CAPITAL MURDER
THE LAW OF VOIR DIRE

CAPITAL MURDER CERTIFICATION SEMINAR
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I. VOIR DIRE--WAINWRIGHT V. WITT: EXCLUSION FOR CAUSE BECAUSE OF VIEWS ON DEATH PENALTY

A. Witt, Not Witherspoon, Is The Law

1. In every venire there will be several persons who are opposed to the death penalty. Some will express their opposition with total, unalterable conviction and unmistakable clarity. Some will frankly say that they do not know just how strong their feelings are. Others will vacillate, being against the death penalty one minute and for it the next. Generally, the defendant wants these people on the jury, or, at least he wants the state to use a valuable peremptory challenge to remove them. The state generally wants them off, and wants to use a challenge for cause rather than a peremptory. Formerly, the test for such venirepersons was stated in *Witherspoon v. Illinois*, 391 U.S. 510 (1968). Under *Witherspoon*, a venireperson could be excluded for cause only when he made it unmistakably clear he would automatically vote against imposition of the death penalty, or when his attitude would preclude him from making an impartial determination of guilt or innocence. This posed a difficult burden on the state.

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

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

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

B. "Equivocating" And "Vacillating" Venirepersons

1. An "equivocating" juror is one who expresses uncertainty about being

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

C. Reversible Error Is Almost Inconceivable

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

2. The practical effect of the new standard is to insulate the trial court from reversible error in all but the most extraordinary cases. For example, under *Witherspoon*, excusal of a "vacillating" or an "equivocating" venireperson might result in reversal on appeal, because the record did not show a basis for the challenge with "unmistakable clarity." *See Hartfield v. State*, 645 S.W. 2d 436, 439-441 (Tex. Crim. App. 1980). Under *Witt*, no error is committed by excusing such a person. This is clear from *Nichols v. State*, 754 S.W. 2d 185, 194-96 (Tex. Crim. App. 1988), in which the venireperson was described as quintessentially vacillating and equivocating:

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

Id. at 195.

3. *Perillo v. State*, 758 S.W. 2d 567, 577 (Tex. Crim. App. 1988), is another excellent example how unassailable the ruling of the trial court has become. There, the juror was a "classic" vacillating juror, sometimes seeming precisely the sort of venireperson who could *not* be challenged under *Adams*, other times seeming challengeable. The court of criminal appeals acknowledged that there was an adequate basis to support both the conclusion that she was challengeable, as well as the conclusion that she was not. In other words, there was support for the trial court's decision to excuse,

and no error was committed. *Id*. at 576-77.

D. Trial Court's Ruling Is Not Presumptively Correct In Texas

1. 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).

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

E. Post-Witt Reversals

1. A few recent cases suggest a narrow possibility for succeeding on appeal even after *Witt*. In *Riley v. State*, 889 S.W. 2d 290, 291 (Tex. Crim. App. 1994), venireperson Brown frankly stated that she did not believe in the death penalty, and agreed that she personally could not participate in a proceeding that might result in a death penalty. However, once the special issue submission system was explained to her, she said she could answer the issues affirmatively if the evidence called for it, despite her personal beliefs, and that she would have to sacrifice her conscientious objections. She testified unequivocally that her opposition to the death penalty would not substantially impair her ability to follow her oath and render a true verdict. She was not a vacillating venireperson. *Id*. at 297-98. A venireperson who maintains unswervingly that his reservations against the death penalty will not prevent him from answering the special issues to the best of his abilities in accordance with the evidence, without conscious distortion, is qualified. Venireperson Brown was not disqualified simply because answering the issues affirmatively would be difficult or would violate her religious or moral beliefs. *Id*. at 299. The following principle from *Hernandez v. State*, 757 S.W. 2d 744 (Tex. Crim. App. 1988), is "resurrect[ed]:" "[A] juror may not be excluded merely because there is difficulty in resolving question of fact, even when that difficulty is exacerbated by a sensitive conscience. Only when there is a substantial likelihood that he will balk at the task or falsify an answer should he be judged unqualified." *Riley v. State*, 889 S.W.2d at 301. Here, Ms. Brown did not balk at the prospect of taking the oath, nor did she indicate she might falsify answers to the special issues to protect her conscience. *Id*. The court noted that, when Mr. Riley was tried, the jury's function in a capital case was "purely that of a factfinder." The court expressed no opinion of the jury's role under the post-*Penry* statute. *Id*. at 299 n.2. Under the present statute, "it is arguable that

categorical opposition to the death penalty can support a trial court's conclusion that a venireman is 'substantially impaired' under *Wainwright v. Witt*, supra, at least if that opposition would cause the venireman invariably to answer the special issue required to be submitted by subsection (e) in such a way as to prevent imposition of the death penalty." *Id*. at 301 n.4.

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

3. The trial court erred in granting the state's challenge for cause against venireperson Jones, following an "unusually brief" voir dire, in which the prosecutor never explained the sentencing procedure to her. *Clark v. State*, 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.

4. *Staley v. State*, 887 S.W.2d 885 (Tex. Crim. App. 1994), is interesting. There, the venireperson was arguably not challengeable, because she said she would not automatically answer the special issues 'no' merely to prevent the death penalty. That is, although she was opposed to the death penalty, she may have been able to follow the law. In this case, though, the trial court questioned the venireperson on the fourth special issue--the appropriateness of the death penalty-- and concluded that her moral belief that death was not appropriate would impair her service under *Witt*. The court of criminal appeals agreed. *Id*. at 894. *See 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).

5. 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.

F. Willingness To Set Aside Beliefs

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

G. The Contemporaneous Objection Rule

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

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

3. What constitutes a sufficient objection will depend on its context. In *Miller v. State*, 741 S.W. 2d 382, 387 (Tex. Crim. App. 1987), the very general "note our exception" was sufficient because, in context, defendant's objection was obvious to the judge and prosecutor. *Accord Carter v. State*, 717 S.W. 2d 60, 76 (Tex. Crim. App. 1986); *Ex parte Bravo*, 702 S.W. 2d 189, 193 (Tex. Crim. App. 1982)("note our exception" sufficient when there is "no suggestion in the record that the parties did not

know the basis and nature of . . . objection"); *see also Mann v. State*, 718 S.W. 2d 741, 746-47 (Tex. Crim. App. 1986)(objection that excusals violate *Witherspoon* and *Adams* is sufficient, without need to state "why" that rule was violated); *Green v. State*, 682 S.W. 2d 271, 275 (Tex. Crim. App. 1984)(objections "on the basis of the unconstitutionality of the statute," although not models of clarity, are sufficient).

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

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

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

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

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

H. Witt Error Is Not Harmless

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

I. Commutation

1. There are several cases in which the court of criminal appeals initially reversed a death sentence for *Witt*-type error, and, after reversal, the Governor commuted the defendant's sentence to life imprisonment. According to a majority of the court, commutation renders *Witt* error harmless, which requires that the court grant the state's motion for rehearing and withdraw its earlier reversal. *E.g.*, *Graham v. State*, 643 S.W. 2d 920, 925 (Tex. Crim. App. 1983); *see also Ex parte May*, 717 S.W. 2d 84, 85-86 (Tex. Crim. App. 1986); *Adams v. State*, 624 S.W. 2d 568, 569 (Tex. Crim. App. 1981). Judge Clinton strongly disagrees with this practice. *Adams v. State*, 624 S.W. 2d at 569-73 (Clinton, J., dissenting).

J. Collateral Attack

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

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

K. No Batson/Witherspoon Synthesis

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

L. The Remedy For A Witt Violation

1. If the appellant establishes a *Witt* violation, the conviction itself need not be reversed. Rather, the court need only remand for a new punishment proceeding. "We hold that voir dire error regarding a subject that a jury would consider only during the punishment phase of a trial is 'error affecting punishment only,' unless the defendant produces evidence showing that the error necessarily produced a jury biased against the defendant on the issue of guilt." *Ransom v. State*, 920 S.W. 2d 288, 298, (Tex. Crim.

App. 1996); *accord Clark v. State*, 929 S.W. 2d 5, 10 (Tex. Crim. App. 1996).

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

A. The Holding In Batson

1. In *Batson v. Kentucky*, 476 U.S. 79 (1986), the black defendant complained that the state used its peremptory challenges in a racially discriminatory way to strike all four black persons on the panel. The Supreme Court recognized that purposeful racial discrimination in jury selection violates a defendant's right to equal protection of the law. *Id*. at 86. "Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, as long as that reason is related to his view concerning the outcome' of the case to be tried . . . the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Id*. at 89.

2. *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.

3. 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).

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

1. The courts have frequently overruled *Batson*-type challenges where the

venireperson expresses some sort of antipathy to the death penalty. *E.g., 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).

C. The Contemporaneous Objection

1. A contemporaneous objection will be required to preserve *Batson*-type error.

2. Whether or not an objection is timely depends on when the case was tried, and on what kind of case it is:

a. For cases tried after April 30, 1986, when *Batson* was decided, but before the effective date of Tex. Code Crim. Proc. Ann. art. 35.261 (Vernon 1989), the defendant must properly object after the composition of the jury is known, but before the jury is sworn and the venire is discharged. *Henry v. State*, 729 S.W. 2d 732, 736-37 (Tex. Crim. App. 1987); Failure to do so results in a waiver. *McGee v. State*, 774 S.W. 2d 229, 245 (Tex. Crim. App. 1989); *Brown v. State*, 769 S.W. 2d 565, 568 (Tex. Crim. App. 1989).

b. For *non-capital* cases tried after the effective date of article 35.261, which is August 31, 1987, a *Batson* challenge is timely if made after the strikes are delivered, but before the jury is impaneled, even if the jury has been discharged. *Hill v. State*, 827 S.W.2d 860, 864 (Tex. Crim. App. 1992); *See Rousseau v. State*, 824 S.W.2d 579, 581 (Tex. Crim. App. 1992); Tex. Code Crim. Proc. Ann. art. 35.261 (Vernon Supp. 1995); *accord Somerville v. State*, 792 S.W. 2d 265, 267 (Tex. App. -- Dallas 1990, pet. ref'd).

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

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

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

3. Where appellant makes a late objection, but the trial court proceeds with

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

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

D. Article 35.261 In Capital Cases

1. In non-capital cases, litigants may be able to choose remedies, between quashal of the panel and seating the improperly struck venireperson. This option may not be available in capital cases. In *Butler v. State*, 872 S.W. 2d 227, 231-233 (Tex. Crim. App. 1994), the trial court divided the venire into mini-panels, and, after several mini-panels had been examined, appellant made a *Batson* objection. The court sustained the objection, and appellant moved to quash the entire venire. The trial court quashed only the mini-panel which had contained the person improperly excluded under *Batson*. The court of criminal appeals held that article 35.261 did not apply to the voir dire procedure followed by the trial court. *Batson* was satisfied, though, by the remedy used by the trial court. It was "the most satisfactory method in the instant case to preserve appellant's right to equal protection."

E. Does *Batson* Extend To Jury Shuffles?

1. In *Ladd v. State*, ___ S.W. 2d ___, ___ No. 72,914 (Tex. Crim. App. October 6, 1999), appellant objected that the state's request for a jury shuffle was racially-motivated, in violation of *Batson*, which, according to the defense, naturally extends to jury shuffles. Here, the trial court held a *Batson* hearing and found that the prosecutor's motivation for requesting a shuffle was racially neutral. The court found no clear error in the trial court's ruling, assuming *arguendo* that *Batson* extends to jury shuffles. In a footnote, the court made the following opaque statement: "One scholar has argued that, logically, *Batson* should extend to jury shuffles. We wish to make it clear, however, that we do not endorse such a view." Why would the court be so anxious to clearly distance itself from this admittedly logical argument.

III. VOIR DIRE--CHALLENGES FOR CAUSE

A. By The Defendant

1. Tex. Code Crim. Proc. Ann. art. 35.16(c)(2)(Vernon Supp. 1999) permits the defendant to challenge a venireperson for cause on the ground "[t]hat he has a bias or prejudice against any of the law applicable to the case upon which the defendant is entitled to rely, either as a defense to some phase of the offense for which the defendant is being prosecuted or as a mitigation thereof or of the punishment therefor."

a. "Any juror to whom mitigating factors are likewise irrelevant should be disqualified for cause, for that juror has formed an opinion concerning the merits of the case without basis in the evidence developed at trial." *Morgan v. Illinois*, 112 S.Ct. 2222, 2229-2235 (1992); *but see Rosales v. State*, ___ S.W. 2d ___, ___ No. 73,163 (Tex. Crim. App. October 13, 1999)(defense is not entitled to remove a venireperson for cause who says he would not consider a particular type of evidence as mitigating); *Chambers v. State*, 903 S.W. 2d 21, 29 (Tex. Crim. App. 1995)(intoxication is not mitigating as a matter of law); *Banda v. State*, 890 S.W. 2d 42, 54 (Tex. Crim. App. 1994)(the mere fact that venireperson believes evidence of voluntary intoxication deserves little or no mitigating weight is not cause for challenge under article 35.16). In *Heiselbetz v. State*, 906 S.W. 2d 500 (Tex. Crim. App. 1995), the defense asked the venirepersons whether they would consider a variety of specific circumstances -- including brain damage, poverty, unemployment, good behavior in jail, lack of a criminal record, and child abuse -- as mitigating evidence. Apparently, none of the venirepersons in question would have refused to consider *any* mitigating evidence, but, likewise, each balked at considering at least some of the specific evidence mentioned. The court held that a venireperson was not subject to a challenge for cause just because they refused to consider each of the proffered circumstances as mitigating. "Since there is no precedent for requiring that jurors consider certain evidence mitigating as a matter of law, the trial court did not err in overruling appellant's challenges for cause." *Id*. at 508-509; *see Morrow v. State*, 910 S.W. 2d 471, 473 (Tex. Crim. App. 1995)(trial court did not err in overruling challenge for cause because the venirepersons in question did not believe that certain evidence was mitigating). The juror is the one who decides what weight, if any, is to be given to mitigating evidence. There was no error in denying appellant's challenge to a venireperson who refused to consider appellant's abused and deprived childhood as mitigating. It is apparent that the venireperson did not consider the named factors as mitigating. *Curry v. State*, 910 S.W. 2d 490, 494 (Tex. Crim. App. 1995)(noting that counsel asked whether the venireperson would consider evidence of abuse and deprived childhood as mitigating, and not whether he would consider these factors at all); *see also Lagrone v. State*, 942 S.W. 2d 602, 616 (Tex. Crim. App. 1997)(no error in denying

appellant's challenge for cause against a venireperson who refused to consider good prison behavior as mitigating); *Green v. State*, 934 S.W. 2d 92, 105 n.6 (Tex. Crim. App. 1996)*(*"juror is not required to consider youth as a mitigating factor"); *Soria v. State*, 933 S.W. 2d 46, 66 (Tex. Crim. App. 1996)(that venireperson would give no weight to appellant's youth did not subject him to challenge for cause); *Prystash v. State*, ___ S.W. 2d ___, ___ No. 72,572 (Tex. Crim. App. September 15, 1999)(same).

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

c. "[J]urors must be willing to at least *consider* the defendant's background and character in answering [the third special issue], although they need not give *mitigating weight* to any particular type of evidence." *Maldonado v. State*, 998 S.W. 2d 239, 250 (Tex. Crim. App. 1999).

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

e. Any venireperson who would automatically answer the first or second special issues affirmative, or who would place the burden of proof on the defense is challengeable for cause. "However, there is no law placing the burden of proof on the State as to the mitigation issue, so a venireman is not challengeable for cause simply because he would place the burden of proof on mitigation on the defense." *Ladd v. State*, ___ S.W. 2d ___, ___ No. 72,914 (Tex. Crim. App. October 6, 1999).

f. A venireperson unable to consider the minimum punishment for the lesser included offense of murder should be excused for cause. *Pierce v. State*, 696 S.W.2d 899, 903 (Tex. Crim. App. 1985); *Barrow v. State*, 688 S.W.2d 860, 863 (Tex. Crim. App. 1985); *Jordan v. State*, 635 S.W.2d 522, 523 (Tex. Crim. App. 1982). In *King v. State*, 953 S.W. 2d 266, 268 (Tex. Crim. App. 1997), the court refused to consider the merits of this type of complaint. "Because appellant was convicted of capital murder, any error relating to the punishment range of the lesser-included offense of murder made no contribution to appellant's conviction or punishment." *Id*. *See also Ladd v. State*, ___ S.W. 2d ___, ___ No. 72,914 (Tex. Crim. App. October 6, 1999)("venireman is not challengeable for cause simply because he cannot immediately envision a scenario in which the minimum punishment would be appropriate").

g. Because of the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any venireperson who will automatically vote for the death penalty in every case. *Morgan v. Illinois*, 112 S.Ct. 2222, 2229-2230 (1992). In Texas, the defendant may remove venirepersons who cannot consider a sentence of life imprisonment as appropriate punishment for capital murder. *Cumbo v. State*, 760 S.W.2d 251, 256 (Tex. Crim. App. 1988); *Pierce v. State*, 604 S.W.2d 185, 187 (Tex. Crim. App. 1980); *Cuevas v. State*, 575 S.W.2d 543, 546 (Tex. Crim. App. 1978); *Smith v. State*, 573 S.W.2d 763, 766 (Tex. Crim. App. 1977); *but cf. Curry v. State*, 910 S.W. 2d 490, 493-94 (Tex. Crim. App. 1995)(challenge for cause properly denied where venireperson admitted there were some instances where she could answer a special issue no, and where she acknowledged that she would answer the questions no if the state failed to prove them beyond a reasonable doubt).

h. Inability to distinguish between deliberate and intentional conduct is grounds for a cause challenge. *Martinez v. State*, 763 S.W.2d 413, 415 (Tex. Crim. App. 1987); *accord Bigby v. State*, 892 S.W. 2d 864, 882 (Tex. Crim. App. 1994); *Felder v. State*, 758 S.W.2d 760, 770 (Tex. Crim. App. 1988); *cf. Rougeau v. State*, 738 S.W. 2d 651, 659 (Tex. Crim. App. 1987)(juror did not unequivocally say she would always answer the first question "yes"); *Sattiewhite v. State*, 786 S.W.2d 271, 281 (Tex. Crim. App. 1989)(equivocating venireperson rehabilitated by agreeing to wait until the trial is over before deciding); *but see White v. State*, 779 S.W.2d 809, 818 (Tex. Crim. App. 1989)(no error under "unique circumstances of this case"). A venireperson's belief "that all capital murders would be -- could be -- should be committed to the death penalty" is "an ambiguous statement" which does not unequivocally establish his inability to follow the law, and, in light of the totality of the examination, the trial court did not err in overruling appellant's challenge for cause. *Moore v. State*, 999 S.W. 2d 385, 407 (Tex. Crim. App. 1999) .

i. Bias or prejudice against the first and third issues. *Cumbo v. State*, 760 S.W.2d 251, 256 (Tex. Crim. App. 1988).

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

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

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

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

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

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

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

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

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

s. Venirepersons are challengeable if they cannot impartially judge the credibility of witnesses. “However, this means only that jurors must be open-minded and persuadable, with no *extreme* or *absolute* positions regarding the credibility of any witness.” A venireperson is not challengeable simply because he would give certain classes of witnesses -- here, doctors and policemen -- “a slight edge in terms of credibility. . . .” *Ladd v. State*, ___ S.W. 2d ___, ___ No. 72,914 (Tex. Crim. App. October 6, 1999)(venireperson not challengeable because he would tend to believe policemen and doctors slightly more than others”).

2. Are the “reasons” enumerated in article 35.16 exhaustive? *Maldonado v. State*, 998 S.W. 2d 239, 248 (Tex. Crim. App. 1999)(yes); *Mason v. State*, 905 S.W. 2d 570, 577 (Tex. Crim. App. 1995)(no); *Butler v. State*, 830 S.W. 2d 125, 127-28 (Tex. Crim. App. 1992)(yes); *Moore v. State*, 542 S.W.2d 664 (Tex. Crim. App.1976)(no).

3. The trial court does not err in overruling defendant's challenge for cause provided there is some support in the entire record that the venireperson's belief does not amount to a bias or prejudice against the law. *Pyles v. State*, 755 S.W.2d 98, 106 (Tex. Crim. App. 1988). The defendant has an uphill battle to fight to reverse a trial court for refusing to grant a challenge for cause. In *Cordova v. State*, 733 S.W. 2d 175 (Tex. Crim. App. 1987), the court of criminal appeals found "ambiguous" a venireperson's statement that "he really wanted to fry the guy." Because of this perceived ambiguity, the appellate court felt compelled to defer to the trial judge who had an opportunity to observe the

person's demeanor. *Id*. at 181-82. "[The venireperson] was not as a matter of law subject to a challenge for cause." *Id*. at 183. In *Penry v. State*, 903 S.W. 2d 715 (Tex. Crim. App. 1995), the court disposed of a number of the appellant's contested challenges by noting that, whatever else the record showed, the venireperson ultimately stated he would follow the court's instructions. *Id*. at 736,737. Recitation of this mantra apparently cures all possibility of error.

4. To establish a challenge for cause against one for bias against the law, the appellant must inform the venireperson what the law requires. *Teague v. State*, 864 S.W. 2d 505, 513 (Tex. Crim. App. 1993). The same rule applies to the state. *See Jones v. State*, 982 S.W. 2d 386, 390 (Tex. Crim. App. 1998).

5. "To preserve reversible error in regard to the denial of a defendant's challenge to a prospective juror for cause, the defendant must show that he has been forced to exercise a peremptory challenge to excuse the prospective juror to whom the defendant's challenge for cause should have been sustained, and that he has exhausted all his peremptory challenges and he had later been forced to accept a juror whom he found objectionable." *Felder v. State*, 758 S.W.2d 760, 766-67 (Tex. Crim. App. 1988); *accord Brooks v. State*, 990 S.W. 2d 278, 289 (Tex. Crim. App. 1999)*; Pondexter v. State*, 942 S.W. 2d 577, 583 (Tex. Crim. App. 1996)*; Lewis v. State*, 911 S.W. 2d 1, 4 (Tex. Crim. App. 1995); *Burks v. State*, 876 S.W. 2d 877, 892-893 (Tex. Crim. App. 1994); *Satterwhite v. State*, 858 S.W. 2d 412, 415 (Tex. Crim. App. 1993); *Bell v. State*, 724 S.W.2d 780, 795 (Tex. Crim. App. 1986).

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

> We held [in *Harris v. State*] that in order to warrant a reversal by this Court for the trial court's erroneous denial of an appellant's valid challenge for cause the appellant must show:
>
> "1. The voir dire of the individual venireperson was recorded and transcribed.
>
> "2. The appellant at trial asserted a clear and specific challenge for cause clearly articulating the grounds therefor.
>
> "3. After the challenge for cause is denied by the trial court, appellant uses a peremptory challenge on that juror.

"4. All peremptory challenges are exhausted.

"5. When all peremptory challenges have been exhausted, appellant makes a request for additional peremptory challenges.

"6. Finally, the defendant must assert that an objectionable juror sat on the case. The appellant should point out to the trial court he is being forced to try the case with a juror seated whom he would have exercised a peremptory challenge had he one."

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

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

8. The rule for preservation of error also applies to challenges for cause against *alternate* jurors. *Cooks v. State*, 844 S.W. 2d 697, 721 (Tex. Crim. App. 1992). The selection of alternate jurors is treated distinctly and separately from selection of the primary panel. *McFarland v. State*, 928 S.W. 2d 482, 508-09 (Tex. Crim. App. 1996). It is improper to claim the alternate juror as objectionable, for the purposes of preservation of error. *Id*.

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

10. Later in the paper are cases which hold that the state may challenge biased venirepersons for cause even though the nature of their bias would seem to make them good jurors for the state. The appellant in *Morrow v. State*, 910 S.W. 2d 471 (Tex. Crim. App. 1995), was creative, arguing that he should be able to challenge venirepersons who are biased against a law the state is entitled to rely upon. Specifically, appellant unsuccessfully challenged venirepersons who said they would hold the state to a higher

burden of proof than beyond a reasonable doubt. The court of criminal appeals disallowed such challenges by the defense. The state is able to make such challenges because of its duty to see that justice is done. "However, defense attorneys do not have an identical duty; rather their duty is to provide the best possible defense for their clients." *Id*. at 474.

B. By The State

1. Tex. Code Crim. Proc. Ann. art. 35.16(b)(3)(Vernon Supp. 1999) authorizes the state to challenge for cause venirepersons who have "a bias or prejudice against any phase of the law upon which the state is entitled to rely for conviction or punishment."

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

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

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

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

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

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

g. The state may remove a juror who would require evidence of premeditation. *Crane v. State*, 786 S.W.2d 338, 345 (Tex. Crim. App. 1990). *Accord Moore v. State*, 999 S.W. 2d 385, 400 (Tex. Crim. App. 1999); *Chambers v. State*, 568 S.W.2d 313, 322 (Tex. Crim. App. 1978); *cf. Esquivel v. State*, 595 S.W.2d 516, 526 (Tex. Crim. App. 1980) (motive).

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

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

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

k. The state may challenge a juror who could not consider the death penalty unless the appellant had previously been convicted of murder. *Fuller v. State*, 829 S.W.2d 191, 200 (Tex. Crim. App. 1992).

l. The trial court erred in granting, over appellant's objection, the state's challenge for cause against a venireperson who stated that he could never answer the second special issue affirmatively based solely on the facts of the offense itself. Although the facts, if severe enough, may support an affirmative answer, no case requires the venireperson to answer affirmatively solely on the facts of the offense. A venireperson is not subject to challenge for cause merely because he would require more evidence than the legal minimum to answer the special issues affirmatively. *Garrett v. State*, 851 S.W. 2d 853, 859-60 (Tex. Crim. App. 1993); *accord Ransom v. State*, 920 S.W.2d 288, 292 (Tex. Crim. App. 1994); *Sigler v. State*, 865 S.W. 2d 957, 961 (Tex. Crim. App. 1993). This error is not harmless simply because the state has unused peremptories at the end of voir dire. *Ransom v. State*, 920 S.W.2d at 292-93. This sort of error, however, is waived if appellant does not object at trial. *Goff v. State*, 931 S.W. 2d 537, 547 (Tex. Crim. App. 1996).

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

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

o. "A venireperson so traumatized by the experience of being called to jury duty that she is physically shaking, may be properly struck for cause as unfit under Article 35.16, despite her assurances that she will survive the 'crisis.'" *Powell v. State*, 897 S.W.2d 307, 312 (Tex. Crim. App. 1994).

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

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

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

s. The state -- and, presumably the defense too -- may remove a venireperson who was convicted of a felony and put on probation if no order was subsequently entered terminating the probation. Completion of the probation is not alone enough. *Wolfe v. State*, 917 S.W. 2d 270, 277 (Tex. Crim. App. 1996).

t. The trial court properly granted the state's challenge for cause against a venireperson who asserted that she could never answer the first special issue favorably to the state based on property crimes alone, even if that evidence convinced her

that appellant would commit future acts of criminal violence that constituted a continuing threat to society. *Howard v. State*, 941 S.W. 2d 102, 127 (Tex. Crim. App. 1996).

u. A venireperson who indicates she will be more skeptical of an accomplice witness than of a non-accomplice witness, but who does not take an extreme or absolute position regarding the credibility of an accomplices, is not challengeable for cause. *Jones v. State*, 982 S.W. 2d 386, 389 (Tex. Crim. App. 1998). The error though is harmless unless the defense can show that it affected his substantial rights. *Id*. at

2. *Formerly* the rule in a capital case was that, if the trial court improperly sustains the state's challenge for cause to a qualified juror, the defendant preserves error by timely and specifically objecting, and the fact that the state has peremptory challenges remaining at the conclusion of voir dire does not render the error harmless. *Sigler v. State*, 865 S.W. 2d 957, 961 (Tex. Crim. App. 1993); *Bell v. State*, 724 S.W.2d 780, 795 (Tex. Crim. App. 1986). The objection must be *quite* specific. *See Ex parte Russell*, 720 S.W. 2d 477, 487 (Tex. Crim. App. 1986); *but see Crane v. State*, 786 S.W.2d 338, 345 (Tex. Crim. App. 1990)("we'll submit the juror is qualified" preserved error where it was apparent from the record that the trial court was informed of the basis of the objection). In *Jones v. State*, 982 S.W. 2d 386 (Tex. Crim. App. 1998), the court of criminal appeals *radically altered* this rule. Now, where the error is not of constitutional dimension, "the erroneous excusing of a veniremember will call for reversal only if the record shows that the error deprived the defendant of a lawfully constituted jury." *Id*. at 394. *Accord Brooks v. State*, 990 S.W. 2d 278, 289 (Tex. Crim. App. 1999)(any error in granting the state's challenges for cause was harmless absent showing that this denied appellant a fair and impartial jury).

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

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

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

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

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

IV. EXCUSES FROM JURY SERVICE

A. Tex. Code Crim. Proc. Ann. art. 35.03 (Vernon 1989)

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

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

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

4. A variety of excuses have sufficed:

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

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

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

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

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

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

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

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

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

j. *Fuentes v. State*, 991 S.W. 2d 267, 277 (Tex. Crim. App. 1999)(that the venireperson cannot concentrate because his son has was just arrested and faces 35 years imprisonment upon adjudication of his guilt).

5. "[A] trial court has the authority to excuse a juror for a proper basis, although sworn, at any point up to the time the jury has been sworn as a whole and impaneled." *Kemp v. State*, 846 S.W. 2d 289, 295 n.4 (Tex. Crim. App. 1992); *see*

Butler v. State, 830 S.W. 2d 125, 131 (Tex. Crim. App. 1992)(power to excuse "inheres to the trial judge from the first assemblage of the array until the juror is, at last, seated").

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

7. "[T]he exercise of this authority by trial judges should be jealously guarded and relied upon, not by the parties, but by the judges as a last resort for excusing, what would otherwise be, a proper juror". *Johnson v. State*, 773 S.W.2d 322, 330 (Tex. Crim. App. 1989).

8. A visiting judge assigned to the case pursuant to the Government Code has all the powers of the judge of the court to which he is assigned, including the power to entertain excuses and exemptions. *Moore v. State*, 999 S.W. 2d 385, 400 (Tex. Crim. App. 1999).

B. Tex. Gov't Code Ann. § 62.110 (Vernon 1998)

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

2. Subsection (c) prohibits excusal "for an economic reason unless each party of record is present and approves the release of the juror for that reason." Tex. Gov't Code Ann. § 62.110(c) (Vernon 1998).

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

b. The trial judge may excuse a venireperson who is "so preoccupied by personal problems so that she could not be fair," since that person is incapable or unfit to serve under article 35.16(a) of the Texas Code of Criminal Procedure. *Moore v. State*, 542 S.W. 2d 664, 669 (Tex. Crim. App. 1976)(venireperson had teenage children and no

husband, was not paid when not at work, and stated she could not keep her mind on the case for worrying about how to pay the bills).

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

A. Sua Sponte Excusal Of The Absolutely Disqualified Is Permissible

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

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

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

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

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

Tex. Gov't Code Ann. § 62.105 (Vernon 1998).

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

a. An inability to distinguish deliberate and intentional conduct. *Green v. State*, 764 S.W. 2d 242, 247 (Tex. Crim. App. 1989).

b. Preoccupation with an upcoming wedding. *Nichols v. State*, 754 S.W. 2d 185, 193 (Tex. Crim. App. 1988)(error not reversible since defendant did not show he was tried by a jury to which he had a legitimate objection).

c. Pre-paid trip to Hong Kong. *Rougeau v. State*, 738 S.W. 2d 651, 661 (Tex. Crim. App. 1987)(error waived in absence of objection).

d. That the venireperson is disinclined to accept responsibility to judge another. *Martinez v. State*, 621 S.W. 2d 797, 799 (Tex. Crim. App. 1981).

e. A prior conviction for felony driving while intoxicated, in which the defendant had served his probationary period and had his probation terminated. *Payton v. State*, 572 S.W. 2d 677, 679 (Tex. Crim. App. 1978).

f. A mere stated prejudice in the case. *Ernster v. State*, 308 S.W. 2d 33, 35 (Tex. Crim. App. 1957).

g. Visiting relatives. *Johnson v. State*, 666 S.W. 2d 518, 518 (Tex. App.--Corpus Christi 1983, pet. ref'd).

h. Former employment with the district attorney's office and the police department, coupled with statement that venireperson could not be fair in driving while intoxicated case. *Neel v. State*, 658 S.W. 2d 856, 857 (Tex. App.--Dallas, pet. ref'd).

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

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

2. Should a qualified venireperson be excused, *sua sponte*, defendant can

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

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

a) object;

b) claim at the conclusion of the voir dire that he is to be tried by a jury to which he has a legitimate objection;

c) specifically identify the jurors of whom he is complaining.

d) exhaust all his peremptory challenges and request additional peremptories.

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

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

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

VI. VOIR DIRE--MISCELLANEOUS

A. When Must Peremptory Strikes Be Made

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

2. In *Sanne v. State*, 609 S.W.2d 762 (Tex. Crim. App. 1980), the defendant complained that article 35.13 violated his right to due process and equal protection of the law by denying him the right of a non-capital defendant to make sensible and circumspect use of his peremptory strikes. Without deciding this issue, the court of criminal appeals intimated that "this constitutional challenge is not without merit." *Id*. at 767. In a later case, however, the court has squarely rejected this contention. *Janecka v. State*, 739 S.W.2d 813, 833-834 (Tex. Crim. App. 1987)(customary method does not violate due process or equal protection); *see also Ladd v. State*, ___ S.W. 2d ___, ___ No. 72,914 (Tex. Crim. App. October 6, 1999). After *Janecka*, however, the court rejected a *Sanne*-type argument, not on the merits, but because the appellant did not properly preserve error in the detailed manner specified in *Sanne*. *Pierce v. State*, 777 S.W.2d 399, 413 (Tex. Crim. App. 1989). Does *Pierce* mean that *Sanne* is still good law? In *Rousseau v. State*, 824 S.W.2d 579, 582 n.4 (Tex. Crim. App. 1992), the court recognized that "[a]n alternative procedure sometimes utilized in building the jury list is to question a number of venirepersons individually with no action being taken on individuals except challenges for cause. After forty-two persons have been qualified and questioned . . . the parties then make their strikes and objections much the same as in a non-capital case." In *Busby v. State*, 990 S.W. 2d 263, 268 (Tex. Crim. App. 1999), appellant requested that he be allowed to exercise his peremptories retroactively, and the trial court permitted both parties to do so. On appeal, appellant complained that this was error. The court of criminal appeals disagreed. “Although this practice varies from the statutory procedure for capital cases . . . given our prior precedent, we find that the procedure controlling the order and timing of the exercise of peremptory challenges is not an absolute requirement. Hence, appellant waived any error by requesting the procedure followed in the present case.” *Id*. The court went on to reject appellant’s claim that trial counsel had been ineffective for requesting this procedure. In the process, the court “recognized that the non-capital procedure offers a minor advantage over the procedure designated for capital cases: the ability to exercise peremptory challenges after looking at the venire as a whole.” *Id*. at 269.

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

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

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

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

B. When May Challenges For Cause Be Made

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

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

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

C. Scope Of Voir Dire

1. **In general**

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

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

c. There are older cases which hold that the trial court may prohibit inquiry into venireperson's understanding of certain punishment terminology. *E.g.*, *Esquivel v. State*, 595 S.W.2d 516, 525 (Tex. Crim. App. 1980)("deliberately" and "probability"); *Battie v. State*, 551 S.W.2d 401, 405 (Tex. Crim. App. 1977)("criminal acts of violence"). In light of *Gardner v. State*, *supra*, the continued validity of these holdings is questionable. *But see Lagrone v. State*, 942 S.W. 2d 602, 614-15 (Tex. Crim. App. 1997)(in a capital case, the trial court does not abuse its discretion by refusing to permit counsel to question venirepersons concerning their definition of “probability” and “criminal acts of violence”); *see also Trevino v. State*, 815 S.W.2d 592, 610 (Tex. Crim. App. 1991).

d. "Because the phrase 'criminal acts of violence' as used in the second special issue is not defined for the jury, error in the voir dire examination occurs when the State attempts to limit the venire to its definition." Here, the state did not attempt to limit the venireperson, but merely suggested offenses other than murder, while

emphasizing that it would be up to the juror to determine this in his own mind. This was not error. *Coble v. State*, 871 S.W. 2d 192, 201 (Tex. Crim. App. 1993). *See Burks v. State*, 876 S.W.2d 877, 895 (Tex. Crim. App. 1994) (proper for state to determine, without committing, whether venirepersons could conceive of arson and burglary as crimes of violence).

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

f. The Texas Court of Criminal Appeals has held that the trial court can prohibit inquiry into the venireperson's understanding of the law of parole. *King v. State*, 631 S.W.2d 486, 490 (Tex. Crim. App. 1982). The United States Court of Appeals for the Fifth Circuit agrees. *King v. Lynaugh*, 850 F.2d 1055 (5th Cir. 1988). *See also Ford v. State*, 919 S.W. 2d 107, 116 (Tex. Crim. App. 1996)*; Sonnier v.State*, 913 S.W. 2d 511, 518 (Tex. Crim. App. 1995). "Questions about parole eligibility are not proper questions." *Eldridge v. State*, 940 S.W. 2d 646, 651 (Tex. Crim. App. 1996). *See also Rojas v. State*, 986 S.W. 2d 241, 251 (Tex. Crim. App. 1998)*; Collier v. State*, 959 S.W. 2d 621, 624 (Tex. Crim. App. 1997). For offenses committed on or after September 1, 1999, of course, the jury is now instructed on parole, if requested by the defense. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(e)(2) (Vernon Supp. 1999). Clearly, both sides will now be eligible to discuss parole, at least if the defense intends to request a parole instruction.

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

h. The trial court did not err in permitting the state to question venirepersons about their attitudes toward the death penalty. "[W]ithin reasonable limits both the State and the defendant must be allowed to explore any attitudes of veniremembers which might render them challengeable for cause or otherwise subjectively undesirable as jurors. In a death penalty case, such attitudes plainly include beliefs concerning the propriety, efficacy, and desirability of capital punishment as a component of the criminal justice system." *Draughon v. State*, 831 S.W.2d 331, 333-334 (Tex. Crim. App. 1992)(citations omitted).

i. 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).

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

k. The trial court did not err in refusing to permit appellant to voir dire the jury that voluntary intoxication is a defense to capital murder. *Raby v. State*, 970 S.W. 2d 1, 5 (Tex. Crim. App. 1998).

2. **Mitigation**

a. "Evidence which tends to mitigate against a defendant receiving the death penalty is a proper area for inquiry by defense counsel." *Goff v. State*, 931 S.W. 2d 537, 546 (Tex. Crim. App. 1996).

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

c. The trial court correctly sustained the state's objection to appellant's efforts to ask the venireperson whether he thought good conduct in prison to be an aggravating or mitigating circumstance. "Appellant was attempting to elicit, not whether the veniremember could consider good conduct in prison, but whether the veniremember would find good conduct in prison to be mitigating." *Rhoades v. State*, 934 S.W. 2d 113, 123 (Tex. Crim. App. 1996).

d. In *Coleman v. State*, 881 S.W.2d 344 (Tex. Crim. App. 1994), the trial court refused to allow appellant to ask the venirepersons whether they would consider as mitigating, evidence of poor family conditions and good conduct in jail. It is not error to refuse to allow appellant to ask questions based on facts peculiar to the case on trial. *Id*. at 350-351; *accord Garcia v. State*, 919 S.W. 2d 370, 399-400 (Tex. Crim. App. 1996)(no error in refusing to permit appellant to commit venirepersons to consider as mitigating evidence of alcohol and drug problems, family history, jail conduct and voluntary intoxication); *see Soria v. State*, 933 S.W. 2d 46, 65 (Tex. Crim. App. 1996)(appellant may not ask venirepersons whether they would consider specified evidence in mitigation under any circumstances). *See also Raby v. State*, 970 S.W. 2d 1,

6 (Tex. Crim. App. 1998).

e. The trial court did not err in forbidding appellant from informing the jury that certain evidence is mitigating and must be considered as such in assessing punishment. This is an incorrect statement of the law. *Morrow v. State*, 910 S.W. 2d 471, 473 (Tex. Crim. App. 1995).

f. The trial court did not err in refusing to permit appellant from asking the venire "whether they could consider evidence that was not related to his blameworthiness [to be] mitigating evidence." Under Texas statute, mitigating evidence is expressly defined as evidence a juror might regard as reducing the defendant's moral blameworthiness. "Hence, the wording of appellant's desired question, whether jurors could consider evidence not related to appellant's blameworthiness to be mitigating, was, in fact, contrary to the law." *Skinner v. State*, 956 S.W. 2d 532, 542 (Tex. Crim. App. 1997).

g. Appellant may properly be prevented from asking whether a venireperson believed that drug usage could ever be mitigating. *Rhoades v. State*, 934 S.W. 2d 113, 123 (Tex. Crim. App. 1996).

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

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

j. The trial court does not abuse its discretion in refusing to allow the defense to ask a venireperson how he would qualify a 19 or 20 year old in terms of youthfulness. *Moore v. State*, 999 S.W. 2d 385, 407 (Tex. Crim. App. 1999).

3. **Time limits**

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

4. **Harm**

a. In *Janecka v. State*, 937 S.W. 2d 456, 470 (Tex. Crim. App. 1996), appellant contended that the trial court erred in denying him the right to ask proper questions of sixteen venirepersons. The state argued that appellant failed to preserve this issue for appeal because he did not exhaust all his peremptory challenges, and the court of criminal appeals agreed. In this circumstance, appellant must "blindly" exercise a peremptory challenge against the venireperson in question. "Only if this prophylactic use of the peremptory challenge subsequently results in the deprivation of a peremptory challenge he would have used later on can we say the error in denying him the intelligent use of the peremptory challenge was harmful." *Id*. at 471. Left over peremptories will also mitigate the harm of failing to allow proper questions to multiple venirepersons in a capital case. "In either event the remaining peremptory challenge or challenges apparently signify that forcing appellant to exercise some of his peremptories 'blindly' did not cause him to waste needed peremptories before the jury was selected." *Id*. In so holding, the court distinguished a contrary rule established in *Nunfio v. State*, 808 S.W. 2d 482 (Tex. Crim. App. 1991), on the ground that *Nunfio* was not a capital case. *Id*. at 471 n. 9. The court also distinguished several capital cases, including *Cockrum v. State*, 758 S.W. 2d 577, 584 (Tex. Crim. App. 1988), on the ground that the language in those cases was *dicta*. *Id*. at 471 n. 9. S*ee also Rachal v.State*, 917 S.W. 2d 799, 815 (Tex. Crim. App. 1996)(such error *is* subject to a harmless error analysis).

b. *Anson v. State*, 959 S.W. 2d 203 (Tex. Crim. App. 1997), is a non-capital case that cited *Janecka* for the proposition that the harm analysis "traditionally applied to the erroneous denial of a defendant's challenge for cause also applies to the erroneous prohibition of proper questioning of individual prospective jurors." *Id*. at 204. That is, the defendant must exhaust all his peremptory challenges, request more peremptories, have this request denied, and identify objectionable jurors seated on the jury he would have struck peremptorily. The appellant in *Anson* waived error by not requesting additional challenges. "Hence, under *Janecka*, appellant has suffered no harm from the trial court's refusal to permit questioning of the individual prospective jurors involved." *Id*.

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

d. Although the trial court abused its discretion in curtailing appellant's examination concerning "reasonable doubt," the error was harmless, since jury

selection concluded prior to reaching the venireperson in question. *Dinkins v. State*, 894 S.W. 2d 330, 345 (Tex. Crim. App. 1995).

e. In *Santana v. State*, 714 S.W. 2d 1 (Tex. Crim. App. 1986), the trial court prohibited defense counsel from questioning certain venirepersons about the lesser included offense of murder. The court of criminal appeals found that this restriction was clearly erroneous, but refused to reverse because the facts adduced at trial did not raise the offense of murder. *Id*. at 10; *accord Soria v. State*, 933 S.W. 2d 46, 64 (Tex. Crim. App. 1996).

D. Misleading Hypotheticals

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

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

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

E. § 12.31(b) Oath

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

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

2. In *Adams v. Texas*, 448 U.S. 38 (1980), the Supreme Court reversed a long line of Texas cases and held that venirepersons could not constitutionally be disqualified merely because they were unable to swear that they would not be "affected" by the death penalty, as provided by § 12.31(b).

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

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

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

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

F. The Right To Individual Voir Dire

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

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

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

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

5. For offenses committed after September 1, 1992, where the state does not seek the death penalty, there is no absolute right to individual voir dire. Tex. Code Crim. Proc. Ann. art. 35.17(2)(Vernon Supp. 1999).

G. Shuffle

1. The trial court, upon demand of either party, must shuffle the names of those assigned to and seated in the courtroom as prospective jurors. Tex. Code Crim. Proc. Ann. art. 35.11 (Vernon Supp. 1999).

2. Article 35.11 clearly applies in capital cases where there is no special

venire. "We therefore hold that in capital murder cases which do not involve a special venire . . . when timely and properly requested, the accused is entitled to have the names of those persons assigned to and seated in the courtroom where the cause is to be heard, shuffled or redrawn." *Hall v. State*, 661 S.W.2d 113, 116 (Tex. Crim. App. 1983). Failure to grant a request to shuffle is automatic reversible error. *Id*. at 115. The *Hall* court did not decide whether the parties have a right to shuffle if there is a special venire. *Id*. at 116 n.3.

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

4. The trial court erred in granting the state's motion to shuffle the jury after the venire had already been shuffled at appellant's request. Only one shuffle is allowed under article 35.11, absent a showing of misconduct. Formerly, this sort of error was deemed not subject to a harm analysis. *Chappell v. State*, 850 S.W. 2d 508, 509, 513 (Tex. Crim. App. 1993). This is probably no longer the law. In *Roberts v. State*, 978 S.W. 2d 580, 580 (Tex. Crim. App. 1998), the case was remanded to the court of appeals to determine "whether the 'jury shuffle' error which occurred at trial can be analyzed in terms of harm and, if so, whether any harm occurred." Two non-death cases are now before the Texas Court of Criminal Appeals on petitions for discretionary review, where the questions concern how harm can be determined pursuant to Rule 44.2 of the Texas Rules of Appellate Procedure when the trial court errs in regard to granting or denying a jury shuffle. *See Garza v. State*, 988 S.W. 2d 352 (Tex. App.--Fort Worth 1999, pet. granted); *Ford v. State*, 977 S.W. 2d 824 (Tex. App.--Fort Worth 1998, pet. granted).

5. It is not an improper "one-person 'jury shuffle'" for the trial court to permit a venireperson with vacation plans to appear later than the date he was originally scheduled to be examined. *Goff v. State*, 931 S.W. 2d 537, 550 (Tex. Crim. App. 1996).

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

1. A defendant in a capital case must be provided at least two days (including holidays) prior to trial with a copy of the names of the persons summoned as veniremen, for the week for which his case is set for trial except where he waives the right or is on bail. When the defendant is on bail, the clerk shall furnish such a list to the defendant or his counsel at least two days prior to the trial (including holidays) upon timely motion by the defendant. Tex. Code Crim. Proc. Ann. art. 34.04 (Vernon Supp. 1999).

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

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

4. In *King v. State*, 953 S.W. 2d 266 (Tex. Crim. App. 1997), the trial court anticipated that the original venire would be exhausted, and it ordered additional names be drawn, as provided by article 34.04. These names were served on defense counsel, but not on the defendant himself. Counsel did not immediately object, but instead waited several days. Counsel argued that this objection was timely because it was before trial commenced. The court disagreed. "'Prior to trial,' however, was not the earliest opportunity for appellant to object. To preserve error, defense counsel should have objected when he was presented with the list." *Id*. at 267-68. Because his objection was untimely, the court did not reach the merits of the argument, holding that error, if any, was waived.

5. Article 34.04 has been amended, effective for offenses committed after September 1, 1991. Thus, in capital cases where the state does not seek the death penalty, there is no requirement that the jury list be provided prior to voir dire. Tex. Code Crim. Proc. Ann. art. 34.04 (Vernon Supp. 1999).

I. Number of Peremptory Challenges

1. Where the state seeks the death penalty, each party gets 15 peremptory challenges if there is only one defendant. Tex. Code Crim. Proc. Ann. art. 35.15(a)(Vernon Supp. 1999).

2. Where the state seeks the death penalty and there is more than one defendant, each party gets eight peremptory challenges. Tex. Code Crim. Proc. Ann. art. 35.15(a)(Vernon Supp. 1999).

3. Where the state does not seek the death penalty, each party gets 10 peremptory challenges if there is only one defendant. Tex. Code Crim. Proc. Ann. art. 35.15(b)(Vernon Supp. 1999).

4. Where the state does not seek the death penalty and there is more than

one defendant, each party gets six peremptory challenges. Tex. Code Crim. Proc. Ann. art. 35.15(b)(Vernon Supp. 1999).

J. Special Venire

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

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

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

K. Alternate Jurors

1. In a capital case in which the state seeks the death penalty, the court may direct that two alternate jurors be selected and that the first fourteen names not stricken be called off by the clerk. The last two names to be called are the alternate jurors." Tex. Code Crim. Proc. Ann. art. 35.26 (Vernon Supp. 1999).

2. "If alternate jurors have been selected in a capital case in which the state seeks the death penalty and a juror dies or becomes disabled from sitting at any time before the charge of the court is read to the jury, the alternate juror whose name was called first under Article 35.26 of this code shall replace the dead or disabled juror. Likewise, if another juror dies or becomes disabled from sitting before the charge of the court is read to the jury, the other alternate juror shall replace the second juror to die or become disabled." Tex. Code Crim. Proc. Ann. art. 36.29(b)(Vernon Supp. 1999).

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

L. Presence Of The Defendant

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

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

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

4. In *Lawton v. State*, 913 S.W. 2d 542 (Tex. Crim. App. 1995), the trial judge examined a venireperson in chambers, and in the absence of appellant, to determine whether she had been affected by a telephone call from the jail. After this meeting, the venireperson was dismissed from the jury. The court held that this procedure did not constitute a voir dire proceeding which required appellant's presence. "The *in camera* meeting lacked the traditional adversarial elements of a voir dire proceeding. [The venireperson] was not instructed or examined in the traditional sense of a voir dire examination; neither party desired to question her. She was dismissed upon the suggestion, agreement, and by request of both parties without challenge for cause or peremptory challenge. Both parties and the trial court stated that their purpose in the dismissal was to protect the integrity of the trial proceedings." *Id*. at 549. "Article 33.03 neither purports to govern nor was intended to govern the peculiar situation which arose in this case." *Id*.

5. "[A] defendant's 'trial' does not include jury panel formation during the general assembly." *Moore v. State*, 999 S.W. 2d 385, 399 (Tex. Crim. App. 1999). Thus, the trial court does not violate article 33.03 by exempting and excusing prospective jurors summoned to a general assembly and not assigned to any particular case.

M. Videotaping The Proceedings

1. The trial court's refusal to allow the videotaping of the voir dire proceedings by appellant was not an abuse of discretion. *Curry v. State*, 910 S.W. 2d 490, 492 (Tex. Crim. App. 1995); *accord Massey v. State*, 933 S.W. 2d 141, 151 (Tex. Crim. App. 1996).

N. Alternating The Order Of Questioning

1. In *Ladd v. State*, ___ S.W. 2d ___, ___ No. 72,914 (Tex. Crim. App. October 6, 1999), appellant argued that the court was required to alternate between the defense and the state the right to initiate questioning of each venireperson. "We are unpersuaded by appellant's psychological speculations, and we find his lack of authority unsurprising. Indeed, it may be the case that, generally, the lawyer who questions a potential juror *last* has the greater ability 'to shape the juror's views.'"

O. False Information Provided By Written Questionnaires

1. Where counsel diligently asks *oral* questions during voir dire, and a venireperson withholds information, a new trial should be granted if appellant was harmed. *See Brandon v. State*, 599 S.W. 2d 567, 577 (Tex. Crim. App. 1979); *Salazar v. State*, 562 S.W. 2d 480, 482 n.5 (Tex. Crim. App. 1978).

2. A different rule applies when the venireperson's response is to a written questionnaire. In *Gonzales v. State*, ___ S.W. 2d ___, ___ No. 0874-98, et al. (Tex. Crim. App. September 15, 1999), a non-capital case, the venireperson answered that she was not a complainant in a criminal case, when she was. The court of criminal appeals held that written questions, even those that seem subject to only one interpretation, are "vulnerable to misinterpretation." *Id*. at ___. "For this reason, 'diligent counsel' will not rely on written questionnaires to supply any information that counsel deems material. Counsel who does otherwise is simply not diligent." Here, counsel should have asked oral questions to verify the information on the written questionnaires. *Id*.