No. 2010-CR-1000

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	227TH JUDICIAL DISTRICT
THOMAS SMITH	)	BEXAR COUNTY, TEXAS

MOTION TO DECLARE THE CURRENT STATUTORY TREATMENT OF MITIGATING EVIDENCE AND THE "SUDDEN PASSION" DEFENSE IN CAPITAL MURDER CASES UNCONSTITUTIONAL

TO THE HONORABLE JUDGE OF SAID COURT

Thomas Smith files this motion pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, § 3, 10, 13, 19, and 29 of the Texas Constitution, and respectfully moves the Court to find that Texas statutes (1) relegating the "sudden passion" defense to a punishment phase issue, (2) preventing the defendant in a capital case from presenting evidence of "sudden passion" at the guilt/innocence phase, (3) prohibiting a capital defendant from providing the jury with an instruction on the "sudden passion" issue, and that (4) preventing the jury from hearing and considering all mitigating evidence, are unconstitutional.

I.

Punishment for one convicted of capital murder in Texas is mandatory: death or life imprisonment, without the possibility of parole. TEX. PENAL CODE § 12.31(a). Capital murder is the most serious offense in Texas. The state has announced that it will not seek death against Mr. Smith.

II.

Texas law provides that defendants are entitled to a jury instruction concerning mitigation when the instruction is supported by the evidence:

> At the punishment stage of a trial, the defendant may raise the issue as to whether he caused the death under the immediate influence of sudden passion arising from an adequate cause. If the defendant proves the issue in the affirmative by a preponderance of the evidence, the offense is a felony of the second degree.

TEX. PENAL CODE § 19.02(d).

III.

Although § 19.02(d) does not explicitly so state, as a practical matter it certainly is unavailable to those persons who are convicted of capital murder where the state does not seek the death penalty. In those cases, the defendant has no opportunity to present mitigating evidence regarding "sudden passion" or to seek a jury instruction concerning this evidence at the punishment phase, since punishment is automatic upon conviction.

IV.

If Mr. Smith is convicted of capital murder, he will have no opportunity to present mitigating evidence of "sudden passion," or indeed, any mitigating evidence at all, despite the fact that there is an abundance of such evidence available to this 31 year old man who has never before been convicted of any crime, and who has worked steadily and raised a family since shortly after graduating from high school. If he is convicted of a lesser crime, he will have full opportunity to persuade the jury that he is entitled to a sentence less than the maximum.

V.

The Eighth Amendment to the United States Constitution bars the infliction of "cruel and unusual punishments." This amendment applies to the States through the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *State of Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947); *Puga v. State*, 916 S.W. 2d 547, 548 (Tex. App.–San Antonio 1996, no pet.). The Eighth Amendment "encompasses a narrow proportionality principle." *Harmelin v. Michigan*, 501 U.S. 957, 997 (1991)(Kennedy, J., concurring). This principle is only rarely applied, and "its precise contours are unclear. *Id*. at 998. It forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Id*. at 1001. Although the State of Texas is entitled to punish those it convicts, disproportionate punishments violate a person's rights to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution. It would be constitutionally disproportionate to sentence Mr. Smith to the extreme sentence of life imprisonment without parole and to deprive him of the opportunity to present mitigating evidence of any sort, including evidence of sudden passion, simply because he was convicted of capital murder.

VI.

It is well settled that the Texas Constitution may provide greater protection than its federal counterpart. *Heitman v. State*, 815 S.W. 2d 681 (Tex. Crim. App. 1991). A comparison of the different texts of the Texas and United States Constitutions concerning cruel and unusual punishment reveals that the Texas Constitution is in fact more protective.

The Eighth Amendment on its face prohibits cruel *and* unusual punishment. The use of the conjunctive "and" is significant. In *Harmelin v. Michigan*, petitioner claimed that it was cruel and unusual to impose a mandatory life sentence for possession of more than 650 grams of cocaine. A majority of the Court rejected this argument. Justice Scalia, writing for the Court, conceded that while "[s]evere, mandatory penalties" may be cruel, they are not constitutionally unusual. 501 U.S. 957, 994-995 (1991). This suggests that a law must be *both* cruel *and* unusual to violate the Eighth Amendment, and that means necessarily that "cruel" is different than "unusual."

Article I, § 13 of the Texas Constitution expressly prohibits cruel *or* unusual punishment.[1] In Texas, then, a punishment is unconstitutional if it is either cruel or unusual. In § V of this motion, Mr. Smith says that sentencing him to life imprisonment without allowing him the opportunity to present any mitigating evidence, including evidence of sudden passion, is constitutionally disproportionate and violates the Eighth Amendment. He also submits that this total prohibition on mitigating evidence and evidence of sudden passion is both cruel and unusual. But even if it is not unusual, it is every bit as "cruel" as Justice Scalia seemed to concede that the life sentence was in *Harmelin*. The difference, of course, is that a sentence is federally unconstitutional only if it is *both* cruel *and* unusual, while a sentence that is "only" cruel is unconstitutional in Texas.

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[1] This provision reads, in pertinent part: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted." TEX. CONST. art. I, § 13.

VII.

Additionally, unfair, or disproportionate, or arbitrary and capricious punishments violate a person's rights to Due Process of Law, guaranteed by the 14th Amendment to the United States Constitution. In *Rochin v. California*, 342 U.S. 165, 166 (1952), the police had information that petitioner was selling narcotics, so they forced their way into his home and struggled with him to extract two capsules they saw him put in his mouth. When they were unable to disgorge the capsules they handcuffed Rochin and took him to the hospital where his stomach was pumped against his will. The two capsules thus retrieved constituted the evidence against Rochin at his trial for possession of morphine. The Supreme Court reversed, finding that the Due Process Clause is violated when a conviction is "brought about by methods that offend 'a sense of justice.'" *Id*. at 173.

> Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime to energetically. *This is conduct that shocks the conscience.* Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents – this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

Id. at 172(emphasis supplied). Rochin prevailed because the police broke into his home, choked him, and had his stomach pumped to retrieve two morphine capsules that were later used to obtain a 60 day jail sentence. Mr. Smith's position is simple: If Rochin was entitled to

constitutional relief for what happened to him, then due process of law also prohibits sentencing a man to life imprisonment without the opportunity to present mitigating evidence, including evidence of sudden passion.

VIII.

Due Course of Law, under Article I, §§ 13 and 19 of the Texas Constitution is also offended by Texas statutes that prevent a person facing life imprisonment without parole from presenting available mitigating evidence to his sentencing jury.

IX.

All persons in Texas are entitled to Equal Protection Of Law under the Fourteenth Amendment to the United States Constitution. The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). Most legislation classifies, and, if it does not impair a fundamental right or target a suspect class, a legislative classification will be upheld "so long as it bears a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631 (1996).

> Unequal treatment of persons under a state law which is founded upon unreasonable and unsubstantial classification constitutes discriminating state action and violates both the state and federal Constitutions.

Milligan v. State, 554 S.W. 2d 192, 194 (Tex. Crim. App. 1997)(finding there is a rational basis for distinguishing violent felons from all other felons); *see also Ex parte Montgomery,* 894 S.W. 2d 324, 329 (Tex. Crim. App. 1995)(legislation must bear "some fair relationship to a legitimate

public purpose"); *John v. State*, 577 S.W. 2d 483, 485 (Tex. Crim. App. 1979)(legislature may classify to serve "legitimate aims if the limits of the class are not unreasonable or arbitrary"). Persons convicted of murder are entitled to present mitigating evidence in an effort to persuade their jurors to sentence them to less than life imprisonment. Persons convicted of capital murder against whom the state seeks a death sentence are constitutionally and statutorily entitled to present mitigating evidence in a effort to convince the jury to impose less than the maximum sentence. It is irrational and a violation of Equal Protection of the Law to disallow someone situated as is Thomas Smith from presenting mitigating evidence, including evidence of sudden passion. But this is just what Texas law does.

X.

Article I, § 3 of the Texas Constitution will also be violated if Mr. Smith is convicted of capital murder and thereby statutorily prohibited from presenting mitigating evidence, including evidence that he acted under the immediate influence of sudden passion arising from an adequate cause.

Respectfully submitted:

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By _____
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CERTIFICATE OF SERVICE

I certify that a copy of this motion been delivered to the Bexar County District Attorney, Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas, on this the 6th day of January, 2012.

_____
MARK STEVENS

ORDER

On this the ____ day of _____, 2012, came to be considered Defendant's Motion To Declare The Current Statutory Treatment Of Mitigating Evidence And The "Sudden Passion" Defense In Capital Murder Cases Unconstitutional, and said motion is hereby

(GRANTED) (DENIED)

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JUDGE PRESIDING