.W. 2d 922, 936 (Tex. Crim. App. 1996); *Morris v. State*, 940 S.W. 2d 610, 614 (Tex. Crim. App. 1996); *Janecka v. State*, 937 S.W. 2d 456, 461 (Tex. Crim. App. 1996); *Colella v. State*, 908 S.W. 2d 437, 448 (Tex. Crim. App. 1996).

d. Although it is impossible to conduct a meaningful appellate review of the mitigation special issue, this does not render our capital punishment scheme unconstitutional. *Lawton v. State*, 913 S.W. 2d 542, 557 (Tex. Crim. App. 1995). *Accord Baker v. State*, 956 S.W. 2d 19, 21 (Tex. Crim. App. 1997)*; Johnson v. State*, ___ S.W. 2d ___, ___ No. 72,046 (Tex. Crim. App. April 30, 1997)*, slip op. 11; Shannon v. State*, 942 S.W. 2d 591, 599 (Tex. Crim. App. 1996)*; Pondexter v. State*, 942 S.W. 2d 577, 588 (Tex. Crim. App. 1996)*; Eldridge v. State*, 940 S.W. 2d 646, 652 (Tex. Crim. App. 1996)*; Bell v. State*, 938 S.W. 2d 35, 44 (Tex. Crim. App. 1996); *Williams v. State*, 937 S.W. 2d 479, 492 (Tex. Crim. App. 1996); *Janecka v. State*, 937 S.W. 2d 456, 474 (Tex. Crim. App. 1996); *Green v. State*, 934 S.W. 2d 92, 107 (Tex. Crim. App. 1996)*; Lane v. State*, 933 S.W. 2d 504, 508 (Tex. Crim. App. 1996); *Cockrell v. State*, 933 S.W. 2d 73, 92 (Tex. Crim. App. 1996).

e. Article 44.251(a) of the code of criminal procedure provides that the court of criminal appeals shall reform a death sentence if there is insufficient evidence to support a

negative answer to the mitigation special issue. The court of criminal appeals agrees that article 44.251(a) is "problematic," because it implies, on its face "that what we have held to be unnecessary if not impossible is possible." *Lawton v. State*, 913 S.W. 2d 542, 557 n.13 (Tex. Crim. App. 1995). Problematic, maybe, but not unconstitutional. "[W]e are convinced that the flaw in Article 44.251(a) is unimportant to the constitutionality of our capital punishment scheme in general and to the constitutionality of Article 37.071 in particular. So long as the jury is not precluded from hearing and effectuating mitigating evidence, our capital punishment scheme is constitutional regardless of whether appellate review of the jury's mitigation verdict is possible." *Id*. at 557; *see Eldridge v. State*, 940 S.W. 2d 646, 652 (Tex. Crim. App. 1996); *Bell v. State*, 938 S.W. 2d 35, 44 (Tex. Crim. App. 1996)*; Janecka v. State*, 937 S.W. 2d 456, 474 (Tex. Crim. App. 1996)*; Cantu v. State*, 939 S.W. 2d 627, 641 (Tex. Crim. App. 1997).

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

7. *Proportionality review*

a. In *Honda Motor Company Ltd. v. Oberg*, 512 U.S. 415 (1994), the Supreme Court held that the Due Process Clause requires appellate review of jury awards of punitive damages in civil cases. In *Janecka v. State*, 937 S.W. 2d 456, 474-75 (Tex. Crim. App. 1996), appellant asserted that this principle requires a comparative proportionality review on appeal of the deathworthiness of each person sentenced to death in Texas. The court of criminal appeals disagreed. *See also Tuttle v. State*, ___ S.W. 2d ___, ___ No. 72,387 (Tex. Crim. App. November 5, 1997), slip op. 22. *Morris v. State*, 940 S.W. 2d 610, 616 (Tex. Crim. App. 1996)*; Bell v. State*, 938 S.W. 2d 35, 52 (Tex. Crim. App. 1996); *Cockrell v. State*, 933 S.W. 2d 73, 92 (Tex. Crim. App. 1996); *Anderson v. State*, 932 S.W. 2d 502, 508 (Tex. Crim. App. 1996).

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

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

> It is for good reason, therefore, that the United States Supreme Court has not held that due process requires a comparative proportionality review of the sentence of death, but instead has held that such a review would be "constitutionally superfluous."

Id. at 509-09.

8. *Constitutionality, in general*

a. The mitigation issue is not unconstitutional because it permits open-ended discretion condemned in *Furman*. *Tuttle v. State*, ___ S.W. 2d ___, ___ No. 72,387 (Tex. Crim. App. November 5, 1997), slip op. 23; *King v. State*, 953 S.W. 2d 266, 274 (Tex. Crim. App. 1997); *Jones v. State*, 944 S.W. 2d 642, 656 (Tex. Crim. App. 1996); *Shannon v. State*, 942 S.W. 2d 591, 598 (Tex. Crim. App. 1996); *Pondexter v. State*, 942 S.W. 2d 577, 587 (Tex. Crim. App. 1996); *Morris v. State*, 940 S.W. 2d 610, 614 (Tex. Crim. App. 1996); *Williams v. State*, 937 S.W. 2d 479, 491 (Tex. Crim. App. 1996).

b. The mitigation issue is not unconstitutional for allowing the untrammeled discretion in imposing the death sentence. *Cockrell v. State*, 933 S.W. 2d 73, 92-93 (Tex. Crim. App. 1996). *See also Whitaker v. State*, ___ S.W. 2d ___, ___ No. 72,371 (Tex. Crim. App. May 20, 1998), slip op. 12.

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

d. The statutory definition of "mitigating evidence" is not facially unconstitutional because it limits the Eighth Amendment concept of "mitigation" to factors that render a capital defendant less morally "blameworthy" for commission of the capital murder. *King v. State*, 953 S.W. 2d 266, 274 (Tex. Crim. App. 1997)("moreover, appellant fails to specify what if any evidence he presented which was mitigating but the jury was unable to consider"). *See also Raby v. State*, ___ S.W. 2d ___, ___ No. 71,938 (Tex. Crim. App. March 4, 1998), slip op. 18; *Tuttle v. State*, ___ S.W. 2d ___, ___ No. 72,387 (Tex. Crim. App. November 5, 1997), slip op. 20.

V. The 10-2 Verdict: Article 37.071 §§ 2(d)(2) and 2(f)(2)

1. *The statutes*

a. Article 37.071, § 2(d)(2) requires the court to charge the jury that "it may not answer any issue submitted under Subsection (b) of this article, "yes" unless it agrees unanimously and it may not answer any issue "no" unless 10 or more jurors agree." TEX. CODE CRIM. PROC. ANN.art. 37.071, § 2(d)(2) (Vernon Supp. 1998).

b. Regarding the mitigation special issue, the court is required by article

37.071, § 2(f)(2) to charge the jury that it "may not answer the issue "no" unless it agrees unanimously and may not answer the issue "yes" unless 10 or mor jurors agree." TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(f)(2) (Vernon Supp. 1998).

2. *Case law: Direct appeal*

a. In *Lawton v. State*, 913 S.W. 2d 542 (Tex. Crim. App. 1995), appellant contended that articles 37.071 § 2(d) & 37.071 § 2(f) are unconstitutional because they require that at least 10 jurors agree before a life sentence can be imposed. The court disagreed. "[W]hile it is true that the jury is instructed that they may not answer any of the special issues in a manner that would result in a life sentence unless ten jurors agree to that answer, this instruction follows the instruction that the jury may not answer any of the special issues in a manner resulting in capital punishment unless the verdict is unanimous. Under these facts, appellant's argument that jurors will be misled lacks merit; every juror knows that capital punishment cannot be imposed without the unanimous agreement of the jury on all three special issues. The jury is not informed of the consequences of a hung jury, but each juror will know that without his or her vote the death sentence cannot be imposed." *Id*. at 559; *accord Johnson v. State*, ___ S.W. 2d ___, ___ No. 72,046 (Tex. Crim. App. April 30, 1997); *see also Tuttle v. State*, ___ S.W. 2d ___, ___ No. 72,387 (Tex. Crim. App. November 5, 1997), slip op. 22; *Cantu v. State*, 939 S.W. 2d 627, 644 (Tex. Crim. App. 1997); *Williams v. State*, 937 S.W. 2d 479, 490 (Tex. Crim. App. 1996).

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

W. When The Jury Cannot Agree: Articles 37.071(g) & 37.071 § 2(a)

1. *Text: Article 37.071(g)*

a. TEX. CODE CRIM. PROC. ANN. art. 37.071(g) (Vernon Supp. 1998) 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. *Text: Article 37.071 § 2(a)*

a. TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(a) (Vernon Supp. 1998), provides, among other things, that "[t]he court, the attorney representing the state, the defendant, or the defendant's counsel may not inform a juror or a prospective juror of the effect of a failure of a jury to agree on issues submitted under Subsection (c) or (e) of this article."

3. *Case law: Direct appeal*

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

b. 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 Pondexter v. State*, 942 S.W. 2d 577, 586 (Tex. Crim. App. 1996)*; Eldridge v. State*, 940 S.W. 2d 646, 650 (Tex. Crim. App. 1996)*; Green v. State*, 912 S.W. 2d 189, 194 (Tex. Crim. App. 1995); *Emery v. State*, 881 S.W.2d 702, 711 (Tex. Crim. App. 1994); *Robertson v. State*, 871 S.W. 2d 701, 710 (Tex. Crim. App. 1993); *Arnold v. State*, 873 S.W. 2d 27, 38 (Tex. Crim. App. 1993); *Moreno v. State*, 858 S.W. 2d 453, 460-61 (Tex. Crim. App. 1993); *Beavers v. State*, 856 S.W. 2d 429,434 (Tex. Crim. App. 1993). *Nobles v. State*, 843 S.W.2d 503, 508-509 (Tex. Crim. App. 1992); *Cantu v. State*, 842 S.W.2d 667, 692-93 (Tex. Crim. App. 1992); *See also Johnson v. State*, ___ S.W. 2d ___, ___ No. 72,046 (Tex. Crim. App. April 30, 1997).

c. Article 37.071, §2(a) is constitutional. *Cantu v. State*, 939 S.W. 2d 627, 644 (Tex. Crim. App. 1997)("same analysis applies to the new statute and appellant has given us no reason to revisit this issue"). *See Raby v. State*, ___ S.W. 2d ___, ___ No. 71,938 (Tex. Crim. App. March 4, 1998), slip op. 14; *Shannon v. State*, 942 S.W. 2d 591, 600 (Tex. Crim. App. 1996). *See also Morris v. State*, 940 S.W. 2d 610, 615 (Tex. Crim. App. 1996)(the same is true regarding article 37.0711(3)(i)).

X. The Admissibility Of Unadjudicated Offenses At Punishment

1. Article 37.071 § 2 provides, among other things, that at the punishment phase, "evidence may be presented by the state and the defendant or the defendants counsel as to any matter that the court deems relevant to sentence, including evidence of the defendant's background or character or the circumstances of the offense that mitigates against the imposition of the death penalty." TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2 (Vernon Supp. 1998).

2. Unadjudicated extraneous offenses are admissible at the punishment phase of a capital trial, in the absence of surprise. *Gentry v. State*, 770 S.W. 2d 780, 793 (Tex. Crim. App. 1988); *accord Pondexter v. State*, 942 S.W. 2d 577, 587 (Tex. Crim. App. 1996); *Matchett v. State*, 941 S.W. 2d 922, 937-38 (Tex. Crim. App. 1996); *Cantu v. State*, 939 S.W. 2d 627, 648 (Tex. Crim. App. 1997); *Bell v. State*, 938 S.W. 2d 35, 55 n. 30 (Tex. Crim. App. 1996); *Cockrell v. State*, 933 S.W. 2d 73, 94 (Tex. Crim. App. 1996). To be admissible, it must be proven beyond a reasonable doubt that appellant committed the offense; the offense must be relevant to appellant's deathworthiness, and its prejudicial or inflammatory potential must not substantially outweigh its probative value. *Rachal v.State*, 917 S.W. 2d 799, 807 n. 4 (Tex. Crim. App. 1996); *see Lewis v. State*, 911 S.W. 2d 1, 5 (Tex. Crim. App. 1995); *Rumbaugh v. State*, 629 S.W.2d 747, 754 (Tex. Crim. App. 1982); *see also Lawton v. State*, 913 S.W. 2d

542, 560 (Tex. Crim. App. 1995)(article 37.071, not article 37.07, applies in capital cases); *McFarland v. State*, 928 S.W. 2d 482, 512 (Tex. Crim. App. 1996); *but see Autry v. Estelle*, 706 F.2d 394, 406 n.5 (5th Cir. 1983)(admission of extraneous offenses must be closely watched); *Davis v. State*, 597 S.W.2d 358, 361 (Tex. Crim. App. 1980)(Clinton, J., dissenting)(constitutional warning); *accord McManus v. State*, 591 S.W.2d 505, 532 (Tex. Crim. App. 1979)(Phillips, J., dissenting). *Cf. Sharp v Texas*, 488 U.S. 872, 872 (1988)(Marshall, J., dissenting)(admission of unadjudicated criminal conduct cannot be reconciled with the heightened need for reliability in criminal cases); *Williams v. Lynaugh*, 484 U.S. 935 (1987)(Marshall, J., joined by Brennan, J., dissenting from denial of certiorari)(dissenters contend that admission of extraneous offenses raises "serious constitutional issue"); *Unreliable and Prejudicial: The Use of Extraneous Unadjudicated Offenses in the Penalty Phases of Capital Trial*, 93 COLUM.L.REV. 1249 (1993). Before an extraneous offense is admissible, however, "the State must 'clearly prove' that an offense was committed and that the accused was its perpetrator." *Kemp v. State*, 846 S.W. 2d 289, 307 (Tex. Crim. App. 1992); *accord Burks v. State*, 876 S.W. 2d 877, 898-900 (Tex. Crim. App. 1994); *see Harris v. State*, 827 S.W.2d 949, 961 (Tex. Crim. App. 1992)(to be relevant, state must present evidence that, if believed, establishes that appellant himself committed the extraneous misconduct). Admission of such evidence, which might be inadmissible in a non-capital trial, does not violate equal protection or due process of law. *Felder v. State*, 848 S.W. 2d 85, 98 (Tex. Crim. App. 1992).

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

Y. Estelle v. Smith: Psychiatric Evidence And The Fifth And Sixth Amendments

1. *Warnings and notice must be given*

a. 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).

b. 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.

c. *Smith* makes it clear that, in addition to the standard *Miranda*-type warning, the psychiatrist must specifically advise that statements made can be used against him at the punishment phase in a capital trial. *Hernandez v. State*, 805 S.W.2d 409, 411 (Tex. Crim. App. 1990); *accord Wilkens v. State*, 847 S.W.2d 547, 554 (Tex. Crim. App. 1992); *see also Powell v. Texas*, 109 S.Ct. 3146, 3148 (1989); *Estelle v. Smith*, 451 U.S. 454, 468 (1981).

2. *Reversals on direct appeal in Texas for Smith error*

a. Appellant's Fifth Amendment right was violated when the examining doctors did not inform him that what he said could be used against him in court, and, in particular, at the punishment phase. *Wilkens v. State*, 847 S.W.2d 547, 554 (Tex. Crim. App. 1992).

b. 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.

c. 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).

d. 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).

e. 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).

f. 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).

g. 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).

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

3. *No Error On Direct Appeal Under Smith*

a. *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).

b. 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).

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

d. 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).

e. 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).

f. 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).

g. 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).

h. *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).

i. 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); *Wilkens v. State*, 847 S.W.2d 547, 554 (Tex. Crim. App. 1992); *Hernandez v. State*, 805 S.W.2d 409, 411 (Tex. Crim. App. 1990).

j. 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.

4. *Waiver*

a. 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.

b. *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).

c. *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).

d. 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).

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

f. 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.

g. 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).

h. 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).

i. 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*.

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

5. *Harmless or harmful?*

a. 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).

(i) 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 Wilkens v. State*, 847 S.W.2d 547, 554 (Tex. Crim. App. 1992).

(ii) *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).

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

(iv) *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.

6. *Commutation*

a. 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).

7. *The contemporaneous objection rule*

a. 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*).

b. *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).

c. 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*).

8. *Retroactivity*

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

Z. Victim Impact Evidence

1. *Booth and Payne*

a. 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.

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

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

2. *The criteria*

a. "Victim impact evidence is relevant to assist the trier of fact in a determination of a defendant's moral blameworthiness for the crime, so long as that evidence is limited to the impact the victim's death had on an immediate family member, or a surviving victim of the offense." *Johnson v. State*, ___ S.W. 2d ___, ___ No. 72,046 (Tex. Crim. App. April 30, 1997), slip op. 3. The court then went on to hold that victim impact evidence is admissible if it meets the following criteria: (1) "the evidence must be relevant to a special issue during punishment or offered to rebut a defensive punishment theory;" (2) "the probative value cannot be outweighed by the danger of undue prejudice;" (3) "the testimony must come from either a surviving victim of the crime itself, or from a family member or legal guardian of a victim of the crime;" (4) "the testimony must regard the impact the crime has had on that individual's life;" (5) "that testimony cannot create a comparative judgment

situation, i.e., it *must* show the uniqueness of the loss of the victim as an individual only as it pertains to the immediate family, guardian or surviving victim;" (6) "the evidence may not pertain to the character of the victim unless it is introduced in rebuttal of a defensive theory offered during punishment;" and, (7) "the testimony may not discuss the value of the individual to the community, as such testimony could create a comparative judgment situation which the Supreme Court . . . expressly discouraged." *Id.* at slip op. 6.

b. In *Mosley v. State*, ___ S.W. 2d ___, ___No. 72,281 (Tex. Crim. App. July 1, 1998), slip op. at 88, the court modified *Johnson*, holding that the witnesses do not necessarily have to be related to the victim.

c. Recognizing that its jurisprudence in this area has been sometimes inconsistent and confusing, the court announced the following rule to be applied in the future:

> Both victim impact and victim character evidence are admissible, in the context of the mitigation special issue, to show the uniqueness of the victim, the harm caused by the defendant, and as rebuttal to the defendant's mitigating evidence. Rule 403 limits the admissibility of such evidence when the evidence predominantly encourages comparisons based upon the greater or lesser worth or morality of the victim. When the focus of the evidence shifts from humanizing the victim and illustrating the harm caused by the defendant to measuring the worth of the victim compared to other members of society then the State exceeds the bounds of permissible testimony.

Mosley v. State, ___ S.W. 2d ___ No. 72,281 (Tex. Crim. App. July 1, 1998), slip op. at 86-87.

d. "[V]ictim impact and character testimony from strangers, including those who learned about the case in the media and those who did so as participants in a criminal investigation, will rarely, if ever, be admissible under Rule 403." *Mosley v. State*, ___ S.W. 2d ___ No. 72,281 (Tex. Crim. App. July 1, 1998), slip op. at 88.

e. "[V]ictim impact and character evidence may become unfarily prejudicial through sheer volume. Even if not technically cumulative, an undue amount of this type of evidence can result in unfair prejudice under Rule 403. Hence, we encourage trial courts to place appropriate limits upon the amount, kind, and source of victim impact and character evidence." *Mosley v. State*, ___ S.W. 2d ___ No. 72,281 (Tex. Crim. App. July 1, 1998), slip op. at 88.

f. Victim impact and character is relevant only to the mitigation issue. It is "patently irrelevant" to future dangerousness. *Mosley v. State*, ___ S.W. 2d ___ No. 72,281 (Tex. Crim. App. July 1, 1998), slip op. at 88. Thus, this evidence "would be wholly irrelevant if appellant affirmatively waived submission and reliance upon the mitigation special issue." *Id*. at slip op. 89.

3. *Held admissible on direct appeal*

a. The complainant's sister was properly allowed to testify that it was very important to her and her family to get her sister's remains back for proper burial, and that she was fearful of going out at night alone. "These effects arising from such a murder are certainly foreseeable and to

commit such a murder in disregard of these effects on survivors seems to go to the perpetrator's moral culpability for such acts." *McDuff v. State*, 939 S.W. 2d 607, 620 (Tex. Crim. App. 1997). Testimony about how the "sister's marriage broke up after the disappearance and missing the decedent's love and not being able to talk to her, seems to be more tenuously tied to appellant's moral culpability." Nonetheless, the court was within its discretion in admitting this evidence. *Id*.

b. "[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).

c. 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.

d. The trial court did not err in admitting testimony from the complainant's daughter about how much she missed her mother and how her mother would not be a part of her life. *Tuttle v. State*, ___ S.W. 2d ___, ___ No. 72,387 (Tex. Crim. App. November 5, 1997), slip op. 24-25.

4. *Held inadmissible on direct appeal*

a. "Victim," in the phrase "victim impact impact evidence," means the victim of the crime for which appellant is indicted and tried. The trial court erred in permitting the state to elicit victim impact evidence from the mother of Ms. Pena, when the indictment named only Ms. Ertman as the complainant. *Payne* does not contemplate admisison of evidence concerning a person who is not the victim for whose death appellant has been indicted and tried. This evidence is irrelevant under Rule 401 and article 37.071, and the danger of unfair prejudice from "extraneous victim impact evidence" is unacceptably high. Nonetheless, the evidence here was harmless beyond a reasonable doubt. *Cantu v. State*, 939 S.W. 2d 627, 637-38 (Tex. Crim. App. 1997).

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

c. 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.

d. 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).

e. "It is never competent for the State in the first instance to prove that the person slain was peaceable and inoffensive." *Armstrong v. State*, 718 S.W. 2d 686, 695 (Tex. Crim. App. 1985). In *Armstrong*, the court held that it was impermissible for the state to call the complainant's widow in rebuttal at the punishment phase to testify that the deceased was a peaceable man, where the appellant had not put the complainant's character in issue. *Cf. Matchett v. State*, 941 S.W. 2d 922, 931 (Tex. Crim. App. 1996)(testimony at the guilt/innocence phase of the trial by the complainant's widow that they had been married 25 years, had five children and that he was alone at home on the night of the murder, and her identification of a picture of him with friends was not victim impact testimony).

5. *Waiver*

a. Appellant waives his right to complain on appeal absent proper objection. *Tuttle v. State*, ___ S.W. 2d ___, ___ No. 72,387 (Tex. Crim. App. November 5, 1997), slip op. 23-24; *Bell v. State*, 938 S.W. 2d 35, 56 (Tex. Crim. App. 1996). As noted in the *Johnson* case, victim impact evidence is admissible in certain circumstances. Counsel must take care to not simply to object generally to all victim impact evidence offered. "Rather, a specific objection must be made to each objectionable statement or group of statements. If a person's testimony contains information which is admissible and information which is inadmissible, and the defendant has made only a general objection to the entirety of the person's testimonu, then the judge has discretion to admit all of the testimony or exclude all of the testimony." *Johnson v. State*, ___ S.W. 2d ___, ___ No. 72,046 (Tex. Crim. App. April 30, 1997), slip op. 8. In *Johnson*, the court held that, because some of the testimony was admissible, the court had discretion to admit all of the testimony over the general objection." *Id*. at slip op. 10. *See Thompson v. Lynaugh*, 821 F. 2d 1080, 1081 (5th Cir. 1987)(waiver on federal habeas corpus review); *see also James v. State*, 772 S.W. 2d 84, 101 (Tex. Crim. App. 1989)(contemporaneous objection rule applies even though this case was tried before *Booth* was decided, since it did not create a previously unrecognized right); *Paster v. Lynaugh*, 876 F.2d 1184, 1188 (5th Cir. 1989).

AA. The Law Of Parole At The Punishment Phase

1. *The statutes*

a. 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).

b. 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. 1997).

2. *The general rule, historically*

a. 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).

b. 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.

c. 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*.

3. *Simmons v. South Carolina*

a. 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."

4. *Simmons in Texas*

a. 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?

b. 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 Whitaker v. State*, ___ S.W. 2d ___, ___ No. 72,371 (Tex. Crim. App. May 20, 1998), slip op. 11-12; *Raby v. State*, ___ S.W. 2d ___, ___ No. 71,938 (Tex. Crim. App. March 4, 1998), slip op. 13; *Colburn v. State*, 966 S.W. 2d 511, 519-20 (Tex. Crim. App. 1998); *McGinn v. State*, 961 S.W. 2d 161, 166 (Tex. Crim. App. 1998); *Tuttle v. State*, ___ S.W. 2d ___, ___ No. 72,387 (Tex. Crim. App. November 5, 1997), slip op. 22-23; *Green v. State*, 934 S.W. 2d 92, 105 (Tex. Crim. App. 1996)*; Morris v. State*, 940 S.W. 2d 610, 613 (Tex. Crim. App. 1996)*; Williams v. State*, 937 S.W. 2d 479, 489 (Tex. Crim. App. 1996)*; Martinez v. State*, 924 S.W. 2d 693, 698 (Tex. Crim. App. 1996); *McFarland v. State*, 928 S.W. 2d 482, 523 (Tex. Crim. App. 1996); *Rhoades v. State*, 934 S.W. 2d 113, 120 (Tex. Crim. App. 1996); *Wolfe v. State*, 917 S.W. 2d 270, 278 (Tex. Crim. App. 1996); *Curry v. State*, 910 S.W. 2d 490, 498 (Tex. Crim. App. 1995)*; Lawton v. State*, 913 S.W. 2d 542, 556 (Tex. Crim. App. 1995); *Sonnier v.State*, 913 S.W. 2d 511, 521 (Tex. Crim. App. 1995); *Broxton v. State*, 909 S.W. 2d 912, 919 (Tex. Crim. App. 1995); *Green v. State*, 912 S.W. 2d 189, 194 (Tex. Crim. App. 1995). The court of criminal appeals further distinguished *Simmons* by noting that Texas, unlike South Carolina, has a number of safeguards to ensure that the law of parole is not discussed by the jury.

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

d. Certiorari was denied in *Brown v. Texas*, 118 S. Ct. 355 (1997). Justice Stevens, joined by Justices Souter, Ginsburg and Breyer, wrote "to reiterate the important point that the Court's action in denying certiorari does not constitute either a decision on the merits or the questions presented . . . or an appraisal of their importance." *Id.* at 356. There, Mr. Brown had argued that he was entitled to present evidence to the jury that a life sentence would require him to spend at least 35 years in prison. The four justices noted an "obvious tension" between the Texas law prohibiting such evidence, and its decision in *Simmons*. *Id*. at 355.

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

Id. at 356.

e. Judge Mansfield, concurring in *Whitaker v. State*, ___ S.W. 2d ___, ___ No. 72,371 (Tex. Crim. App. May 20, 1998)(Mansfield, J., concurring), slip op. 1, stated that: "It does seem somewhat incongruous that juries in noncapital cases are instructed as to applicable parole law whereas in capital cases juries are not to be so instructed. Depending on the life expectancy of an individual sentenced to life imprisonment upon conviction of capital murder, the forty calendar years he must serve before becoming eligible for parole may be, effectively, a life sentence without possibility of parole." Judge Mansfield found the *Brown* opinion to be "interesting," but also noted that, given the fact that the legislature has clearly expressed its intent that capital juries are not to be instructed on parole, "we are not free to substitute our own judgment on this matter, absent clear direction from the United States Supreme Court that we must do so." *Id*.

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

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

Whitaker v. State, ___ S.W. 2d ___, ___ No. 72,371 (Tex. Crim. App. May 20, 1998)(Price, J., concurring), slip op. 1. Judges Baird and Overstreet wrote dissenting opinions in *Whitaker* expressing the same reservations about the Texas approach.

5. *Evidence of lack of future danger in combination with parole eligibility*

a. Recently, some members of the court have noted that minimum parole eligibility *might* be constitutionally mitigating, if the defense can demonstrate relevance towards the issue of future dangerousness. *Willingham v. State*, 897 S.W.2d 351, 360 (Tex. Crim. App. 1995)(Overstreet, J. concurring). Justice Clinton suggested that if the defendant presents evidence to show that "for the duration of his lengthy incarceration he will pose no threat to the prison population or that by the time he is eligible for parole he will not pose a threat to any facet of society," then information about minimum parole eligibility is "indisputably relevant" to the second issue, and therefore, admissible. *Id*. at 359; *but see Broxton v. State*, 909 S.W. 2d 912, 919 (Tex. Crim. App. 1995)(reasons for rejecting parole information apply equally well to the exclusion of parole testimony). In *Eldridge v. State*, 940 S.W. 2d 646, 651 (Tex. Crim. App. 1996), the court referred to *Willingham* as stating the "most charitable view" under which parole information would only be required if there was some evidence, in combination with parole eligibility, which showed a lack of future dangerousness.

There being no such evidence in *Eldridge*, there was no need for an instruction on parole. In *Shannon v. State*, 942 S.W. 2d 591, 594 (Tex. Crim. App. 1996), the court described its treatment of *Simmons* in *Smith* as "comprehensive." The court noted that it had distinguished *Simmons* on the grounds that paroleis traditionally not a matter for jury discussion in Texas, and because *Simmons* had not been extended to parole eligible defendants. *Id*. at 594. The court also noted that appellant in *Shannon* gave the court no "distinguishing evidence in the record" such as evidence of his ability to live peaceably in prison, or expert testimony relating to a probable decline in his propensity for violence. *Id*.

b. 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).

c. 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).

6. *A parole instruction is "permissible"*

a. In *Ford v. State*, 919 S.W. 2d 107, 116 (Tex. Crim. App. 1996), the court acknowledged that it "is permissible" for the trial court to instruct the jury that appellant would have to serve at least 35 years before becoming eligible for parole. *Accord Santellan v. State*, 939 S.W. 2d 155, 171 (Tex. Crim. App. 1997)(especially where appellant's counsel approved the jury charge on parole and where he made the motion to voir dire the jury on parole); *Cockrell v. State*, 933 S.W. 2d 73, 91 (Tex. Crim. App. 1996)(appellant waived error when he "acquiesced" in parole instructions given during voir dire and at end of case).

b. 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).

BB. Caldwell v. Mississippi: Shifting The Jury's Respon sibility 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 assump-

> tion 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).

CC. 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 "the more authoritative holdings of *Gregg*, . . . *Jurek*, . . . and . . . *Tuilaepa*. . . ." *Lawton v. State*, 913 S.W. 2d 542, 558 (Tex. Crim. App. 1995); *accord Raby v. State*, ___ S.W. 2d ___, ___ No. 71,938 (Tex. Crim. App. March 4, 1998), slip op. 15; *Moore v. State*, 935 S.W. 2d 124, 128 (Tex. Crim. App. 1996); *see also Jones v. State*, 944 S.W. 2d 642, 656 (Tex. Crim. App. 1996)*; Matchett v. State*, 941 S.W. 2d 922, 938 (Tex. Crim. App. 1996)*; Williams v. State*, 937 S.W. 2d 479, 492 (Tex. Crim. App. 1996); *Bell v. State*, 938 S.W. 2d 35, 54 (Tex. Crim. App. 1996); *Janecka v. State*, 937 S.W. 2d 456, 475 (Tex. Crim. App. 1996).

3. According to the court of criminal appeals, reliance on Justice Blackmun's dissent is unfounded. "[T]he Supreme Court recently held that, once the jury finds that the defendant falls within the legislatively defined category of persons *eligible* for the death penalty, the sentencer may be given 'unbridled discretion' in determining whether the death penalty should be imposed." *Cantu v. State*, 939 S.W. 2d 627, 645(Tex. Crim. App. 1997)(citing *Tuilaepa v. California*, 114 S. Ct. 2630, 2639 (1994)); *accord Shannon v. State*, 942 S.W. 2d 591, 600 (Tex. Crim. App. 1996).

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

DD. Execution Of The Mentally Infirm

1. *Ford v. Wainwright: Execution of the insane is prohibited*

a. 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.

2. *Texas procedures after Ford*

a. *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 regained 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.

b. 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.

c. 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.

d. In *Colburn v. State*, 966 S.W. 2d 511, 513 (Tex. Crim. App. 1998), appellant argued that the trial court abused its discretion, under *Ford v. Wainwright*, in sentencing him to death because he was severely mentally ill. Appellant also argued that his sentence was illegal because the court of criminal appeals has not yet articulated a legal standard by which to determine whether a person is insane. The court disagreed.

> *Ford* . . . and related authority proscribe the *execution* of an *insane* person, not the *imposition of sentence* on a *mentally ill* person. The fact that appellant had a mental illness when he was tried and sentenced is not determinative of whether he will be sane at the moment of his execution. The proper time to argue the issue presented in appellant's first point of error is after appellant has been sentenced to death and his execution is imminent. That would also be the proper time for this Court to articulate the applicable standard for determining a capital defendant's sanity for purposes of addressing a *Ford* claim. Thus, appellant's Federal Constitutional claim is not yet ripe and is not properly before this Court in the instant appeal. Further, we note that the psychiatric evaluations and other information necessary to evaluate appellant's sanity at the time of execution will not necessarily be found in the record from trial. A record of such evidence is best developed in the context of a hearing held in relation to an application for writ of habeas corpus.

Id(emphasis in original).

3. *Execution of the retarded is not prohibited*

a. *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).

b. 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; *but see Bell v. State*, 938 S.W. 2d 35, 55 (Tex. Crim. App. 1996)(rejecting appellant's argument that the fact that 10 states have banned the execution of the retarded requires a similar ban in Texas).

EE. Jeopardy

1. *Is there death after life?*

a. 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).

b. 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.

c. 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, McClaflin. 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 McClaflin 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 McClaflin 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.

d. 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.

e. 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. *Boggess v. State*, 855 S.W. 2d 656, 664 (Tex. Crim. App. 1989).

f. 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*. 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.

2. *No collateral estoppel without final judgment*

a. 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.

3. *Multiple trials following acquittal*

a. 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.

4. *Sufficiency review of the first trial*

a. 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.

5. *Mistrial before jury sworn*

a. 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.

6. *Unadjudicated offenses at punishment*

a. 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); *accord McDuff v. State*, 939 S.W. 2d 607, 621 (Tex. Crim. App. 1997); *see Smith v. State*, 842 S.W. 2d 401, 404 (Tex. App. -- Fort Worth 1992, pet.

ref'd).

7. *Retrial following hung jury*

a. 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*.

FF. Clemency Procedures and Due Process

1. Five Justices on the United States Supreme Court -- Stevens, O'Connor, Souter, Ginsburg, and Breyer -- believe that "some *minimal* procedural safeguards apply to clemency proceedings." *Ohio Adult Parole Authority v. Woodard*, 118 S.Ct. 1244, 1254 (1998). A majority of the Court in *Woodard*, however, did not believe that the procedures employed in Ohio amounted to a due process violation.

2. In *Ex parte Tucker*, ___ S.W.2d ___, ___ No. 21,159-03 (Tex. Crim. App. January 28, 1998), the Texas Court of Criminal Appeals held that "no minimum federal due process procedures apply to the manner in which executive clemency decisions are made in Texas." *Id*. at slip op. 4 (McCormick, P.J. concurring, joined by Mansfield, Keller, Price, and Holland, JJ.). "Clemency decisions are not the business of the courts; they belong solely to the executive branch." *Id*. at slip op.2.

3. In *Texas Board of Pardons and Paroles v. Williams*, ___ S.W. 2d ___ No. 73,053 (Tex. Crim. App. April 29, 1998)(Baird, J., concurring and dissenting), Judge Baird argued that the board of pardons and paroles violates Article IV, § 11 of the Texas Constitution by failing to keep records of its clemency proceedings. "With no records kept by the Board, there is no way to determine whether the requirements of the Due Process Clause are being met." *Id*. at slip op. 3.

V. SCHEDULING, MODIFYING OR WITHDRAWING THE EXECUTION DATE

A. TEX. CODE CRIM. PROC. ANN. Art. 43.141

1. *Text*: Article 43.141

"(a) If an intial application under Article 11.071 is timely filed, the convicting court may not set an execution date before:

(1) the court of criminal appeals denies relief; or

(2) if the case is filed and set for submission, the court of criminal appeals issues a mandate.

(b) If an original application is not timely filed under Article 11.071 or good cause is not shown for an untimely application under Article 11.071, the convicting court may set an execution date.

(c) The first execution date may not be earlier than the 91st day after the date the convicting court enters the order setting the execution date. A subsequent execution date may not be earlier than the 31st day after the date the convicting court enters the order setting the execution date.

(d) the convicting court may modify or withdraw the order of the court setting a date for execution in a death penalty case if the court determines that additional proceedings are necessary on a subsequent or untimely application for a writ of habeas corpus filed under Article 11.071.

(e) If the convicting court withdraws the order of the court setting the execution date, the court shall recall the warrant of execution. If the court modifies the order of the court setting the execution date, the court shall recall the previous warrant of execution, and the clerk of the court shall isue a new warrant."

TEX. CODE CRIM. PROC. ANN. art. 43.141 (Vernon Supp. 1998).

VI. FEDERAL HABEAS IN DEATH CASES

A. 21 U.S.C. § 2254

2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that---

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim---

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clean and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that---

(A) the claim relies on---

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State courts determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

B. 21 U.S.C. § 2261, et seq.

2261. Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment

(a) This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and (c) are satisfied.

(b) This chapter is applicable if a State establishes by statute, rule of its court of last resort, or by another agency authorized by State law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes. The rule of court or statute must provide standards of competency for the appointment of such counsel.

(c) Any mechanism for the appointment compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record---

(1) appointing one or more counsels to represent the prisoner upon finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer;

(2) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made decision with an understanding of its legal consequences; or

(3) denying the appointment of counsel upon a finding that the prisoner is not indigent.

(d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

(e) The ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2254. This limitation shall not preclude the appointment of different counsel, on the court's own motion or at the request of the prisoner, at any phase of State or Federal post-conviction proceedings on the basis of the ineffectiveness or incompetence of counsel in such proceedings.

2262. Mandatory stay of execution; duration; limits on stays of execution; successive petitions

(a) Upon the entry in the appropriate State court of record of an order under section 2261(c), a warrant or order setting an execution date for State prisoner shall be stayed upon application to any court that would have jurisdiction over any proceedings filed under section 2254. The application shall recite that the State has invoked the post-conviction review procedures of this chapter and that the scheduled execution is subject to stay.

(b) a stay of execution granted pursuant to subsection (a) shall expire if---

(1) a State prisoner fails to file a habeas corpus application under section 2254 within the time required in section 2263;

(2) before a court of competent jurisdiction, in the presence of counsel, unless the prisoner has competently and knowingly waived such counsel, and after having been advised of the consequences, a State prisoner under capital sentence waives the right to pursue habeas corpus review under section 2254; or

(3) a State prisoner files a habeas corpus petition under section 2254 within the time required by section 2263 and fails to make a substantial showing of the denial of a Federal right or is denied relief in the district court or at any subsequent stage of review.

(c) If one of the conditions in subsection (b) has occurred, no Federal court thereafter shall have the authority to enter a stay of execution in the case, unless the court of appeals approves the filing of a second or successive application under section 2244 (b).

2263. Filing of habeas corpus application; time requirements; tolling rules

(a) Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.

(b) The time requirements established by subsection (a) shall be tolled---

(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;

(2) from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition; and

(3) during an additional period not to exceed 30 days, if---

(A) a motion for an extension of time is filed in the Federal district court that would have jurisdiction over the case upon the filing of a habeas corpus application under section 2254; and

(B) showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section.

2264. Scope of Federal review; district court adjudications

(a) Whenever a State prisoner under capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts, unless the failure to raise the claim property is---

(1) the result of State action in violation of the Constitution or laws of the United States;

(2) the result of the Supreme Court's recognition of a new federal right that is made retroactively applicable; or

(3) based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review.

(b) Following review subject to subsections (a), (d), and (e) of section 2254, the court shall rule on the claims properly before it.

2265. Application to State unitary review procedure

(a) For purposed of this section, a "unitary review" procedure means a State procedure that authorizes a person under sentence of death to raise, in the course of direct review of the judgment, such claims as could be raised on collateral attack. This chapter shall apply, as provided in this section, in relation to a State unitary review procedure if the State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in the unitary review proceedings, including expenses relating to the litigation of collateral claims in the proceedings. The rule of court or statute must provide standards of competency for the appointment of such counsel.

(b) To qualify under this section, a unitary review procedure must include an offer of counsel following trial for the purpose of representation on unitary review, and entry of an order, as provided in section 2261(c), concerning appointment of counsel for that purpose. No counsel appointed to represent the prisoner in the unitary review proceedings shall have previously represented the prisoner at trial in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

(c) Sections 2262,2263,2264, and 2266 shall apply in relation to cases involving a sentence of death from any State having a unitary review procedure that qualifies under this section. References to State "post-conviction review" and "direct review" in such sections shall be understood as referring to unitary review under the State procedure. The reference in section 2262 (a) to "an order under 2261 (c)" shall be understood as referring to the post-trial order under subsection (b) concerning representation in the unitary review proceedings, but if a transcript of the trial proceedings is unavailable at the time of the filing of such an order in the appropriate State court, then the start of the 180-day limitation period under section 2263 shall be deferred until a transcript is made available to the prisoner or counsel of the

prisoner.

2266. Limitation periods for determining applications and motions

(a) The adjudication of any application under section 2254 that is subject to this chapter, and the adjudication of any motion under section 2255 by a person under sentence of death, shall be given priority by the district court and by the court of appeals over all noncapital matters.

(b) (1) (A) A district court shall render a final determination and enter a final judgment on any application for a writ of habeas corpus brought under this chapter in a capital case not later than 180 days after the date on which the application is filed.

(B) A district court shall afford the parties at least 120 days in which to complete all actions, including the preparation of all pleadings and briefs, and if necessary, a hearing, prior to the submission of the case for decision.

(C) (i) A district court may delay for not more than one additional 30-day period beyond the period specified in subparagraph (A), the rendering of a determination of an application for a writ of habeas corpus if the court issues a written order making a finding, and stating the reasons for the finding, that the ends of justice that would be served by allowing the delay outweigh the best interest of the public and the applicant in a speedy disposition of the application.

(ii) The factors, among others, that a court shall consider in determinin whether a delay in the disposition of an application is warranted are as follows:

(I) Whether the failure to allow the delay would be likely to result in a miscarriage of justice.

(II) Whether the case is so unusual or so complex, due to the number of defendents, the nature of the prosecution, or the existence of novel questions of fact or law, that is unreasonable to ecpect adequate briefing within the time limitations established by subparagraph (A).

(III) Whether the failure to allow a delay in a case that, taken as a whole, is not so unusual or so complex as described in subclause (II), but would otherwise deny the applicant reasonable time to obtain counsel, would unreasonably deny the applicant or the government continuity of counsel, or would deny counsel for the applicant or the government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(iii) No delay in disposition shall be permissible because of general congestion of the court's calendar.

(iv) The court shall transmit a copy of any order issued under clause (I) to the Director of the Administrative Office of the United States Courtd for inclusion in the report under paragraph (5).

(2) The time limitations under paragraph (1) shall apply to---

(A) an initial application for a writ of habeas corpus;

(B) any second or successive application for a ewrit of habeas corpus; and

(C) any redetermination of an application for a writ of habeas corpus following a remand by the court of appeals or the Supreme court for further proceedings, in which case the limitation period shall run from the date the remand is ordered.

(3) (A) The time limitations under this section shall not be construed to entitle an applicant to a stay of execution, to which the applicant would otherwise not be entitled, for the purpose of litigating any application or appeal.

(B) No amendment to an application for a writ of habeas corpus under this chapter shall be permitted after the filing of the answer to the application, except on the grounds specified in section 2244 (b).

(4) (A) The failure of a court to meet or comply with a time limitation under this section shall not be a ground for granting relief rom a judgment of conviction or sentence.

(B) the State may enforce a time limitation under this section by petitioning for a writ of mandamus to the court of appeals. The court of appeals shall act on the petition for a writ of mandamus not later than 30 days after the filing of the petition.

(5) (A) The Administrative Office of the United States courts shall submit to Congress an annual report on the compliance by the district courts with the time limitations under this section.

(B) The report described in subparagraph (A) shall include copies of the orders submitted by the district courts under paragraph (1) (B) (iv).

(c) (1) (A) A court of appeals shall hear and render a final determination of any appeal of an order granting or denying, in whole or in part, an application brought under this chapter in a capital case not later than 120 days after the date on which the reply brief is filed, or if no reply brief is filed, not later than 120 days after the date on which the answering brief is filed.

(B) (i) A court of appeals shall decide whether to grant a petition for rehearing or other request for rehearing en banc not later than 30 days after the date on which the petition for rehearing is filed unless a responsive pleading is required, in which case the court shall decide whether to grant the petition not later than 30 days after the date on which the responsive pleading is filed.

(ii) If a petition for rehearing or rehearing en banc is granted, the court of appeals shall hear and render a final determination of the appeal not later than 120 days after the date on which the order granting rehearing or rehearing en banc is entered.

(2) The time limitations under paragraph (1) shall apply to---

(A) an initial application for a writ of habeas corpus;

(B) any second or successive application for a writ of habeas corpus; and

(C) any redetermination of an application for a writ of habeas corpus or related appeal following a remand by the court of appeals en banc or the Supreme Court for further proceedings, in which case the limitation period shall run from the date the remand is ordered.

(3) The time limitations under this section shall not be construed to entitle an applicant to a stay of execution, to which the applicant would otherwise not be entitled, for the purpose of litigating any application or appeal.

(4) (A) The failure of a court to meet or comply with a time limitation under this section shall not be a ground for granting relief from a judgment of conviction or sentence.

(B) The State may enforce a time limitation under this section by applying for a writ of mandamus to the Supreme Court.

(5) The Administrative Office of the United States Courts shall submit to Congress an annual report on the compliance by the courts of appeals with the time limitations under this section.

VII. RESOURCES

A. Lynn B. Lamberty, *State Capital Writs: A View From The Applicant's Perspective*, *in* STATE BAR OF TEXAS, TEXAS CRIMINAL APPELLATE MANUAL K (1996).

B. Roe Wilson, *Capital Murder Habeas Litigation: A Guideline For The State For Addressing Capital Habeas Writs And Applying Article 11.071*, *in* STATE BAR OF TEXAS, TEXAS CRIMINAL APPELLATE MANUAL I (1996).

C. John G. Jasuta, *Post Conviction Remedies Pursuant To Article 11.07, V.A.C.C.P., in* STATE BAR OF TEXAS, TEXAS CRIMINAL APPELLATE MANUAL J (1996).

D. JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE (2D ED. 1994)

E. IRA P. ROBBINS, HABEAS CORPUS CHECKLIST (1998).