OVERVIEW
OF
RECENT CAPITAL DECISIONS

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35TH ANNUAL ADVANCED CRIMINAL LAW COURSE
July 20-23, 2009
Dallas

CHAPTER 15.1

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OVERVIEW OF RECENT CAPITAL DECISIONS

I. SCOPE OF ARTICLE

This article discusses issues which commonly arise in Texas capital cases, and provides citations to the applicable cases and statutes. Emphasis is placed on trial issues. Appellate procedure is discussed only briefly, to the extent it varies from appellate procedure in non-capital cases. Post-conviction remedies are beyond the scope of this article.

II. BAIL

A. Denial Of Bail When Proof Is Evident

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

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

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

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

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

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

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

C. What Amount Is Reasonable?

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

2. *See Ex parte Vasquez*, 558 S.W. 2d 477, 480 (Tex. Crim. App. 1977)(bail reduced from $100,000.00 to $20,000.00); *Ex parte Green*, 553 S.W.2d 382, 392

(Tex. Crim. App. 1977)(bail set at $25,000.00); *Ex parte Cevallos*, 537 S.W.2d 744, 745 (Tex. Crim. App. 1976)(bail reduced from $100,000.00 to $25,000.00); *Ex parte Wilson*, 527 S.W.2d 310, 312 (Tex. Crim. App. 1975)(bail set at $40,000.00 and $20,000.00); *Ex parte Sierra*, 514 S.W.2d 760, 761 (Tex. Crim. App. 1974)($50,000.00); *Ex parte Wood*, 952 S.W. 2d 41, 43 (Tex. App.--San Antonio 1997, no pet.)(bail reduced from $350,000.00 to $50,000,00); *Ex parte Green*, 940 S.W. 2d 799, 802 (Tex. App.--El Paso 1997, no pet.); *Ex parte McDonald*, 852 S.W. 2d 730, 736 (Tex. App. -- San Antonio 1993, no pet.)(bail reduced from $1,000,000.00 to $75,000.00); *Ex parte Delk*, 750 S.W. 2d 816, 817 (Tex. App. -- Tyler 1988, no pet.)(bail reduced from $100,000.00 to $35,000.00); *Ex parte Goosby*, 685 S.W. 2d 440, 442 (Tex. App. -- Houston [1st Dist.] 1985, no pet.)(reduced from $250,000.00 to $100,000.00); *Ex parte Clark*, 635 S.W. 2d 202, 204 (Tex. App. -- San Antonio 1982, no pet.)(reduced from $150,000.00 to $50,000.00).

D. Jurisdiction Of The District Court

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

E. Statutory Entitlement To Bail Where State Receives Continuances

1. Tex. Code Crim. Proc. Ann. art. 29.12 provides:

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

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

F. Article 17.151 In Capital Cases

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

2. The court of appeals in Corpus Christi disagrees. In *Beckcom v. State*, 938 S.W. 2d 780, 782 (Tex. App.--Corpus Christi 1997, no pet.), the court held that the trial court erred in not releasing appellant who was not indicted within 90 days of his detention.

G. Appeal From Denial Of Bail

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

H. Collateral Estoppel

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

I. Application For Writ of Habeas Corpus

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

III. EFFECTIVE ASSISTANCE OF COUNSEL

A. Ex parte Duffy: Reasonably Effective Assistance Of Counsel

1. Once upon a time, the courts took seriously the constitutional right to effective assistance of counsel. In *Ex parte Duffy*, 607 S.W. 2d 507 (Tex. Crim. App. 1980), the defendant was convicted of capital murder and received the death penalty. Trial counsel had solicited

the case from defendant's parents, representing himself as an expert in capital cases. Prior to trial, counsel visited his client for only a few minutes, and otherwise conducted no real pretrial investigation. He filed no meaningful pretrial motions, he participated only minimally in selection of the jury, and he failed to raise the only defense available -- insanity. Additionally, not only did counsel fail to affirmatively aid his client, he did him positive damage by putting on a witness who testified against his client on the question of punishment. The court of criminal appeals reversed the conviction, finding that the lawyer had not rendered "reasonably effective assistance of counsel." *Id*. at 516. This remained the standard in Texas until 1984.

B. Strickland v. Washington: Performance And Prejudice

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

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

Id. at 687.

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

C. Ineffective Assistance In Capital Trials

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

2. *Strickland* makes it difficult to establish that counsel was ineffective. *E.g.,Ex parte Martinez*, 195 S.W. 3d 713, 731 (Tex. Crim. App. 2006); *Chambers v. State*, 903 S.W. 2d 21, 33 (Tex. Crim. App. 1995); *Rodriguez v. State*, 899 S.W. 2d 658, 668 (Tex. Crim. App. 1995); *Butler v. State*, 872 S.W.2d 227, 241 (Tex. Crim. App. 1994); *Ex parte Kunkle*, 852 S.W. 2d 499, 506 (Tex. Crim. App. 1993); *Muniz v. State*, 851 S.W. 2d 238, 258-59 (Tex. Crim. App. 1993); *Hathorn v. State*, 848 S.W. 2d 101, 120-21 (Tex. Crim. App. 1992); *McFarland v. State*, 845 S.W. 2d 824, 842-848 (Tex. Crim. App. 1993); *Miniel v. State*, 831 S.W. 2d 310, 323 (Tex. Crim. App. 1992); *Gosch v. State*, 829 S.W. 2d 775, 784 (Tex. Crim. App. 1991); *Motley v. State*, 773 S.W. 2d 283 (Tex. Crim. App. 1989); *Derrick v. State*, 773 S.W. 2d 271, 272-75 (Tex. Crim. App. 1989); *Holland v. State*, 761 S.W. 2d 307, 320 (Tex. Crim. App. 1988); *Bridge v. State*, 726 S.W. 2d 558, 571 (Tex. Crim. App. 1986).

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

extent reasonable professional judgment supports the limitation." *Id*. at 495.

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

b. In *McFarland v. State*, 928 S.W. 2d 482 (Tex. Crim. App. 1996), the fact that one of appellant's attorneys customarily took a short nap during the afternoon portions of the trial did not deprive appellant of the effective assistance of counsel since he had a second chair. *Id*. at 508. The court also recognized that this might have been a strategic move on the part of the lawyer who did not sleep, hoping that the jury might have sympathy for appellant. *Id*. at 505 n. 20. *See also Ex parte Burdine*, 901 S.W. 2d 456 (Tex. Crim. App. 1995)(Maloney, J., dissenting). *But cf., Burdine v. Johnson*, 262 F. 3d 336 (5th Cir. 2001).

c. Whether McFarland received the effective assistance of counsel was re-evaluated on state habeas corpus. While conceding that applicant might well have been denied the effective assistance of counsel by a lawyer that slept through critical stages of his trial, the court pointed out that a second lawyer, appointed by the trial court, "was an awake, active, and zealous advocate in the adversarial testing of the prosecution's case." *Ex parte McFarland*, 163 S.W. 3d 743, 753 (Tex. Crim. App. 2005). Relief was denied.

d. The deliberate, strategical choice to withhold mitigating evidence at the punishment phase, based on a thorough and complete investigation of the facts, does not constitute ineffective assistance of counsel. *Ex parte Kunkle*, 852 S.W. 2d 499, 506 (Tex. Crim. App. 1993).

e. A claim that trial counsel was ineffective for not requesting a *Penry* charge and for not putting on more mitigating evidence will be rejected where there is no showing that the mitigating evidence proved had significance beyond the special issues, and where there is no explanation of what more mitigating evidence could have been proffered. *Narvaiz v. State*, 840 S.W. 2d 415, 434 (Tex. Crim. App. 1992).

f. Counsel was not ineffective for not requesting a jury instruction on the mitigating effect of appellant's voluntary intoxication where he was not entitled to such an instruction. *Miniel v. State*, 831 S.W. 2d 310, 325 n.16 (Tex. Crim. App. 1992).

g. Counsel was not ineffective for eliciting from his witness, Dr. Quijano, that Hispanics are statistically more likely to be dangerous. The court could not say that this could not be sound trial strategy. *Garcia v. State*, 57 S.W. 3d 436, 441 (Tex. Crim. App. 2001). *See also Saldano v. State*, 70 S.W. 3d 873, 885 (Tex. Crim. App. 2002).

h. Counsel is not ineffective where "there is at least the possibility" that his use of peremptory challenges was reasonable trial strategy. *Murphy v. State*, 112 S.W. 3d 592, 601(Tex. Crim. App. 2003).

4. What about the case where counsel acquiesces to the defendant's demand not to put on mitigating evidence?

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

b. Neither counsel nor the trial court may override appellant's decision not to put on mitigating evidence. *Sonnier v. State*, 913 S.W. 2d 511, 522 (Tex. Crim. App. 1995).

c. *Shore v. State*, 2007 WL 4375939 (Tex. Crim. App. 2007)(not designated for publication), seems paradoxical. On the one hand, the court says that "the decision whether to present mitigation testimony concerns *trial strategy*," in contrast to the "absolute" decision whether to testify. As such, "trial counsel shoulders the primary responsibility of investigating the existence and scope of mitigation and informing the capital defendant of any such evidence

> discovered, as well as the advantages and disadvantages of presenting such mitigation evidence to the jury." *Id* at *11. Later in the opinion, though, the court says this: "When a client explicitly directs counsel to take a specific action that is legal and a reasonable trial strategy, we will not find counsel ineffective when they accede to the client's articulated wishes." *Id*. at *15.

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

6. In *Ex parte Varelas*, 45 S.W. 3d 627 (Tex. Crim. App. 2001), the court found trial counsel deficient for failing to request that the jury be instructed that they must find beyond a reasonable doubt that applicant committed certain extraneous misconduct before considering it in its deliberations, and for failing to request limiting instructions as to the jury's use of this extraneous misconduct. *Id*. at 632. Whether applicant had previously abused the complainant "was essential to the State's case against applicant." *Id*. at 630. Had counsel requested the instruction, and the limiting instructions, they would have been given. *Id*. at 631. Trial counsel gave an affidavit in which she assured the court that her failure to request the instructions was "simply an oversight," and not the result of trial strategy. *Id*. at 632. The court also found that this deficient performance prejudiced applicant. When the charge does not contain an accurate description of the law, "the integrity of the verdict is called into doubt." *Id*. at 633. Because of the incorrect charge and lack of limiting instruction, it is reasonable to presume that the jury did not necessarily find beyond a reasonable doubt that applicant committed the extraneous conduct, and did not consider this misconduct only for the limited purposes permitted by law. *Id*. at 633. The extraneous misconduct was "central" to the state's case. *Id*. at 634. "Applicant was prejudiced because the charged offense was similar in nature to the extraneous acts, and the extraneous acts were likely considered as direct evidence of applicant's guilt. Applicant's defense that L.W.'s mother killed her was undermined because the jury was essentially informed that applicant had harmed L.W. in the past, and therefore, he was the cause of her death. Also, applicant's chances for being convicted only of a lesser-included offenses were severely diminished. We conclude that this harm is 'sufficient to undermine confidence in the outcome' of applicant's trial. There is a reasonable probability that, but for the errors committed by applicant's attorneys, the result of his trial would have been different." *Id*. at 636 (citations omitted).

7. A claim of "strategy," while potent, does not defeat every ineffectiveness argument. "*Strickland*, however, demands more than the mere decision of a strategic choice by counsel. It requires 'informed strategic choices.'" *Lockett v. Anderson*, 230 F. 3d 695, 714 (5th Cir. 2000). *See Beltran v. Cockrell*, 294 F. 3d 730, 735 (5th Cir. 2002)("counsel's *unreasonable* strategic decisions and investigative failures amounted to ineffective assistance of counsel")(emphasis supplied).

8. In *Moore v. Johnson*, 194 F. 3d 596, 621-22 (5th Cir. 1999), the Fifth Circuit found counsel ineffective based on their failure to investigate petitioner's proposed defense; their failure to require submission of exculpatory language in petitioner's confession; their damaging cross-examination of a state's witness which by itself established most of the state's case; and counsel's complete failure to investigate, develop or present available and potentially useful mitigating evidence; *see also Anderson v. Johnson*, 338 F.3d 382, 393-94 (5th Cir.2003); *Beltran v. Cockrell*, 294 F.3d 730, 733-35 (5th Cir.2002); *Lockett v. Anderson*, 230 F.3d 695, 715-17 (5th Cir.2000); *Gray v. Lynn*, 6 F.3d 265, 269-71 (5th Cir.1993).

D. *Wiggins*, *Rompilla*, And The Duty To Investigate

1. *Wiggins v. Smith*, 539 U.S. 510 (2003), is important because it highlights "counsel's duty to investigate." *Id*. at 522. There the petitioner complained that his trial counsel were ineffective because they failed to properly investigate and present mitigating evidence of his unfortunate life history at the punishment phase of his capital trial. *Id*. at 514. The state court had denied

habeas relief after finding that trial counsel had made a deliberate, tactical decision to forego a mitigation case in favor of convincing the jury that appellant was not directly responsible for the murder. *Id*. at 517-518. The Fourth Circuit Court of Appeals agreed that counsel had made a reasonable strategic decision to focus on petitioner's responsibility. *Id*. at 519. The Supreme Court reversed, finding that the state court's "application of *Strickland's* governing legal principles was objectively unreasonable." *Id*. at 528. The Court found counsel constitutionally deficient for failing to investigate petitioner's life history beyond consideration of a presentence investigation report and a report prepared by a municipal social services office. The respondent claimed that trial counsel had exercised reasonable professional judgment in choosing not to put on a mitigation case, and that for this reason, they had not performed deficiently. But the Supreme Court made it clear that its concern was not whether counsel should have presented a mitigation case. "Rather, we focus on whether the investigation supporting counsel's decision not to introduce evidence of Wiggins's background *was itself reasonable*. *Id*. at 523(emphasis in original).

2. *See also Soffar v. Dretke*, 368 F. 3d 441, 478 (5th Cir. 2004)(counsel ineffective for not conducting an adequate pretrial investigation); *Lewis v. Dretke*, 355 F. 3d 364, 369 (5th Cir. 2003)(failure to investigate mitigating childhood abuse evidence); *Anderson v. Johnson*, 338 F. 3d 382, 394 (5th Cir. 2003)(failure to investigate and interview eyewitnesses).

3. The court of criminal appeals rejected applicant's *Wiggins* complaint in *Ex parte Woods*, 176 S.W. 3d 224 (Tex. Crim. App. 2005). Woods's trial lawyers did investigate his mitigation case, and the did present mitigating evidence, "albeit only a minimal amount." *Id*. at 226. Specifically, they consulted with three mitigation specialists, tracked down records, talked extensively to applicant and his family, and put on evidence through one expert. Although there were other witnesses who could have been called, each might have been subjected to damaging cross-examination, and might have opened the door to damaging rebuttal evidence. Although trial counsel did not conduct the most thorough investigation possible, their decisions not to pursue certain avenues were reasonable. "When an attorney opens Pandora's box, he is not constitutionally required to examine each and every disease, sorrow, vice, and crime contained therein before quietly and firmly closing the cover. It is entirely reasonable to conclude that a Texas jury would be singularly unimpressed by the sordid details of applicant's background and bad character traits." *Id*. at 228.

4. *Rompilla v. Beard*, 125 S. Ct. 2456 (2005), is even stronger than *Wiggins*. There the public defenders put on brief testimony in mitigation from family members and argued for residual doubt. The Supreme Court faulted their investigation. This was not a case in which counsel simply ignored their obligation to find mitigating evidence. Counsel interviewed the defendant and some members of his family, and received assistance from three mental health experts who gave opinions at the guilt phase. Rompilla's own contributions to his case were "minimal," and, at times, "even actively obstructive by sending counsel off on false leads." *Id*. at 2462. Habeas counsel identified a number of things trial counsel could have followed, but did not, to build a mitigation case, including school and criminal records and a history of alcohol dependence. The Supreme Court found one deficiency "clear and dispositive: the lawyers were deficient in failing to examine the court file on Rompilla's prior conviction." *Id*. at 2463. This was deficient performance because counsel knew the state intended to use this evidence to prove its death case, and because this was public information easily available. *Id*. at 2464. And, the Court had no doubt that counsels's lapse was prejudicial. Had they looked at the file, they would have found mitigation evidence that no other source revealed, including evidence of bad upbringing, mental deficiency, family alcoholism, and child abuse. "This evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury, and although we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test. It goes without saying that the undiscovered 'mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [Rompilla's] culpability. . . and the likelihood of a different result if the evidence had gone in is 'sufficient to undermine confidence in the outcome' actually reached at sentencing. . . ." *Id*. at 2468-69.

5. In *Ex parte Briggs*, 187 S.W. 3d 458 (Tex. Crim. App. 2005), applicant pleaded guilty to injury to a child, was sentenced to 17 years imprisonment, then filed a writ, alleging, among other things, that her trial counsel was ineffective for not adequately investigating the cause of her child's death. The court of criminal appeals granted relief. Here, the lawyer's decision not to investigate was not a strategic one. Rather, it was economic. He did not consult with an expert because applicant could not come up with the money. A reasonably competent attorney would have either (1) subpoenaed all the doctors who had treated the baby, introduce through them the medical records, and elicit their opinions; (2) withdraw from the case, prove applicant's indigency, and seek appointment of counsel; or (3) prove her indigency and seek appointment of

experts under *Ake v. Oklahoma*. Counsel's financial decision to do nothing to develop evidence concerning the child's medical history was not a reasonable professional judgment, and was prejudicial to applicant. *Id*. at 469.

6. In *Ex parte Gonzales*, 204 S.W. 3d 391 (Tex. Crim. App. 2006), the habeas court found as a matter of fact that applicant's father physically and sexually abused him severely and frequently as a small child, and that, as a result, applicant suffered from a post-traumatic stress disorder. This evidence was not introduced at trial. Trial counsel admitted that he did not ask applicant or his family specifically about past abuse, and that no such information was volunteered. Counsel also admitted that this evidence would have been very helpful in getting a life sentence, and that he should have looked into it. His failure to do so was not a strategic or tactical decision, but a mistake. The issue was not whether counsel should have put this evidence on, but "whether he failed to conduct a reasonable investigation to uncover mitigating evidence." Specifically, was counsel ineffective for failing to ask applicant or his family if he was abused as a child. The court of criminal appeals found counsel ineffective. "We think that, at the time of the applicant's trial, an objective standard of reasonable performance for defense counsel in a capital case would have required counsel to inquire whether the defendant had been abused as a child. Counsel's performance fell below this standard." *Id*. at 397. And the deficient performance prejudiced applicant. The mitigating evidence presented at the habeas hearing was "substantially greater and more compelling than that actually presented by the applicant at his trial." The court could not say with confidence that the facts of the case and the aggravating evidence would clearly have outweighed the mitigating evidence if the jury had heard it. "In short, we conclude that the applicant's available mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of the applicant's moral culpability. Therefore, there is at least a reasonable probability that, had this mitigating evidence been available at the applicant's original punishment hearing, a different result would have occurred, such that it undermines our confidence in the outcome." *Id*. at 399-400.

7. The trial court found that trial counsel failed to prepare for the punishment phase because they thought the jury would not find applicant guilty. As a result, they were unaware of "compelling evidence of physical and emotional abuse, familial violence, wretched treatment of the defendant by his father, alcoholism, the mental retardation of siblings, drug abuse, a history of head injuries, learning disabilities, and possible fetal alcohol syndrome." The trial court believed that the question under *Wiggins* was: "Would the jury have reached a different conclusion knowing about some or all of these mitigating factors?" The court of criminal appeals agreed that this was the issue, and the court accepted the trial court's finding that trial counsel were ineffective. *Ex parte Kerr*, 2009 WL 874005 *2 (Tex. Crim. App. 2009).

E. Unnecessary Impeachment

1. Appellant's conviction was reversed in *Robertson v. State*, 187 S.W. 3d 475 (Tex. Crim. App. 2006), a non-capital case. On direct examination during the guilt phase of the trial his own lawyer elicited testimony from appellant that he was then incarcerated on two convictions that were pending on appeal. The convictions would not have been admissible on cross-examination under Rule 609 because they were on appeal. The questioning opened the door to damaging cross-examination, and both parties referred to the convictions during their summations. Noting that appellant's self-defense claim rested almost entirely on his credibility, the Court found that counsel was deficient in allowing the jury to hear prejudicial and clearly inadmissible evidence that had no strategic value. *Id*. at 485-86.

F. Denial of Counsel Is Presumptively Prejudicial

1. There is another standard, besides *Strickland*, for reviewing error when counsel has been completely denied. In *United States v. Cronic*, 466 U.S. 660, 659 (1984), the Supreme Court recognized that, where counsel is completely denied, prejudice is presumed, avoiding the need to apply *Strickland's* second prong. Complete denial of counsel may either be actual or constructive. Constructive denial occurs where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing . . . ." *Id*. "*Cronic's* presumption of prejudice applies to only a very narrow spectrum of cases where the circumstances leading to counsel's ineffectiveness are so egregious that the defendant was in effect denied *any meaningful assistance at all*." *Martin v. McCotter*, 796 F.2d 813, 820 (5th Cir. 1986); *see Lombard v. Lynaugh*, 868 F.2d 1475, 1481 (5th Cir. 1989)(petitioner not required to prove *Strickland* prejudice where appellate lawyer "afforded almost no appellate representation whatever"); *see also Tucker v. Day*, 969 F. 2d 155, 159 (5th Cir. 1992).

2. In *Ex parte Burdine*, 901 S.W. 2d 456 (Tex. Crim. App. 1995)(Maloney, J., dissenting), the trial court found as a matter of fact and law that counsel slept

during portions of applicant's capital murder trial. The trial court went on to find that counsel was therefore absent, and that this constituted a *per se* denial of the right to effective assistance of counsel. *Id*. at 457. The court of criminal appeals denied applicant's application for writ of habeas corpus. Judge Maloney, joined by Judges Overstreet and Baird, dissented. "The issue presented in this case has never been addressed by the United States Supreme Court nor by this Court. At least one federal circuit court has recognized that in circumstances similar to those in this case, a Sixth Amendment violation occurred. Accordingly, this Court has a duty to at least file and set this case so that we can consider the issue." *Id*. at 458.

3. The federal district court reached a different conclusion than did the majority of the Texas Court of Criminal Appeals. "This Court therefore concludes that when a defense attorney sleeps through a 'substantial' portion . . . of his client's criminal trial, prejudice is to be presumed as a matter of law. A sleeping counsel is equivalent to no counsel at all." *Burdine v. Johnson*, 65 F. Supp.2d 854, 866 (S. D. Tex. 1999).

4. The Court of Appeals for The Fifth Circuit, sitting *en banc*, affirmed the federal district court. "The Supreme Court has long recognized that 'a trial is unfair if the accused is denied counsel at a critical stage of his trial.' *United States v. Cronic*, 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). When a state court finds on the basis of credible evidence that defense counsel repeatedly slept as evidence was being introduced against a defendant, that defendant has been denied counsel at a critical stage of his trial. In such circumstances, the Supreme Court's Sixth Amendment jurisprudence compels the presumption that counsel's unconsciousness prejudiced the defendant." *Burdine v. Johnson*, 262 F. 3d 336, 338 (5th Cir. 2001). The court refused to hold that proof of sleeping would invariably compel the presumption of prejudice. "Our holding, that the repeated unconsciousness of Burdine's counsel through not insubstantial portions of the critical guilt-innocence phase of Burdine's capital murder trial warrants a presumption of prejudice, is limited to the egregious facts found by the state habeas court in this case." *Id*. at 349.

5. "When we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete." *Bell v. Cone*, 535 U. S. 685, 696-97 (2002). Counsel's failure to adduce mitigating evidence and his failure to make a closing argument must be analyzed under *Strickland*, not *Cronic*. *Id*. at 697-98. *Accord Johnson v. Cockrell*, 301 F. 3d 234, 238 (5th Cir. 2002), *cert. denied*, 538 U.S. 1001 (2003)(counsel's elicitation from victim's father that he wanted his son's killer punished may have been "bad lawyering" but it is to be analyzed under *Strickland*, not *Cronic*).

6. Although applicant's retained lawyer slept through critical stages of the trial, co-counsel "was an awake, active, and zealous advocate in the adversarial testing of the prosecution's case." In such a situation, the court will not presume prejudice under *Cronic*. *Ex parte McFarland*, 163 S.W. 3d 743, 753 (Tex. Crim. App. 2005).

G. Prejudice Is Presumed From Conflict of Interest

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

2. In *Ex parte McCormick*, 645 S.W. 2d 801 (Tex. Crim. App. 1983), the court reversed the convictions for capital murder because the lawyers jointly representing the two co-defendants had an actual conflict of interest which affected the adequacy of their representation. *Id.* at 806. Although not then adopting a rule that multiple representation is *per se* unconstitutional in a capital case, the court left that possibility open in the future, noting that an attorney "cannot simultaneously argue with any semblance of effectiveness that each defendant is most deserving of the lesser penalty." *Id*. at 806 n.18. *See Perillo v. Johnson*, 205 F. 3d 775, 808 (5th Cir. 2000).

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

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

5. Two different standards apply regarding conflicts of interest, depending on whether appellant objected at trial. When appellant objects, the trial court is obligated to investigate and determine whether the risk of conflict is too remote to warrant separate counsel. Where appellant does not object, reversal is required on appeal only where appellant shows that the attorney was operating under an actual conflict of interest that adversely affected counsel's performance, in which case no additional showing of harm or prejudice is required. *Routier v. State*, 112 S.W. 3d 554, 581-84(Tex. Crim.

App. 2003)(in this case, appellant did not object at trial, and could not show an actual conflict of interest that affected trial counsel's representation).

H. Ineffective Assistance On Appeal

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

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

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

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

I. Motion For New Trial

1. The grounds for new trial listed in Rule 30(a) are illustrative, not exhaustive, and the trial judge has discretion to grant a new trial for a reason not listed in Rule 30(a), including that trial counsel was ineffective. *Reyes v. State*, 849 S.W. 2d 812, 815 (Tex. Crim. App. 1993).

J. Post-Conviction Assistance

1. The Constitution does not require appointment of counsel to death row inmates for the purpose of pursuing collateral attacks on their sentences. *Murray v. Giarratano*, 492 U.S. 1, 10 (1989); *DeLuna v. Lynaugh*, 873 F.2d 757, 760 (5th Cir. 1989).

2. The Supreme Court interpreted Title 21 U.S.C. 848(q)(4)(B) to require appointment of qualified legal representation for capital defendants in federal habeas corpus proceedings. *McFarland v. Scott*, 512 U.S. 849, 855 (1994). This right adheres prior to the filing of a formal, legally sufficient habeas corpus petition. Additionally, appointed counsel shall, upon a proper *ex parte* showing, be entitled to investigative, expert, or other services reasonably necessary for the representation of the defendant. *Id.*

3. Where counsel was appointed prior to the effective date of article 11.071, § 2(d), and where the appointment remains in effect, this appointment encompasses the filing of the initial application for writ of habeas corpus. Therefore, there is no need to appoint new counsel under article 11.071. *Ex parte Cruz*, 931 S.W. 2d 537, 537 (Tex. Crim. App. 1996).

4. "It is a well established principle of federal and state law that no constitutional right to effective assistance of counsel exists on a writ of habeas corpus." *Ex parte Graves*, 70 S.W.3d 103, 110 (Tex. Crim. App.2002). The statutory reference to "competent" habeas counsel refers to "habeas counsel's qualifications, experience, and abilities at the time of his appointment," and not to the "final product of representation." *Id*. at 114. Because competency of prior habeas counsel is not a cognizable issue on habeas corpus review, such an allegation cannot fulfill the requirements of article 11.071, § 5 for a subsequent writ. A subsequent writ making this allegation will be dismissed as abusive. *Id*. at 105.

5. In *Ex parte Reynoso*, 2006 WL 3735397 (Tex. Crim. App. 2006)(not designated for publication), appointed counsel's writ raised a single allegation, and the trial court recommended that relief be denied. Before the court of criminal appeals could rule, applicant filed a request that new habeas counsel be appointed because his current lawyer was denying him the right to meaningful access to state and federal review. The court remanded the case to the trial court to investigate the accuracy of applicant's claims, and to make findings of fact as to what should be done.

K. One Lawyer, Or Two?

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

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

3. The court is required to appoint two attorneys, one of whom must be "qualified" under article 26.052 of the code of criminal procedure, to represent an indigent defendant where the state seeks the death penalty. TEX. CODE CRIM. PROC. ANN. art. 26.052(e).

L. Time To Prepare

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

M. Self-Representation

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

2. In *Daniels v. State*, 921 S.W. 2d 377 (Tex. App.--Houston [1st Dist.] 1996, pet. ref'd), the trial court denied appellant's motion for continuance which was based on the unavailability of one of his lawyers. The trial court then gave appellant the option of proceeding with his lawyer who was available (but who had filed a motion to withdraw) or proceeding *pro se*, and appellant chose the later. This was not error. "[I]t is not unfair for a trial court to require a defendant to choose between going to trial with appointed counsel or proceeding *pro se*." *Id*. at 382. This was a capital case, but unlike *Dunn*, it was not one in which the state sought the death penalty.

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

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

5. *United States v. Davis*, 285 F. 3d 378, 381 (5th Cir. 2002)("district court's decision to appoint an independent counsel violates Davis's Sixth Amendment right to self- representation").

N. Delay In Appointment

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

O. When Should Ineffectiveness Be Raised?

1. Ineffective assistance of counsel can be raised on direct appeal or collaterally, by writ of habeas corpus. One problem with raising such issues on direct appeal is that the record is not adequately developed. In *Rodriguez v. State*, 899 S.W. 2d 658, 668 (Tex. Crim. App. 1995), Judge Baird concurred with this note:

"Appellate counsel would be well advised and appellants would be better served, if claims of ineffective assistance of counsel were *not* raised on direct appeal but rather in applications seeking habeas corpus relief." *See Chambers v. State*, 903 S.W. 2d 21, 35-36 (Tex. Crim. App. 1995)("This is so because a hearing on a writ application develops a record on the conduct of counsel. With such a record, we can better gauge the effectiveness of counsel's representation.")(Baird, J., concurring). *See also Tong v. State*, 25 S.W. 3d 707, 714 n. 10 (Tex. Crim. App. 2000)(however, "prior rejection of the claim on direct appeal will not bar relitigation of the claim to the extent that an applicant gathers and introduces evidence not contained in the direct appeal record").

2. In a non-capital case, the court recognized a "substantial risk" accompanying a claim of ineffective assistance on direct appeal, where only "[r]arely" will an appellate court possess an adequate record to fairly evaluate the claim. *Thompson v. State*, 9 S.W. 3d 808, 813-14 (Tex. Crim. App. 1999). "This opinion should not be read as a declaration that no claim of ineffective assistance of counsel can be brought on direct appeal. However, in the vast majority of cases, the undeveloped record on direct appeal will be insufficient for an appellant to satisfy the dual prongs of *Strickland*. *Id*. at 814 n.6. "Recourse for appellant's claim is still available. This Court has held that the general doctrine that forbids an application for writ of habeas corpus after direct appeal has addressed the issue not apply in these situations, and appellant can resubmit his claim via an application for writ of habeas corpus." *Id*. at 814. *See also Mitchell v. State*, 68 S.W. 3d 640, 642 (Tex. Crim. App. 2002)(generally the record on direct appeal is insufficient to show deficient performance; petition for writ of habeas corpus is usually the appropriate vehicle).

3. In *Robinson v. State*, 16 S.W. 3d 808, 813 (Tex. Crim. App. 2000), the court of appeals had found that appellant forfeited his right to complain that trial counsel was ineffective because he did not make a contemporaneous objection. The court of criminal appeals reversed this peculiar holding. Counsel cannot, by inaction at trial, waive the right to claim ineffectiveness on appeal.

4. Be careful about waiting too long. In a non-capital case, *Ex parte Carrio*, 9 S.W. 3d 163, 163 (Tex. Crim. App. 1999), the court recognized that laches may bar a claim of ineffectiveness. There, the trial court made a finding that the delay of 14 years prejudiced the state's ability to respond, and recommended that relief be denied. The court of criminal appeals adopted the recommendation.

P. Article 26.052 "Standards"

1. Although article 26.052 of the Texas Code of Criminal Procedure provides that a designated committee shall prescribe standards and designate qualified counsel, and that the list of same shall be prominently posted, the failure to do so does not require reversal where counsel who tried the case were competent and capable. *Hughes v. State*, 24 S.W. 3d 833, 837-38 (Tex. Crim. App. 2000).

2. "Without harm, appellant cannot prevail on this point of error." *Wright v. State*, 28 S.W. 3d 526, 531 (Tex. Crim. App. 2000).

Q. In DNA Hearings

1. The court has not yet decided if there is a right to effective counsel in a DNA hearing under Chapter 64 of the Texas Code of Criminal Procedure. Assuming such a right exists, the appellant must make the standard two-pronged *Strickland* showing to prevail. *Bell v. State*, 90 S.W. 3d 301, 307 (Tex. Crim. App. 2002).

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

A. Article 26.052

Article 26.052 establishes procedures for the appointment and payment of counsel to represent indigent persons in capital murder cases. This provision permits appointed counsel in a death penalty case to file "a pretrial ex parte confidential request for advance payment of expenses to investigate potential defenses." TEX. CODE CRIM. PROC. ANN. art. 26.052(f). The statute details the requirements of such a request. The trial court is required to grant a "reasonable" request. TEX. CODE CRIM. PROC. ANN. art. 26.052(g). Expenses may also be incurred without prior approval of the court, and must be reimbursed if "reasonably necessary and reasonably incurred." TEX. CODE CRIM. PROC. ANN. art. 26.052(h).

B. The Holding In *Ake v. Oklahoma*

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

dangerousness was an aggravating factor at punishment. *Id*. at 86.

C. The Implications Of *Ake*

Several things should be emphasized about *Ake*:

1. A disinterested expert does not satisfy *Ake*

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

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

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

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

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

2. *Ake* is not limited to psychatric experts

Although *Ake* itself was concerned with psychiatric assistance, "*Ake* is not limited to psychiatric experts." *Moore v. State*, 935 S.W. 2d 124, 130 (Tex. Crim. App. 1996). Due process requires "the opportunity to participate meaningfully in a judicial proceeding," *Ake v. Oklahoma*, 470 U.S. at 76, "access to the raw materials integral to the building of an effective defense," *Id*. at 77, basic tools of an adequate defense," *Id.*, and "assistance . . . crucial to the defendant's ability to marshal his defense," *Id*. at 80. Logically, then, any investigatorial or expert assistance necessary to provide these basic tools to an adequate defense should be made available. In *McBride v. State*, 838 S.W.2d 248, 252 (Tex. Crim. App. 1992), the court held that due process required the appointment of a chemist to inspect the alleged cocaine. *See Rey v. State*, 897 S.W. 2d 333, 338-39 (Tex. Crim. App. 1995)(holding that, under the facts of this case, appellant was entitled to appointment of a forensic pathologist). *See generally Griffith v. State*, 983 S.W. 2d 282, 286 (Tex. Crim. App. 1998).

3. *Ake* guarantees a competent expert

The *Ake* case guarantees access to *competent* assistance. *Ake v. Oklahoma*, 470 U.S. at 83. It goes without saying that not every expert you might be appointed will be competent. If not, be prepared to object.

4. *Ake* does not guarantee the right to choose an expert

Ake does not necessarily guarantee the right to choose your own expert, or to receive funds to hire your own expert. *See Griffith v. State*, 983 S.W. 2d 282, 287 (Tex. Crim. App. 1998)(judge not outside the reasonable zone of disagreement in refusing to appoint the expert requested by appellant); Rather, the state must provide *access* to a competent expert. *Ake v. Oklahoma*, 470 U.S. at 83.

5. *Ake* guarantees the right to an *ex parte* hearing

Ake permits the defendant to "make an *ex parte* threshold showing to the trial court" as to his need for an

expert. *Id*. at 82. Proceeding *ex parte* may be a very valuable right, necessary to avoid exposing your defensive theories prematurely. In *Williams v. State*, 958 S.W. 2d 186 (Tex. Crim. App. 1997), the trial court denied appellant his right to proceed *ex parte*, and compelled him to provide a copy of his motion requesting appointment of an expert to the state. This was error. Many times a defendant will have to provide affidavits or evidence in support of his *Ake* motion. "The problem with requiring this showing to be shared with the State at the pretrial stage is that it compels a defendant to disclose to the State his defensive theories or 'work product.'" *Id*. at 193.

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

Id. at 193-94. The right to an *ex parte* hearing is waived absent a request to do so at trial. *Busby v. State*, 990 S.W. 2d 263, 270 (Tex. Crim. App. 1999). The trial court does not err in refusing an ex parte hearing where the hearing held did "not reveal any material, new information to the State." B*usby v. State*, 990 S.W. 2d 263, 270 (Tex. Crim. App. 1999). *See also* TEX. CODE CRIM. PROC. ANN. art. 26.052(f)(statutorily providing the right to an *ex parte* proceeding).

6. *Ake* is not limited to capital cases

Ake is not limited to capital cases. *Taylor v. State*, 939 S.W. 2d 148, 151 (Tex. Crim. App. 1996)(sexual assault); *DeFreece v. State*, 848 S.W.2d 150, 156 n.5 (Tex. Crim. App. 1993)(murder); *see also McBride v. State*, 838 S.W. 2d 248, 249 (Tex. Crim. App. 1992)(possession of cocaine).

7. The threshold burden is on the defense

a. *Ake* makes it clear that the defendant bears the "threshold" burden of showing his need for assistance. The Texas Court of Criminal Appeals has always placed hyper technical demands on the defendant to prove his entitlement to expert assistance. Expect the court to be just as rigorous post-*Ake*, and make your record carefully. Otherwise, be prepared for the court to tell you later that you did not preserve the issue for appeal. In *Rey v. State*, 897 S.W. 2d 333, 343 (Tex. Crim. App. 1995), appellant explained his defensive theory and how it could effect the outcome of the case, and he supported this explanation with the affidavit of his expert, who seriously questioned the findings of the state's expert. Additionally, appellant's expert set forth his own opinion as to the mechanism of death which was consistent with appellant's defensive theory. This clearly established that the mechanism of death was to be a significant factor at trial, and was therefore sufficient to meet appellant's threshold burden. *Cf. Jackson v. State*, 992 S.W. 2d 469, 474 (Tex. Crim. App. 1999)(appellant not entitled to appointment of polygraph expert where he made no preliminary showing of a significant issue of fact either on which the State would present expert testimony or on which the knowledge of a lay jury would not be expected to encompass).

b. The court refused to consider appellant's argument that he was entitled to the appointment of a psychiatrist to assist him at voir dire, since appellant presented no authority, argument, or evidence to show his entitlement. *Teague v. State*, 864 S.W. 2d 505, 509 (Tex. Crim. App. 1993); *see Busby v. State*, 990 S.W. 2d 263, 270 (Tex. Crim. App. 1999)(trial court did not err in refusing to appoint a jury consultant because this expert was a luxury, not a necessity; trial court did not err in refusing to appoint a drug abuse expert where the court did appoint a mental health expert who was well qualified in this field); *Matchett v. State*, 941 S.W. 2d 922, 939 (Tex. Crim. App. 1996)(every lawyer able to ask questions has the expertise, without an expert, to determine whether the jury understands the law); *Cantu v. State*, 939 S.W. 2d 627, 639 (Tex. Crim. App. 1997)(trial court did not err in refusing to provide appellant funds to hire a scholar to study whether Texas jurors are capable of understanding the special punishment issues because appellant showed no particularized need for such a study); *Moore v. State*, 935 S.W. 2d 124, 130 (Tex. Crim. App. 1996)(appellant's request for expert assistance to select a jury was properly denied where he "offered nothing but undeveloped assertions that the requested assistance would be beneficial").

c. *Ake* does not apply to a motion by the defense requesting that appellant be allowed to accompany his attorney to the alleged crime scene to assist in taking measurements, photographs and in otherwise investigating the offense. The defense had access to the state's file regarding the crime scene, and the trial court ordered the state to turn over its work product if counsel was not allowed access to the crime scene itself. The record is silent as to who was living in the apartment at the time the defense wanted access. *Rosales v. State*, 4 S.W. 3d 228, 232 (Tex. Crim. App. 1999).

8. A motion for continuance must be timely

In *Wright v. State*, 28 S.W. 3d 526, 532-33 (Tex. Crim. App. 2000), appellant complained, not of the failure to appoint an expert, but that the trial court denied him a continuance needed to examine DNA materials provided by the state. Counsel waited until the first day of trial to request appointment of their expert. The court held that the defense failed to show harm, and that counsel would not be permitted to profit from their own failure to act.

9. *Ake* and DNA

For motions for DNA testing made before September 1, 2003, the statute does not authorize an appeal of findings under any articles other than articles 64.03 and 64.04. "The convicting court's decision to deny appointment of a post-conviction DNA expert does not fall within the purviews of Article 64.03 or 64.04 and is therefore not reviewable on appeal under Article 64.05." *Wolfe v. State*, 120 S.W. 3d 368, 371 (Tex. Crim. App. 2003). For DNA motions made after September 1, 2003, the legislature has broadened the scope of appeals under Chapter 64 to include issues pertaining to all articles of that chapter. *Id*. at 372 n. 5.

10. *Ake* and Retained Counsel

In *Ex parte Briggs*, 187 S.W. 3d 458 (Tex. Crim. App. 2005), retained counsel was found to be ineffective where his decision not to investigate the cause of death was financial rather than strategic. One of the things reasonable counsel could have done in that case was to seek appointment of an expert under *Ake* for his now-indigent client. "If any reasonable attorney appointed to represent an indigent defendant would be expected to investigate and request expert assistance to determine a deceased infant's cause of death, a privately retained attorney should be held to no lower standard." *Id*. at 469.

D. Ake Error Cannot Be Harmless

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

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

3. The United States Court of Appeals for the Fifth Circuit disagrees with the Texas Court of Criminal Appeals, believing that *Ake* error can be harmless. *White v. Johnson*, 153 F. 3d 197, 207 (5th Cir. 1998).

V. MOTION TO SET ASIDE INDICTMENT

A. In General

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

B. Unconstitutionality Of The Statute

1. A question involving the constitutionality of a statute upon which the appellant's conviction is based will be addressed on appeal, even when no objection was raised in the trial court. *Holberg v. State*, 38 S.W. 3d 137, 139 n. 7 (Tex. Crim. App. 2000).

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

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

S.W. 2d 527, 534 (Tex. Crim. App. 1992)(statute not vague in this case for failure to define "same criminal transaction").

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

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

d. Article 37.071 is not unconstitutional for failure to provide a carefully detailed instruction on consideration of mitigating evidence, or because that statute prohibits the individualized consideration of mitigating circumstances, or because of capriciousness stemming from the impossibility of predicting future behavior, or because the terms used in the second special issue are vague. *Lackey v. State*, 819 S.W. 2d 111, 135, (Tex. Crim. App. 1989); *see Johnson v. State*, 691 S.W. 2d 619, 624 (Tex. Crim. App. 1984); *but see Penry v. Lynaugh*, 492 U.S. 302 (1989).

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

f. The trial court did not err in overruling a motion to quash based on the unconstitutional and arbitrary selectivity given to prosecutors in deciding whether to indict for capital murder, in the absence of evidence of purposeful discrimination. *County v. State*, 812 S.W. 2d 303, 308 (Tex. Crim. App. 1989); *see also Gregg v. Georgia*, 428 U.S. 153, 199 (1976); *Patrick v. State*, 906 S.W. 2d 481, 495 (Tex. Crim. App. 1995); *Cantu v. State*, 842 S.W.2d 667, 692 (Tex. Crim. App. 1992); *Barefield v. State*, 784 S.W.2d 38, 46 (Tex. Crim. App. 1989); *Fearance v. State*, 620 S.W. 2d 577, 581 (Tex. Crim. App. 1980).

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

h. The Texas death penalty statutes are not unconstitutional for allowing the arbitrary and capricious infliction of the death penalty. *Barrientes v. State*, 752 S.W. 2d 524, 528 (Tex. Crim. App. 1987).

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

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

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

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

m. Article 37.071 is not unconstitutional because it does not allow a proportionality review to determine whether the penalty is proportionate to other similar crimes. *Johnson v. State*, 691 S.W. 2d 619, 624 (Tex. Crim. App. 1984); *see Cantu v. State*, 939 S.W. 2d 627, 648 (Tex. Crim. App. 1997).

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

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

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

q. Article 37.071(g) is not unconstitutional for prohibiting the judge and the parties from informing the jury that a hung jury at punishment will result in a life sentence. *Davis v. State*, 782 S.W.2d 211, 222 (Tex. Crim. App. 1989); *accord Hughes v. State*, 897 S.W. 2d 285, 301 (Tex. Crim. App. 1994); *Garcia v. State*, 887 S.W. 2d 846, 861 (Tex. Crim. App. 1994); *Felder v. State*, 848 S.W. 2d 85, 101 (Tex. Crim. App. 1992); *Sterling v. State*, 830 S.W.2d 114, 122 (Tex. Crim. App. 1992); *cf. Draughon v.*

State, 831 S.W.2d 331, 337 (Tex. Crim. App. 1992)(Texas procedure is "uncommonly enigmatic"); *Hathorn v. State*, 848 S.W. 2d 101, 125 (Tex. Crim. App. 1992).

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

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

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

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

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

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

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

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

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

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

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

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

dd. The Texas capital scheme does not violate the Equal Protection Clause because Texas currently has more than one capital sentencing procedure in effect. "Because those committing the same offense on the same day are subject to the same statutory scheme, similarly situated defendants are similarly treated for purposes of the fourteenth amendment." *Lawton v. State*, 913 S.W. 2d 542, 560 (Tex. Crim. App. 1995); *accord Jones v. State*, 944 S.W. 2d 642, 655 (Tex. Crim. App. 1996); *Matchett v. State*, 941 S.W. 2d 922, 934 (Tex. Crim. App. 1996); *Skinner v. State*, 956 S.W. 2d 532, 546 (Tex. Crim. App. 1997); *see also Cantu v. State*, 939 S.W. 2d 627, 639 (Tex. Crim. App. 1997); *Morris v. State*, 940 S.W. 2d 610, 616 (Tex. Crim. App. 1996); *Bell v. State*, 938 S.W. 2d 35, 54 (Tex. Crim. App. 1996); *Anderson v. State*, 932 S.W. 2d 502, 509 (Tex. Crim. App. 1996).

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

ff. The statute is not unconstitutional because considerations required by *Penry* contradict the "structured discretion" mandated by *Furman*.

McFarland v. State, 928 S.W. 2d 482, 520 (Tex. Crim. App. 1996).

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

hh. The trial court did not err in denying a motion to set aside the indictment on the grounds that the special issues are not properly understood by the jurors. *Cantu v. State*, 939 S.W. 2d 627, 638-39 (Tex. Crim. App. 1997).

ii. Article 37.071 § 2(e) is not unconstitutional for not requiring the jury to consider mitigating evidence. According to the court, this provision requires the jury to consider *all* evidence. "We note initially that Article 37.071 does not objectively define 'mitigating evidence,' leaving all such resolutions to the subjective standards of the jury." *Cantu v. State*, 939 S.W. 2d 627, 640 (Tex. Crim. App. 1997).

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

kk. The Texas scheme is not unconstitutional because statistics show that racial minorities who kill whites are more likely to get the death penalty. *Cantu v. State*, 939 S.W. 2d 627, 649 (Tex. Crim. App. 1997); *accord Ladd v. State*, 3 S.W. 3d 547, 572 (Tex. Crim. App. 1999); *see also Bell v. State*, 938 S.W. 2d 35, 51 (Tex. Crim. App. 1996)(evidence insufficient to show that decision makers in his case acted with any racially discriminatory intent).

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

mm. The trial court did not err in refusing to give appellant an evidentiary hearing on whether the death penalty is administered in Texas in a racially discriminatory way. "Appellant's argument is purely based on existing statistical studies allegedly showing that, in Texas, the death penalty is more likely to be assessed when the victim is white than when the victim is a member of a racial minority. Appellant offers no evidence specific to his own case that would support an inference that racial consideration played a part in his sentence. This argument has been addressed and rejected by both this Court and the United States Supreme Court and, without more, we will not revisit it here." *Raby v. State*, 970 S.W. 2d 1, 4 (Tex. Crim. App. 1998).

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

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

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

qq. The statute is not unconstitutional because of the many different schemes which have been in effect in Texas since 1989. *Raby v. State*, 970 S.W. 2d 1, 7 (Tex. Crim. App. 1998).

rr. The statute is not unconstitutional because it gives the prosecutor complete discretion whether to seek the death penalty. *Ladd v. State*, 3 S.W. 3d 547, 574 (Tex. Crim. App. 1999).

ss. The Texas death penalty scheme does not violate the United Nations Charter. For one thing, appellant, as an individual and not a sovereign nation, does not having standing to bring this challenge. Also, there is nothing in the terms of the charter which mandates abolition of the death penalty. *Hinojosa v. State*, 4 S.W. 3d 240, 252 (Tex. Crim. App. 1999).

tt. Section 19.03(a)(8), which makes killing a child under six a capital offense, does not violate equal protection because it "is rationally related to serve the government's interests in protecting young children and expressing society's moral outrage against the murder of young children." *Henderson v. State*, 962 S.W. 2d 544, 562-63 (Tex. Crim. App. 1997).

uu. Imposition of the death penalty for killing a child under six does not constitute cruel and unusual punishment. *Henderson v. State*, 962 S.W. 2d 544, 563 (Tex. Crim. App. 1997).

vv. Section 19.03 and article 37.071 do not violate the Establishment Clause of the First

Amendment because there is no showing that the legislature's actual purpose in enacting these statutes was to advance or inhibit religion. The court was not persuaded that the primary effect of the statutes was to advance Protestant beliefs over those of other faiths. The primary effect of the statutes is penal, not religious. Nor do these statutes constitute cruel and unusual punishment because they advance the religious belief of "blood atonement." *Holberg v. State*, 38 S.W. 3d 137, 140 (Tex. Crim. App. 2000).

ww. The statute criminalizing murder in the course of kidnapping is not unconstitutional because the restraint was "part and parcel of the murder." *Reyes v. State*, 84 S.W. 3d 633, 637 (Tex. Crim. App. 2002).

xx. The trial court does not err by refusing to quash an indictment because the death qualification jury selection procedure is unconstitutional. *Canales v. State*, 98 S.W. 3d 690, 700 (Tex. Crim. App. 2003).

C. Lack of Notice

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

a. In the past, a formal defect in an indictment, such as the failure to specify the name of the victim of the underlying offense, generally meant automatic reversible error in the face of a motion to quash. *E.g., Silguero v. State*, 608 S.W. 2d 619, 620 (Tex. Crim. App. 1980); *Evans v. State*, 601 S.W. 2d 943, 947 (Tex. Crim. App. 1980); *Brasfield v. State*, 600 S.W. 2d 288, 295 (Tex. Crim. App. 1980); *King v. State*, 594 S.W. 2d 425, 427 (Tex. Crim. App. 1980); *but cf. Pinkerton v. State*, 660 S.W. 2d 58, 63 (Tex. Crim. App. 1983)(specification not required where indictment is not susceptible to an interpretation that the victim was a person other than person named in indictment). Reversal is no longer automatic. Now, in addition to showing that the defendant was deprived of notice, he must show that the defective indictment prejudiced substantial rights. *See Burks v. State*, 876 S.W. 2d 877, 888 (Tex. Crim. App. 1994)(failure to name robbery victim was not error and, even if it was erroneous, it did not adversely impact on appellant's defense); *Rougeau v. State*, 738 S.W. 2d 651, 656 (Tex. Crim. App. 1987)(error in not naming victim of robbery had no substantial impact on defense); *but cf. Janecka v. State*, 823 S.W.2d 232, 238 (Tex. Crim. App. 1990)(reversal required in murder for hire case where proof shows that failure to name the remunerator impacted upon the ability of the defense to attempt to prove variance and its ability to mitigate punishment).

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

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

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

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

f. A murder/robbery indictment is not quashable for alleging that the defendant acted intentionally and knowingly, even though the

statute proscribes only intentional conduct. *Wyle v. State*, 777 S.W.2d 709, 717 (Tex. Crim. App. 1989); *Castillo v. State*, 739 S.W. 2d 280, 299 (Tex. Crim. App. 1987); *East v. State*, 702 S.W. 2d 606, 616 (Tex. Crim. App. 1985); Wilder v.State, 583 S.W. 2d 349, 361 (Tex. Crim. App. 1979).

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

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

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

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

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

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

m. An indictment is not quashable for alleging that appellant intentionally caused the death of the complainant rather than alleging that he intentionally murdered her. *Williams v. State*, 937 S.W. 2d 479, 484 (Tex. Crim. App. 1996).

D. Violation of Agreement Not To Prosecute

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

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

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

VI. MOTION FOR CHANGE OF VENUE

A. Substance

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

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

Within this context, the question whether to grant a defendant's request for a change of venue because of inflammatory or prejudicial publicity is one of constitutional dimension. A change of venue is the remedy to jury prejudice resulting

> from widespread inflammatory news coverage and is available to assure an accused a fair trial when extensive news coverage has raised substantial doubts about obtaining an impartial jury. However, an applicant seeking a change of venue bears a heavy burden to prove the existence of such prejudice in the community that the likelihood of obtaining a fair and impartial trial is doubtful. When one seeks to have venue changed on the ground of adverse pretrial publicity, he must ordinarily demonstrate an actual, identifiable prejudice attributable to that publicity on the part of members of his jury.
>
> Moreover, simply because a particular criminal case or offense is publicized in the media does not give rise to a prima facie claim of prejudice so that a defendant is entitled to a change of venue. As this Court has stated, "Clearly, . . . [the] standard does not require that jurors be totally ignorant of the facts and issues." Rather, the publicity about the case must be pervasive, prejudicial and inflammatory.

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

2. "To prevail on a motion for change of venue, a defendant must demonstrate that publicity about the case is pervasive, prejudicial, and inflammatory." *Dewberry v. State*, 4 S.W. 3d 735, 745 (Tex. Crim. App. 1999).

3. Forget about it. *E.g.*, *Renteria v. State*, 206 S.W. 3d 689, 709 (Tex. Crim. App. 2006); *McGinn v. State*, 961 S.W. 2d 161, 163-64 (Tex. Crim. App. 1998); *Bell v. State*, 938 S.W. 2d 35, 45-46 (Tex. Crim. App. 1996); *Moore v. State*, 935 S.W. 2d 124, 129 (Tex. Crim. App. 1996); *Ransom v. State*, 920 S.W. 2d 288, 299 (Tex. Crim. App. 1996); *Willingham v. State*, 897 S.W.2d 351, 357-58 (Tex. Crim. App. 1995); *Penry v. State*, 903 S.W. 2d 715, 727 (Tex. Crim. App. 1995); *Banda v. State*, 890 S.W. 2d 42, 53 (Tex. Crim. App. 1994); *Powell v. State*, 898 S.W. 2d 821, 826 (Tex. Crim. App. 1994); *Etheridge v. State*, 903 S.W.2d 1, 6 (Tex. Crim. App. 1994); *Teague v. State*, 864 S.W. 2d 505, 509 (Tex. Crim. App. 1993); *Hathorn v. State*, 848 S.W. 2d 101, 109 (Tex. Crim. App. 1992); *Narvaiz v. State*, 840 S.W. 2d 415, 428 (Tex. Crim. App. 1992); *Long v. State*, 823 S.W.2d 259, 281 (Tex. Crim. App. 1991); *DeBlanc v. State*, 799 S.W.2d 701, 704-705 (Tex. Crim. App. 1990); *Faulder v. State*, 745 S.W. 2d 327, 337-339 (Tex. Crim. App. 1987); *Phillips v. State*, 701 S.W. 2d 875, 879-880 (Tex. Crim. App. 1985); *Nethery v. State*, 692 S.W. 2d 686, 694-95 (Tex. Crim. App. 1979); *Freeman v. State*, 556 S.W. 2d 287, 296-97 (Tex. Crim. App. 1977).

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

5. In *Gonzalez v. State*, 222 S.W. 3d 446 (Tex. Crim. App. 2007), the court of criminal appeals reversed the court of appeals, which had reversed the trial court's decision denying the defense's motion to change venue. The court noted that in the last 40 years it had been "reluctant" to find an abuse of discretion in venue cases, and, in fact, that it had done so only once, in the notorious case, *Rubenstein v. State*, 407 S.W. 2d 793 (Tex. Crim. App. 1966). The only thing distinguishing *Gonzalez* from the myriad post-*Ruby* cases which had been affirmed was a videotape, and this was not enough to change the result in *Gonzalez*. "We find the present case to be distinguishable from *Rubenstein*." *Id*. at 452. Apparently, then, unless the defendant kills on national TV the person under investigation for assassinating the President of the United States, the trial judge can feel very comfortable denying a motion to change venue.

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

7. It is permissible for the trial court to reconsider a motion for change of venue during voir dire. "A trial court may use the jury selection process to gauge the tenor of the community as a whole." *Dewberry v. State*, 4 S.W. 3d 735, 745 (Tex. Crim. App. 1999).

B. Procedure

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

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

b. It is error to deny a motion for change of venue which is uncontroverted by the state. *Durrough v. State*, 562 S.W. 2d 488, 489 (Tex. Crim. App. 1978); *but see Cooks v. State*, 844 S.W. 2d 697, 730 (Tex. Crim. App. 1992)(defendant waives right to change of venue as a matter of law by

participating in hearing on the merits of the motion and allowing the state to put on evidence, without objection, controverting appellant's motion, at which time the issue becomes one of fact); *Bird v. State*, 692 S.W. 2d 65, 68 (Tex. Crim. App. 1985)(defendant waives his right to complain of uncontroverted motion to change venue if he proceeds to a hearing on that motion without objection).

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

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

VII. 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. "Prospective jurors who can set aside their beliefs against capital punishment and honestly answer the special issues are not properly challengeable for cause. Prospective jurors are challengeable for cause if their views about the death penalty would prevent or substantially impair the performance of their duties in accordance with their instructions and oath." *Russeau v. State*, 171 S.W. 3d 871, 879 (Tex. Crim. App. 2005)(citations omitted).

5. "[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.

6. Aricle 35.16 is not unconstitutional on its face, in violation of *Witt v. Wainwright*. *Ortiz v. State*, 93 S.W. 3d 79, 88 (Tex. Crim. App. 2002).

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.

4. Rehabilitating a juror who seems like she might be a problem under *Witt* must be about the easiest task in criminal advocacy. In *Rayford v. State*, 125 S.W. 3d 521 (Tex. Crim. App. 2003), the juror said she was "absolutely" in favor of the death penalty; that "anyone who murders another should be put to death. *Period*!; that she was "all for" the death penalty; and, that any person who committed intentional murder should receive the death penalty. Even so, the trial court did not abuse its discretion when it denied the defense's challenge for cause. "Examination of Potts' entire voir dire reflected that while she strongly favored the death penalty, she consistently stated that she would follow the law and would keep an open mind during punishment." *Id*. at 531-32. How difficult is it to commit a juror to following the law and keeping an open mind?

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*, 519 U.S. 145, 146 (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 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 her 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.

6. A negative answer, in isolation, to the following question, would provide insufficient grounds for a challenge under *Witt*: "Could you ever, sitting as a juror, no matter – no matter what the evidence showed, vote to inflict the death penalty?" Although that question was ambiguous, the record as a whole supported the trial court's conclusion that the venireperson could never personally vote in such a manner that the death penalty could be assessed. *Ortiz v. State*, 93 S.W. 3d 79, 90 (Tex. Crim. App. 2002).

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). It is only necessary to object after the court sustains the state's challenge; the defense need not obtain a ruling on that objection. "So long as the objection is made immediately after the challenge is granted, the discharge of the prospective juror from service is tantamount to an adverse ruling on the

objection." *Ortiz v. State*, 93 S.W. 3d 79, 90 (Tex. Crim. App. 2002).

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*, 510 U.S. 938 (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 disagreed 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).

M. Ineffective Counsel

1. Trial counsel will not be found ineffective for failing to object to a cause challenge violative of *Witt* unless the record reflects his reasons for doing so, where there is the possibility that it was legitimate trial strategy. *Ortiz v. State*, 93 S.W. 3d 79, 88-89 (Tex. Crim. App. 2002).

VIII. 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., Jasper v. State*, 61 S.W. 3d 413, 422 (Tex. Crim. App. 2001); *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, 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; *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*, 3 S.W. 3d 547, 563-64 (Tex. Crim. App. 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." *Id*. at 563 n. 9.

2. In this case, the Court reiterates what it said – or didn't say in *Ladd* – that it does "not endorse such a view," but does agree that it will determine appellant's *Batson's* claim "by looking at the shuffle as one of the facts of the case." The Court assumed, arguendo, that appellant shifted the burden to the state to come forward with a race-neutral explanation when he brought to the trial court's attention that the shuffle would cause many minority jurors to be moved further down the list. The Court held that the state met its burden when it stated that it had local people assisting who provided information about the prospective jurors, and that the overwhelming number of good state's jurors were in the back of the panel. "And so that's why I asked for a shuffle." This explanation, "if believed, is sufficiently race-neutral. We defer to the trial court's ruling on this point." *Ramey v. State*, 2009 WL 335276 (Tex. Crim. App. 2009)(not designated for publication).

IX. VOIR DIRE--CHALLENGES FOR CAUSE

A. By The Defendant

1. TEX. CODE CRIM. PROC. ANN. art. 35.16(c)(2) 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*, 504 U.S. 719, 739 (1992); *but see Johnson v. State*, 68 S.W. 3d 644, 656 (Tex. Crim. App. 2002)(defense not entitled to remove venireperson who would not consider youth as mitigating); *Rosales v. State*, 4 S.W. 3d 228, 233 (Tex. Crim. App. 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); *accord Prystash v. State*, 3 S.W. 3d 522, 526 (Tex. Crim. App. 1999)(same).

b. "[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).

c. "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).

d. 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*, 3 S.W. 3d 547, 559 (Tex. Crim. App. 1999).

e. 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*, 3 S.W. 3d 547, 559 (Tex. Crim. App. 1999)("venireman is not challengeable for cause simply because he cannot immediately envision a scenario in which the minimum punishment would be appropriate").

f. 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*, 504 U.S. 719, 729 (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).

g. 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) .

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

i. 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).

j. 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).

k. 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. The trial court does not abuse its discretion in denying a challenge for cause for this reason, "where the law was not carefully or adequately explained" to the venireperson. *Murphy v. State*, 112 S.W. 3d 592, 600 (Tex. Crim. App. 2003).

l. 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).

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

n. 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). 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).

o. "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).

p. "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).

q. A venireperson who affirms that there is established in his mind "such a conclusion as to the guilt or innocence of the defendant as would influence him in his action in finding a verdict," is challengeable for cause under article 35.16(a)(10) of the code of criminal procedure. In *Heiselbetz v. State*, 906 S.W. 2d 500, 510 (Tex. Crim. App. 1995), the defense asked the venireperson whether she had formed a conclusion or opinion as to the guilt or innocence of the defendant, and when she answered, "yes," he asked whether it would take evidence to remove or overcome that conclusion. When she answered "yes" again, counsel challenged for cause. Rather than grant the challenge, the trial court asked further questions, ultimately rehabilitating the venireperson. On appeal, appellant claimed that the venireperson was incapable of rehabilitation, given article 35.16(a)(10). The court disagreed, faulting counsel for having "abandoned the statutory language," thereby failing to establish whether the venireperson's conclusion would influence her verdict. *Id*. This is a very strict reading of the statute. *See Curry v. State*, 910 S.W. 2d 490, 493 (Tex. Crim. App. 1995)(venireperson's admission that "already some picture of guilt" had been created during voir dire is not enough to sustain challenge under article 35.16(a)(1) absent testimony that the conclusion would in fact effect the venireperson's verdict); *see also Rodriguez v. State*, No. 74,399 (Tex. Crim. App. March 29, 2006)(not designated for publication) (appellant's "question . . . whether [the venirepersons] had an opinion or belief that the appellant was guilty . . . is *significantly different* from the statutory question of whether there was established in the mind of the juror a conclusion as to the guilt or innocence of the defendant.")(emphasis supplied).

r. 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*, 3 S.W. 3d 547, 560 (Tex. Crim. App. 1999)(venireperson not challengeable because he would tend to believe policemen and doctors slightly more than others").

s. Since the phrase, "criminal act of violence" has not been defined by the legislature, jurors are presumed to attach a common meaning or understanding to the term. "A threat might

reasonably be viewed as something that could be accomplished by acts or words." Consequently, a venireperson may not be challenged for cause on the ground that a threat does not amount to an act of violence. *Jones v. State*, 119 S.W. 3d 766, 788 (Tex. Crim. App. 2003).

t. The trial court does not err in denying a challenge for cause against a venireperson who views a property crime like theft as a criminal act of violence. *Jones v. State*, 119 S.W. 3d 766, 788-89 (Tex. Crim. App. 2003).

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). "The State may assert grounds for a challenge that are not included in Article 35.16 where the challenge is based on facts demonstrating that the prospective juror would be incapable of or unfit for jury service." *Granados v. State*, 85 S.W. 3d 217, 230 n. 37 (Tex. Crim. App. 2002).

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. *See also Cannady v. State*, 11 S.W. 3d 205, 209 (Tex. Crim. App. 2000)(judge did not abuse his discretion in denying challenge to venireperson who said he "'can't help but think [Cannady's] guilty if he's already killed two people," in light of other statements "that he would follow the law").

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 error, the appellant who claims that the trial court erroneously denied his challenge for cause must take certain steps. Specifically, he "must demonstrate on the record that he asserted a clear and specific challenge for cause, that he used a peremptory challenge on the complained-of veniremember, that all his peremptory challenges were exhausted, that his request for additional strikes was denied, and that an objectionable juror sat on the jury". *Cannady v. State*, 11 S.W. 3d 205, 208 (Tex. Crim. App. 2000); *see also Jacobs v. State*, 787 S.W.2d 397, 405 (Tex. Crim. App. 1990). "Rule 44.2(b) does not change the way that harm is demonstrated for the erroneous denial of a challenge for cause." *Johnson v. State*, 43 S.W. 3d 1, 2 (Tex. Crim. App. 2001). "It is . . . irrelevant that appellant's jury was fair and impartial in determining whether he was harmed by the erroneous denial of a defense challenge for cause." *Newbury v. State*, 135 S.W. 3d 22, 30 (Tex. Crim. App. 2004).

6. Error is not preserved where the defense fails to ask for additional peremptory challenges. *Martinez v. State*, 17 S.W. 3d 677, 682 (Tex. Crim. App. 2000).

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). And the objectionable juror must be identified *in the trial court*; it is not sufficient to identify for the first time on appeal. *Allen v. State*, 108 S.W. 3d 281, 282 (Tex. Crim. App. 2003).

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.

11. In *Threadgill v. State*, 146 S.W. 3d 654 (Tex. Crim. App. 2004)(Womack, J., concurring), four judges found "close" the trial court's decision to deny appellant's challenge for cause against a venireperson who expressed reservations about her ability to be fair because a loved one of hers had been killed. Although they did not find this error, the concurring judges did ask, "why permit close cases in selecting juries?" Unlike with witnesses, where only so many will exist that have relevant information, the venire will ordinarily have many qualified jurors to choose from. "If the question is close, the juror can be sent away." These judges were unwilling to hold that the trial court's close call was wrong, but they did observe that "it was contrary to the policy that courts should follow." *Id*. at 673-74. In *Palmer v. State*, 2006 WL 2694226 (Tex. Crim. App. 2006), Judge Womack, joined by Judges Johnson and Price, dissented from the majority decision that affirmed the trial court's decision to deny appellant's challenge for cause. The trial courts should embrace a liberal policy regarding challenges for cause. "Trial courts should excuse prospective jurors who are brought to tears by memories of similar crimes that affected them. There is no need for close calls." *Id*. at *4.

B. By The State

1. TEX. CODE CRIM. PROC. ANN. art. 35.16(b)(3) 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 391-92.

v. The state may challenge a venireperson who believes that the first special issue cannot be answered because future behavior cannot be predicted. *Rocha v. State*, 16 S.W. 2d 1, 7-8 (Tex. Crim. App. 2000).

w. The state may challenge a venireperson who could never consider the death penalty for a murder committed in the course of a robbery. *Rocha v. State*, 16 S.W. 2d 1, 8 (Tex. Crim. App. 2000).

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 Murphy v. State*, 112 S.W. 3d 592, 598 (Tex. Crim. App. 2003); *Salazar v. State*, 38 S.W. 3d 141, 153 (Tex. Crim. App. 2001); *Brooks v. State*, 990 S.W. 2d 278, 289 (Tex. Crim. App. 1999). The *Jones* analysis, however, does not apply where appellant makes a *constitutional* complaint that a venireperson was improperly challenged based on her views on the death penalty. *Feldman v. State*, 71 S.W. 3d 738, 749 (Tex. Crim. App. 2002).

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). "In determining whether the trial court abused its discretion in ruling on a challenge for cause, where it possessed such discretion, we review the voir dire record in its entirety and ask whether the court had a rational basis for its conclusions. Where the veniremember either vacillates or equivocates on his ability to follow the law, we defer to the trial court's judgment on the challenge for cause." *Granados v. State*, 85 S.W. 3d 217, 230-31 (Tex. Crim. App. 2002).

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).

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).

X. EXCUSES FROM JURY SERVICE

A. TEX. CODE CRIM. PROC. ANN. art. 35.03

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.

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*. *Accord Crutsinger v. State*, 206 S.W. 3d 607, 608-09 (Tex. Crim. App. 2006).

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)(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*, 827S.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).

k. *Jasper v. State*, 61 S.W. 2d 413, 424 (Tex. Crim. App. 2001)(one prosepctive juror excused because she was a "caretaker;" the other because she was pregnant, within six weeks of her due date).

l. *Crutsinger v. State*, 206 S.W. 3d 607, 608-09 (Tex. Crim. App. 2006)(previously arranged travel plans).

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. Distinguish *excuses* from *exemptions*. ""Government Code section 62.106 lists *exemptions* from jury service. Exemptions are enumerated reasons a prospective juror is exempt from service as a matter of law. Excuses are not specifically enumerated, but are considered on a case by case basis within the broad discretion of the court." *Jasper v. State*, 61 S.W. 3d 413, 424 n. 4 (Tex. Crim. App. 2001).

8. "The only statutory restriction on excuses is that an excuse cannot be given for 'an economic reason' without the presence and approval of both parties. TEX. GOV'T CODE § 62.100(c)." *Jasper v. State*, 61 S.W. 3d 413, 424 (Tex. Crim. App. 2001).

9. "[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).

10. 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).

11. In *Jones v. State*, 119 S.W. 3d 766 (Tex. Crim. App. 2003), a dentist asked to be excused because the short notice he was given made it difficult for him to schedule his patients. Postponement for pre-existing scheduling problems is not an excuse for economic reasons, which is prohibited by statute. The judge did not abuse his discretion in granting this excuse. *Id*. at 790.

B. TEX. GOV'T CODE ANN. § 62.110

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).

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).

C. TEX. GOV'T CODE ANN. § 62.1041

1. "Government Code section 62.1041(f) now governs the qualifications for prospective jurors who are deaf or hard of hearing. The statute permits a deaf or hard-of-hearing venire member to request assistance from the court to perform her duties. *See* Gov't Code sec. 62.1041(c), (d), (e). It also authorizes the court to decide that, despite provided accommodations, the juror's hearing loss has rendered her unfit to serve as a juror in that particular case." *Black v. State*, 26 S.W. 3d 895, 899-900 (Tex. Crim. App. 2000). The trial court does not abuse its discretion in excusing a venireperson under this section in the absence of appellant or his attorney. *Id*.

XI. 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). 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.

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.

C. Proving Harm May Be Difficult

1. Formerly, when a qualified venireperson was excused, *sua sponte*, a defendant could 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). *See also Green v. State*, 764 S.W. 2d 242, 248 (Tex. Crim. App. 1989)(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); Nichols v. State, 754 S.W. 2d 185, 192-93 (Tex. Crim. App. 1988)(although a specific objection is always preferable, the defendant 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"). The error was 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).

2. Formerly, if a disqualified venireperson was excused *sua sponte*, to preserve error and show harm, a defendant was required to:

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).

3. Recent cases make it almost impossible to show harm. In *Gamboa v. State*, 2009 WL 928552 (Tex. Crim. App. 2009), a juror was sworn, but, before the trial started, he was arrested for DWI. Even though no one objected, the judge excused the juror sua sponte, fearing that he would be subject to influence from the state. The court of criminal appeals did not reach the merits of this issues. Except when *Witherspoon* is at issue, the excusal of a juror "erroneous excusal of a veniremember will call for reversal 'only if the record shows that the error deprived the defendant of a lawfully constituted jury.'" Here there is no evidence to show that the juror that actually sat was not impartial.

XII. 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. 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.

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 Valle v. State*, 109 S.W. 3d 500, 504 (Tex. Crim. App. 2003); *Ladd v. State*, 3 S.W. 3d 547, 562 (Tex. Crim. App. 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. In *Rocha v. State*, 16 S.W. 2d 1, 6 (Tex. Crim. App. 2000), the court rejected appellant's claim that he had the right to make a retroactive peremptory challenge. Under article 35.13, "'the defendant must exercise peremptory challenges upon the examination of individual prospective jurors without the opportunity to evaluate the panel as a group.'" *Id*., *quoting from Janecka v. State*, 739 S.W. 2d at 833.

3. Once we thought that 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. In *Bigby v. State*, 892 S.W. 2d 864, 880-82 (Tex. Crim. App. 1994), the court held that the trial court erred when it required appellant to exercise his challenges for cause before the state exercised its peremptory on a particular juror, but that the error was harmless because reversal of the challenges would have had no effect on the selection of the jurors. *Bigby* may not mean what we thought. In *Hughes v. State*, 24 S.W. 3d 833, 840-41 (Tex. Crim. App. 2000), the state exercised its peremptory after appellant accepted the venireperson, and appellant objected under *Bigby*. The court of criminal appeals rejected this challenge:

> In *Bigby v. State*, five members of this Court expressed their belief that the fairest and most objective interpretation of Article 35.13 provides trial judges the discretion during voir dire "to permit the exercise of challenges for cause by both sides before moving on to any use of peremptory challenges." [citations omitted] In other words, a trial court has the discretion to decide (1) whether the State must voice both a challenge for cause or a peremptory challenge before the defendant, or (2) that both sides issue any challenges for cause before the State first lodges a peremptory challenge. The latter method appears to be what both the trial court and the State assumed was being followed. Defense counsel, on the other hand, assumed the alternative. Either method, however, is acceptable under Article 35.13, and no error can result if either is followed. Appellant argues that "[h]ad defense counsel exercised a peremptory challenge to eliminate [this venire member], the prosecutors would not

> only have saved a strike but forced appellant to expend one unnecessarily." Such a situation, had it occurred, would have violated Article 35.13 and could have potentially resulted in error. However, these were not the circumstances in the case at bar, and appellant cannot now complain of an error that did not occur. Either of the statutorily approved methods of exercising challenges for cause and peremptory strikes in Article 35.13 requires the State to act before the defendant and ensures that any strategic advantage benefits the defendant. [citation omitted] Appellant was not forced to unnecessarily expend a peremptory challenge, and, therefore, no error occurred.

Id. at 841. *Accord Canales v. State*, 98 S.W. 3d 690, 700 (Tex. Crim. App. 2003).

4. "[A] trial court may allow the method urged by appellant, but has discretion in this regard." *Wood v. State*, 18 S.W. 3d 642, 649 (Tex. Crim. App. 2000).

5. 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).

6. 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.

7. 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 the *Gardner* case, discussed in the previous paragraph, the continued validity of these holdings is questionable. *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 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.*

g. 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).

h. Due Process entitles a defendant to ask venirepersons whether they would automatically vote for the death penalty in a capital case. *Morgan v. Illinois*, 504 U.S. 719, 736 (1992).

i. 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).

j. 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).

k. The trial court would err if it denied appellant the right to ask whether a finding of guilt would "dictate a result in his mind as to the punishment questions." The court does not, however, err in restricting the "form" of counsel's questions. When the court sustains an objection to the form of the question, counsel has an obligation to determine the basis of the limitation and to attempt to fashion an inquiry which complies with the perceived inadequacy. *Wright v. State*, 28 S.W. 3d 526, 534 (Tex. Crim. App. 2000).

l. In *Jones v. State*, 119 S.W. 3d 766 (Tex. Crim. App. 2003), the state and the defense argued about whether a threat of violence would constitute a "criminal act of violence," as defined in the first special issue. The court instructed the venireperson: "The jury will be looking at acts of violence and inasmuch as a threat involves conduct, it could be an act of violence depending on what the jury decides." Since it is in the jury's discretion to decide whether a threat involves conduct, and whether this might constitute an act of violence, the court's instruction was not error. *Id.* at 784-85.

m. The trial court does not err in refusing to permit appellant to ask venirepersons if they could consider a life sentence or if they could be fair or impartial, even though the victim was young, because these were improper commitment questions. *Woods v. State*, 152 S.W. 3d 105, 110-111 (Tex. Crim. App. 2004).

2. Parole

a. 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). Clearly, both sides will now be eligible to discuss parole, at least if the defense intends to request a parole instruction.

b. The court assumed, but did not decide, that questioning about parole is "permissible in some situations," now that Texas law has been changed to allow the jury to be instructed that a defendant sentenced to life for capital murder is eligible for parole in 40 years. *Sells v. State*, 121 S.W. 3d 748, 756-57 (Tex. Crim. App. 2003)(no error, though, where questions the defense sought to ask were vague and committing).

c. Section 508.046 of the Texas Government Code says that one convicted of a capital felony may not be released on parole unless all members of the parole board vote, and at least 2/3 of those voting vote for parole, and that all those voting have received a written report on the probability of that person committing an offense if released. In *Hankins v. State*, 132 S.W. 3d 380 (Tex. Crim. App. 2004), the court held that appellant was not entitled to inform the jury of this law. "[P]recedent maintaining that parole is not a proper issue for jury consideration remains in effect except to the extent explicitly provided for in Article 37.071 § 2(e)(2)(B)." *Id*. at 385.

d. The trial court did not err when it refused to allow the defense to ask the following four questions, which, according to the court, were commitment questions prohibited by *Standefer*, and ambiguous, in violation of *Barajas*: (1) "Would the minimum length of time a Defendant could serve in prison before he could be paroled be something you would want to know in answering the special issues?" (2) "On which special issue would this be important?" (3) "How would this 40-year minimum sentence be important to you in answering the special issues?" (4) "Would you be more likely, or less likely, generally, to view a Defendant as a continuing threat to society if you knew he would not be paroled for a minimum of 40 years?" *Swain v. State,* 181 S.W. 3d 359, 364 (Tex. Crim. App. 2005).

3. 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. 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).

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 erred when it refused to allow the defense to ask this question: "Could you do that [answer the mitigation question "yes"] even if you's already found a defendant guilty beyond a reasonable doubt of committing a capital murder, you'd found special issue number 1, that the State proved that beyond a reasonable doubt, that you found on special issue number 2 that the State proved that beyond a reasonable doubt? If the State did all that, could you still support and vote for a life punishment if you found a sufficient mitigating circumstance?" Although this was a commitment question, it was proper since one of the possible answers would have made the venireperson challengeable for cause. *Woods v. State*, 152 S.W. 3d 105, 109 (Tex. Crim. App. 2004). The error was harmless, though, because appellant was allowed to ask this question, which, according to the court, was "essentially the same question:" "Would you be able to follow the law as to special issue number 3 if you found even one sufficient mitigating circumstance?" *Id*. at 110.

4. 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).

5. 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; see Cannady v. State*, 11 S.W. 3d 205, 210 (Tex. Crim. App. 2000)(no harm in capital case where appellant received two extra peremptory challenges).

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 this variety 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) 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); *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. Although the trial court has much discretion, article 35.17(2) clearly gives the defense the right to individual voir dire in a death penalty case, and the court errs when it denies this right. Whether this statutory error is harmless or not, though, is determined by analysis under Rule 44.2(b) of the Texas Rules of Evidence. *Simpson v. State*, 119 S.W. 3d 262 (Tex. Crim. App. 2003)(error harmless where it was highly unlikely that the defense could have convinced the venireperson to say something different than she had told the court, thereby giving the court of criminal appeals "fair assurance" the error did not influence the outcome of the trial).

3. 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).

4. 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).

5. 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").

6. 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).

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.

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). In *Hall* the court held that the failure to grant a request to shuffle is automatic reversible error. *Id.* at 115. *Contra Ford v. State*, 73 S.W. 3d 923, 926 (Tex. Crim. App. 2003)(denial of motion to shuffle was harmless error under the facts of that case). 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."

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).

5. A shuffle demand is untimely, and a shuffle is not required when made after the judge questions the panel on principles applicable to the case. *Brown v. State*, 270 S.W.3d 564, 569 (Tex. Crim. App. 2008).

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.

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.

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).

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).

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).

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).

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(b).

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).

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.

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. Where the trial judge assigned to preside over the trial also functions as a general assembly judge over prospective jurors already assigned to appellant's specific case, it will be assumed that the trial begins at the time of exemptions, excuses and qualifications. *Jasper v. State*, 61 S.W. 3d 413, 423-24 (Tex. Crim. App. 2001). In such a case it is both constitutional and statutory error for the trial court to proceed with excuses and qualifications in appellant's absence. The error is harmless, though, because the two excuses granted in appellant's absence were permissible. *Id*.

6. The trial court has broad authority to excuse jurors, with or without consent of the parties, up until the time they have been sworn and impaneled. Because of the court's broad discretion, appellant is not entitled to a formal hearing, and defendant's presence is not required pursuant to article 33.03. *Wright v. State*, 28 S.W. 3d 526, 533 (Tex. Crim. App. 2000).

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*, 3 S.W. 3d 547, 562 (Tex. Crim. App. 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*, 3 S.W. 3d 915 (Tex. Crim. App. 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 917. "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*.

P. Promises, Promises

1. In *Tong v. State*, 25 S.W. 3d 707, 709 (Tex. Crim. App. 2000), appellant argued that he was deprived of his rights to due process, due course of law, and effective assistance of counsel because the trial court initially promised him unlimited peremptory challenges, but then changed its mind later. The court of criminal appeals acknowledged that there was some factual support in the record for this claim, but faulted appellant for citing only one case, which it found inapplicable. "This is not to say that appellant may not make a novel argument for which there is no authority directly on point. However, in making such an argument, appellant must ground his contention in analogous case law or provide the Court with the relevant jurisprudential framework for evaluating his claim. In failing to provide any relevant authority suggesting how the judges's actions violated any of appellant's constitutional rights, we find the issue to be inadequately briefed." *Id*. at 710. On appellant's motion for rehearing, the court reiterated its complaint that appellant had relied on a case which dealt with assessing harm, and that it did not support his appellate claim of detrimental reliance. "When briefing an issue on direct appeal, the question of error should always be addressed first, followed by a discussion of whether or not the alleged error is harmful." *Id*. at 718.

Q. Attaching Prospective Jurors

1. Article 35.01 of the code of criminal procedure, which provides a method for attaching absent jurors, is "directory, not mandatory, and in the absence of governmental misconduct in summoning the venire, the failure to grant attachments is not reversible error unless appellant shows injury." Injury requires that the appellant show he was forced to take an "objectionable juror." "However, because appellant did not then or now point to any evidence in support of his allegation that these jurors were challengeable for cause, he has failed to meet his burden of showing he was forced to accept two challengeable jurors." *Jones v. State*, 119 S.W. 3d 766, 785 (Tex. Crim. App. 2003).

XIII. GUILT/INNOCENCE PHASE OF A CAPITAL MURDER TRIAL

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

1. Before September 1, 1991

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

b. This former right, though, was based on a statute. Mere statutory rights are not cognizable on habeas corpus. "[W]e will not grant habeas relief where there is no federal constitutional right and the defendant waived a right in a manner inconsistent with the procedures outlined only by statute, but the record reflects that the defendant did so knowingly and voluntarily." *Ex parte Douthit*, 232 S.W. 3d 69, 74 (Tex. Crim. App. 2007).

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

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

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

which submits the special issues and punishment charge. *Holland v. State*, 761 S.W. 2d 307, 313 (Tex. Crim. App. 1988).

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

2. After September 1, 1991

a. Texas law has been amended to permit the waiver of a jury in a capital case where the state consents and does not seek the death penalty. TEX. CODE CRIM. PROC. ANN. art. 1.13(b).

B. Joinder and Severance

1. In *Goode v. State*, 740 S.W.2d 453 (Tex. Crim. App. 1987), jury selection commenced with defendant joined for trial with her co-defendant. Since there were two co-defendants, each initially received eight peremptory strikes, instead of 15. TEX. CODE CRIM. PROC. ANN. art. 35.15(a). After the jury was sworn, the trial court severed defendants, on the ground that they were pursuing mutually exclusive defenses. Defendant Goode's motion for mistrial was overruled, and she was tried and convicted of capital murder. *Id*. at 456. The court of criminal appeals reversed Goode's conviction, holding that the failure to grant defendant a mistrial violated her statutory right to 15 peremptory strikes, to which she was entitled as a capital murder defendant separately tried. *Id*. at 457.

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

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

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

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

6. State joinder rules have been liberalized by an amendment to the Penal Code. *See* TEX. PENAL CODE ANN. § 3.01.

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

C. Accomplice Witness Testimony

1. The general rule

a. TEX. CODE CRIM. PROC. ANN. art. 38.14 provides:

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

b. "An accomplice is someone who participates with the defendant before, during, or after the commission of a crime and acts with the required culpable mental state. To be considered an accomplice witness, the witness's participation with the defendant must have involved some affirmative act that promotes the commission of the offense with which the defendant

is charged A witness is not an accomplice witness merely because he or she knew of the offense and did not disclose it, or even if he or she concealed it. In addition, the witness's mere presence at the scene of the crime does not render that witness an accomplice witness. And complicity with an accused in the commission of another offense apart from the charged offense does not make that witness's testimony that of an accomplice witness. In short, if the witness cannot be prosecuted for the offense with which the defendant is charged, or a lesser-included offense of that charge, the witness is not an accomplice witness as a matter of law." *Druery v. State*, 225 S.W. 3d 491, 498 (Tex. Crim. App. 2007).

c. "An accomplice is one who participates in an offense, before, during, or after its commission, to the extent that he can be charged with the offense *or with a lesser-included offense*." *Herron v. State*, 86 S.W. 3d 621, 631(Tex. Crim. App. 2002)(trial court erred in not instructing the jury that witnesses were accomplices as a matter of law where they were indicted for lesser included offenses based upon their participation in the greater offense appellant was charged with)(emphasis supplied); *accord* Brown v. State, 270 S.W.3d 564, 567 (Tex. Crim. App. 2008)(non-accomplice testimony was required to corroborate one who participated in the capital murder and was subsequently convicted of the lesser included offense of capital murder).

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

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

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

g. "We decline appellant's invitation to impose legal and factual sufficiency standards upon a review of accomplice witness testimony under Article 38.14. The accomplice witness rule is a statutorily imposed sufficiency review and is not derived from federal or state constitutional principles that define the legal and factual sufficiency standards." The state meets its burden when there is other evidence tending to connect the defendant with the offense. *Cathey v. State*, 992 S.W. 2d 460, 462-63 (Tex. Crim. App. 1999).

h. An accomplice witness instruction need not be given regarding one who does not testify, but whose out of court statement is admitted as a hearsay exception. *Paredes v. State*, 129 S.W. 3d 530, 538 (Tex. Crim. App. 2004).

i. Indirect evidence can make one an accomplice as a matter of fact. *Medina v. State*, 7 S.W. 3d 633, 642 (Tex. Crim. App. 1999)(combined evidence showed that witness was present with the defendant in the car when the crime occurred; the crime was gang-motivated; the witness and the defendant were in the same gang; the witness tried to cover up the crime).

2. Accomplice as a matter of law or fact?

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

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

c. On retrial, Harris was again convicted, and on appeal he again challenged the trial court's ruling that the witness was not an accomplice as a matter of law. The court of criminal appeals rejected this challenge, citing

the "law of the case" which was established in *Harris I. Harris v. State*, 790 S.W. 2d 568, 579 (Tex. Crim. App. 1989). This time, however, Harris raised an additional challenge. He requested that a special issue be submitted to the jury asking it to answer whether or not it found the witness to be an accomplice. The court of criminal appeals also rejected this approach, holding that, except for article 37.071, special issues are not submitted in Texas criminal cases. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07 § 1a.. Having said this, the court further remarked: "This is not to say that a special issue could never be constitutionally necessary despite the statutory prohibition of Article 37.07, §1(a), supra." *Id*. at 579-80.

3. Sufficiency

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

b. Cases holding that the evidence was sufficient to corroborate the accomplice witness are abundant. *E.g*., *Trevino v. State*, 991 S.W. 2d 849, 852 (Tex. Crim. App. 1999)(presence of appellant's blood on victim's panties and appellant's pant fibers on victim's clothes tends to connect him to murder/sexual assault); *see also May v. State*, 738 S.W. 2d 261, 267 (Tex. Crim. App. 1987); *Harris v. State*, 738 S.W. 207, 219 (Tex. Crim. App. 1986); *Gardner v. State*, 730 S.W. 675, 679 (Tex. Crim. App. 1987).

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

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

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

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

iv. "While the issue is close in this case, we hold that the following combined evidence was sufficient to permit a rational jury to infer that Holmes was a party to the crime, and hence, raises a fact issue as to Holmes' accomplice status: (1) Holmes's presence in the car with appellant when the crime occurred, (2) evidence that the crime was a gang-motivated crime, (3) Holmes's membership in the same gang as appellant, and (4) Holmes's efforts to cover up the crime." *Medina v. State*, 7 S.W. 3d 633, 642 (Tex. Crim. App. 1999)(harmless error, though).

4. Harm

a. Although the trial court erred in not instructing the jury that two witnesses were accomplices as a matter of law, appellant failed to show some harm, because there was no "rational and articulable basis" for doubting the reliability of four pieces of non-accomplice evidence, including: the presence of appellant's clothes and fingerprints at the scene, and appellant's possession of stolen property and the murder weapon. *Herron v. State*, 86 S.W. 3d 621, 633-34 (Tex. Crim. App. 2002).

D. Sufficiency Of The Evidence To Support Conviction

1. Legal sufficiency

a. The standard of review for determining the legal sufficiency of the evidence in any criminal case "is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443

U.S. 307, 319 (1979). This standard applies in both direct and circumstantial evidence cases. *Geesa v. State*, 820 S.W.2d 154 (Tex. Crim. App. 1991).

b. For cases tried before November 6, 1991, the date *Geesa* was decided, a more rigorous standard binds the state. In those cases, "a conviction based upon circumstantial evidence cannot be sustained if the evidence does not exclude every reasonable hypothesis other than the guilt of the defendant." *Fuller v. State*, 827 S.W.2d 919, 931 (Tex. Crim. App. 1992). The proper procedure is for the appellate court to accept the inculpatory circumstances, and then to ask if there is a reasonable hypothesis other than guilt which would also account for such circumstances. "Thus, if exculpatory aspects of appellant's statements are fully consistent and in harmony with all of what would otherwise appear to be purely inculpatory circumstantial evidence presented by the State, then . . . [the court] would be constrained to hold the evidence insufficient. If, on the other hand, exculpatory aspects of appellant's version of events necessarily contradict or conflict with inculpatory inferences drawn from other circumstantial evidence presented by the State, and all of the evidence viewed in the light most favorable to the prosecution would rationally support a jury verdict of guilt to a degree of confidence beyond a reasonable doubt, we must hold the evidence sufficient." *Gunter v. State*, 858 S.W. 2d 430, 439 (Tex. Crim. App. 1993).

c. The question is not whether a rational jury could have entertained a reasonable doubt, but rather "whether a rational jury would have *necessarily* entertained a reasonable doubt regarding the aggravating elements of the offense." *Swearingen v. State*, 101 S.W. 3d 89, 96 (Tex. Crim. App. 2003)(emphasis in original).

d. "In determining sufficiency of the evidence, we consider all the evidence, admissible and inadmissible." *Johnson v. State*, 967 S.W. 2d 410, 412 (Tex. Crim. App. 1998); *accord Kutzner v. State*, 994 S.W. 2d 180, 184 (Tex. Crim. App. 1999).

2. Factual sufficiency

a. The court of criminal appeals has the authority to review capital murder cases for *factual* as well as legal sufficiency. *Santellan v. State*, 939 S.W. 2d 155, 164 (Tex. Crim. App. 1997). *See generally Clewis v. State*, 922 S.W. 2d 126 (Tex. Crim. App. 1996). "The factual sufficiency review process begins with the assumption that the evidence is legally sufficient under the *Jackson* test. The appellate court then considers *all* of the evidence in the record related to appellant's sufficiency challenge, not just the evidence which supports the verdict. The appellate court reviews the evidence weighed by the jury which tends to prove the existence of the elemental fact in dispute, and compares it to the evidence which tends to disprove that fact. The court is authorized to disagree with the jury's determination, even if probative evidence exists which supports the verdict." *Santellan v. State*, 939 S.W. 2d at 164 (citations omitted). "However, factual sufficiency review must be appropriately deferential so as to avoid the appellate court's substituting its own judgment for that of the fact finder. The court's evaluation should not substantially intrude upon the jury's role as the sole judge of the weight and credibility of witness testimony. The appellate court maintains this deference to the jury's findings, by finding fault only when 'the verdict is against the *great* weight of the evidence presented at trial so as to be *clearly wrong and unjust*.' Examples of such a wrong and unjust verdict include instances in which the jury's finding is 'manifestly unjust,' 'shocks the conscience,' or 'clearly demonstrates bias.'" *Id*. at 165 (citations omitted)(emphasis in original). When the court finds the evidence factually insufficient, the "only option is to vacate the conviction and remand the case for a new trial." *Id*. Here, the court found the jury's verdict was not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. "A factual sufficiency review takes into consideration *all* of the evidence and weighs the evidence which tends to prove the existence of the fact in dispute against the contradictory evidence." *Fuentes v. State*, 991 S.W. 2d 267, 272 (Tex. Crim. App. 1999)(evidence factually sufficient in this case); *see also Wesbrook v. State*, 29 S.W. 3d 103, 112 (Tex. Crim. App. 2000)(evidence factually sufficient).

b. In *Vodochodsky v. State*, 158 S.W. 3d 502 (Tex. Crim. App. 2004), Engleton had been arrested the previous day for domestic violence. The next day, appellant bailed him out, and the two of them went to a gun store where Engleton bought ammunition. They then went to Engleton's house, and later someone made a 911 call to the police. Several policemen arrived, and Engleton killed three of them, and wounded several others, before committing suicide. Appellant was indicted as a party, and claimed on appeal that he was merely present, that the evidence was legally and factually insufficient to support his conviction for capital murder. The court of criminal appeals disagreed with his legal sufficiency challenge, finding that a rational jury could have found from certain statements appellant had made that appellant was aware of Engleton's plan to kill a peace officer, that he bailed him out of jail to help him carry out that plan, that he helped Engleton wrap up his personal affairs, and that he was present at the scene when the murders occurred. The court went on to find, though, that the overwhelming weight of the evidence

mitigated against the conclusion that appellant was a party to Engleton's crime. Because proof of appellant's guilt was so weak as to undermine confidence in the verdict, the evidence was determined to be factually insufficient. *Id*. at 510.

c. In *McDuff v. State*, 939 S.W. 2d 607 (Tex. Crim. App. 1997), the court criticized counsel for not proposing a standard of reviewing factual sufficiency in a capital case or specifically arguing how the evidence was insufficient under any standard of reviewing factual insufficiency. "We conclude that point number three is insufficiently briefed, presents nothing for review." *Id*. at 613. "Also, after reviewing the evidence under the *Clewis* standard, we conclude that the verdict is not so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust." *Id*.

d. Where appellant did not label his sufficiency challenge "legal" or "factual," but alleged that a judgment of acquittal was appropriate, the court construed the challenge as legal. "In a single sentence at the conclusion of his fifth point of error, appellant requests that we conduct a factual sufficiency review. Appellant otherwise makes no reference to factual insufficiency or the applicable standard thereunder. Appellant has inadequately briefed a claim as to factual insufficiency. *Cardenas v. State*, 30 S.W. 3d 384, 386 n.2 (Tex. Crim. App. 2000).

e. "We have yet to decide what an appellate court should do if the *second* jury reaches the same verdict on the same evidence." *Ladd v. State*, 3 S.W. 3d 547, 557 n.3 (Tex. Crim. App. 1999).

3. Aggravated Murder

a. Section 19.02(b)(1) of the Texas Penal Code defines ordinary murder as intentionally or knowingly causing the death of an individual. Capital murder is § 19.02(b)(1) ordinary murder aggravated by one of several statutory factors. TEX. PENAL CODE ANN. § 19.03.

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

i. The state has the burden of proving beyond a reasonable doubt that appellant had the specific intent to commit kidnapping, and that he committed an act amounting to more than mere preparation The state must also prove "that appellant developed the requisite specific intent for attempted kidnapping at the time of the victim's death or before that point." *Santellan v. State*, 939 S.W. 2d 155, 162 (Tex. Crim. App. 1997). The court there accepted appellant's argument that "a dead body cannot be kidnapped," but went on to hold that there was sufficient evidence that appellant kidnapped the complainant before she died. *Id*. "We conclude that appellant's act of loading the victim into the car and driving away with her was a sufficient act of restraint to amount to more than mere preparation." *Id*. at 163.

ii. "At a minimum, to show attempted robbery, the State carried the burden of proving beyond a reasonable doubt that appellant had the specific intent to commit robbery and that appellant committed an act amounting to more than mere preparation for robbing the victim. [citations omitted] Thus, if the State introduced evidence from which the jury could rationally conclude that appellant possessed the specific intent to obtain or maintain control of the victim's property either before or during the commission of the murder, it has proven that the murder occurred in the course of robbery." *Maldonado v. State*, 998 S.W. 2d 239, 243 (Tex. Crim. App. 1999)(evidence sufficient here).

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

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

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

e. *Cooper v. State*, 67 S.W. 3d 221 (Tex. Crim. App. 2002), was a non-capital robbery case. There, the court of appeals held that evidence merely that a theft occurred after an assault was insufficient to establish the nexus necessary to prove robbery. The court of criminal appeals disagreed. "The general rule is still that a theft occurring immediately after an assault will support an inference that the assault was intended to facilitate the theft." *Id* at 224. The court went on to recognize that, in some circumstances, evidence of a motive other than theft might negate the natural inference arising when the theft immediately follows the assault. "We need not, in this case, attempt to answer that question comprehensively but simply hold that the inference will not be negated by evidence of an alternative motive that the jury could rationally disregard." *Id*.

f. [P]roof of a completed theft is not required to establish the underlying offense of robbery or attempted robbery." *Bustamante v. State*, 106 S.W. 3d 738, 740 (Tex. Crim. App. 2003).

4. Insufficient proof of underlying felony

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

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

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

iii. "Murder and a subsequent theft do not constitute capital murder unless the violent conduct causing death was done with the intent to obtain or maintain control over the victim's property." *Cruz v. State*, 629 S.W. 2d 852, 859 (Tex. App.--Corpus Christi 1982, pet. ref'd). That is, the *mens rea* of the theft must accompany the violent conduct which causes the death. *Id*. In *Cruz* the court found that evidence that the appellant had murdered the victim, coupled with evidence that he was in recent unexplained possession of the victim's watch, was insufficient to establish the nexus necessary for capital murder. "The possession of the watch by appellant in this case, without more, is as consistent with the fact that he killed to obtain it as with the fact that he did not." *Id*. at 859-860. Accordingly, the conviction was reversed and the cause remanded to the trial court to enter a judgment of acquittal to the charge of capital murder. *Id*. at 860; *but see Garrett v. State*, 851 S.W. 2d 853, 856 (Tex. Crim. App. 1993)("Evidence is sufficient to support a capital murder conviction if it shows an intent to obtain or maintain control of property which was formed before or contemporaneously with the murder"); *see Conner v. State*, 67 S.W. 3d 192, 197 (Tex. Crim. App. 2001); *Robertson v. State*, 871 S.W. 2d 701, 705 (Tex. Crim. App. 1993)(sufficient); *Nelson v. State*, 848 S.W. 2d 126, 132 (Tex. Crim. App. 1992)(sufficient).

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

v. Proof that a robbery occurred as an afterthought and unrelated to a murder would not establish capital murder. *Moody v. State*, 827 S.W.2d

875, 892 (Tex. Crim. App. 1992). "In a capital murder prosecution for murder during the course of robbery, the State must prove that the defendant formed the intent to rob prior to or concurrent with the murder." *Williams v. State*, 937 S.W. 2d 479, 483 (Tex. Crim. App. 1996)(evidence sufficient here in light of appellant's confession that his motive for going to complainant's apartment was to steal).

vi. In *Herrin v. State*, 125 S.W. 3d 436 (Tex. Crim. App. 2002), appellant drove up behind the victim, Wayne, exited his truck, walked up to him and shot him with a rifle. His "clear and undiverted intent" was to kill the victim. Nothing suggests that appellant was in the course of attempting to kidnap the victim, or to disable him, when he shot him. In light of appellant's clear intent to kill the victim, his moving the body after shooting him did not amount to evidence that he was in the course of kidnapping when he killed him. "The critical question is whether the murder was committed in the course of the kidnapping or attempted kidnapping, not the other way around." *Id*. at 440-441.

vii. Appellant was charged with murdering Wayne in the course of committing robbery or attempted robbery. "For a murder involving a theft to constitute a capital murder committed in the course of a robbery, the intent to rob must be formulated before or at the time of the murder. Proof that the robbery was committed as an afterthought and unrelated to the murder is not sufficient." *Herrin v. State*, 125 S.W. 3d 436, 441 (Tex. Crim. App. 2002). Here, there was "no evidence that appellant knew Wayne had any money in his wallet or that appellant even knew whether Wayne had his wallet with him, and there is no evidence linking appellant to the wallet. Finally, an intent to steal Wayne's money cannot be reasonably inferred from evidence that Wayne owed appellant's father about $16,000 for repayment for the purchase of a vehicle and other loans. There was evidence that appellant had a balance of over $13,000 in his bank account, suggesting that he did not need money." The evidence was insufficient to prove beyond a reasonable doubt that the murder occurred during the course of robbery or attempted robbery. *Id*. at slip op. * 3-4.

b. Under Rule 78.1 of the Texas Rules of Appellate Procedure, the court of criminal appeals, when reviewing a death penalty conviction on direct appeal, has the authority to reform the judgment of the trial court below to a conviction for a lesser included offense which was submitted to the jury. *Herrin v. State*, 125 S.W. 3d 436, 444 (Tex. Crim. App. 2002).

5. Insufficient corroboration

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

6. Insufficient circumstantial evidence

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

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

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

7. Conspiracy to rob

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

8. Remuneration

a. A person who kills another in order to receive a benefit or financial settlement paid upon the death of the

victim, such as proceeds of insurance and retirement benefits, is guilty of murder for remuneration under § 19.03(a)(3). *Beets v. State*, 767 S.W. 2d 711, 737 (Tex. Crim. App. 1987).

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

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

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

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

9. Same criminal transaction

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

b. The evidence was sufficient to prove that appellant killed two persons during the same criminal transaction, as required by § 19.06(a)(6)(A), where the evidence suggested no realistic scenario other than that appellant carried out two murders in a continuous and uninterrupted process over a short period of time. *Rios v. State*, 846 S.W. 2d 310, 314 (Tex. Crim. App. 1992); *accord Jackson v. State*, 17 S.W. 3d 664, 669 (Tex. Crim. App. 2000)("Because the legislature did not define the term 'same criminal transaction,' we have interpreted that phrase to mean 'a continuous and uninterrupted chain of conduct occurring over a very short period of time . . . in a rapid sequence of unbroken events'").

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

d. The trial court does not err in refusing to define for the jury the phrase "during the same criminal transaction." *Smith v. State*, 2009 WL 1212500 *12 (Tex. Crim. App. 2009).

e. Capital murder of two persons during the same criminal transaction "includes 'knowing' killings." *Medina v. State*, 7 S.W. 3d 633, 639 (Tex. Crim. App. 1999).

f. Sometimes the evidence is very thin. "Appellant's bloody fingerprint puts him in the apartment while the blood was still wet. Further, the discovery of blood consistent with appellant's DNA profile on the towels and on the bloody bar leads to the reasonable conclusion that appellant was injured during the struggle with one or both of the victims. Thus, the evidence is legally sufficient to find that appellant killed [the two victims]." *Jackson v. State*, 17 S.W. 3d 664, 669 (Tex. Crim. App. 2000).

g. The original indictment charged appellant with murdering two people, but was defective because it did not specify whether these murders occurred during the same criminal transaction or whether they were during different criminal transactions, but were pursuant to the same scheme or course of criminal conduct. The state amended the indictment to allege "during the same criminal transaction," and appellant objected, arguing that this amendment violated article 28.10 because it charged a different offense, and because it prejudiced his substantial rights. The court of criminal appeals disagreed. Although the original indictment was defective, it gave appellant notice that he was charged with capital murder and it did not charge an additional or different offense. Nor was appellant prejudiced since he had actual notice of the capital charge against him.

Smith v. State, 2009 WL 1212500 *3-4 (Tex.Crim.App. 2009).

10. Murder while serving a life sentence

a. Section 19.03(a)(6) is not facially unconstitutional because the length of the sentence a person is serving does not provide a reasoned and principled basis for distinguishing between the death penalty and a life sentence. "To pass muster under the Eighth Amendment, an aggravating circumstance contained in an element of a capital offense must meet two requirements: first, the circumstance may not apply to every defendant convicted of a murder, it must apply only to a subclass of defendants convicted of murder; and, second, the aggravating circumstance must not be unconstitutionally vague." *Cannady v. State*, 11 S.W. 3d 205, 214 (Tex. Crim. App. 2000)(Texas statute meets both requirements).

b. In *Cannady v. State*, 11 S.W. 3d 205, 215 (Tex. Crim. App. 2000), appellant argued that § 19.03(a)(6) violated equal protection because there is no constitutionally permissible distinction between one who murders while serving a life sentence, and one who murders while serving a 60 year sentence. The court rejected that argument, holding that the legislature's decision to draw the line at life or 99 years is rational, and therefore does not violate equal protection. *Id*. at. 215-16

c. Under § 19.03(a)(6) of the Texas Penal Code, a person may be indicted for capital murder if he commits murder while serving a sentence of life imprisonment or a term of 99 years for the commission of a 3(g) offense. Conviction is not barred simply because the prior offenses were committed before the effective date of the capital statute. *State v. Cannady*, 913 S.W. 2d 741, 744 (Tex. App.--Corpus Christi 1995, pet. ref'd). The court of criminal appeals agrees with the court of appeals, holding that the date appellant committed the offenses for which he received the life sentences is not an element of the offense of capital murder. *Cannady v. State*, 11 S.W. 3d 205, 208 (Tex. Crim. App. 2000).

d. In *Cannady v. State*, 11 S.W. 3d 205, 216 (Tex. Crim. App. 2000), appellant argued that his jury should have been allowed to decide guilt/innocence before it heard evidence of his prior convictions. The court disagreed. "Under Section 19.03(a)(6), the status of Cannady as an inmate serving a particular sentence (life or 99 years) is an element of the crime of capital murder. Indeed, it is the aggravating element that raises the crime from simple murder (a first-degree felony) to a capital offense. Although the details of the prior conviction may be more prejudicial than is warranted for admission at guilt/innocence, a point which Cannady does not argue here, the State is entitled to prove the fact of the commission of a crime listed in Article 42.12 § 3g(a)(1) and the sentence imposed as part of its burden to prove the crime of capital murder. This requisite does not violate either the due process or due course of law protections." *Id* at slip op. 21-22.

e. Article 42.08(b) of the code of criminal procedure does not require that appellant's death sentence be stacked onto the two life sentences he was serving at the time this offense was committed. *Cannady v. State*, 11 S.W. 3d 205, 218 (Tex. Crim. App. 2000).

11. Murder in the course of kidnapping

a. The act of chaining a man to the back of a truck and dragging him for a mile and a half "was, by itself, a kidnapping under the law." *King v. State*, 29 S.W.3d 556, 563 (Tex. Crim. App. 2000).

b. Nothing in the kidnapping statute requires the state to prove that the accused moved the complainant a certain distance or restrained her for a certain period of time. A kidnapping prosecution is not barred *per se* for conduct occurring during the course of another crime. *Reyes v. State*, 84 S.W. 3d 633, 636-37 (Tex. Crim. App. 2002).

c. In *Rayford v. State*, 125 S.W. 3d 521, 525 (Tex. Crim. App. 2003), appellant argued that the court has construed the capital murder statute in such a way that almost every murder also necessarily involves a kidnapping, and that therefore, there is a failure to adequately narrow the class of persons eligible for the death penalty. The court disagreed.

12. Murder in the course of retaliation

A person commits murder in the course of retaliation if he murders a "prospective witness." The word "prospective" can be synonymous with "potential." *Ortiz v. State*, 93 S.W. 3d 79, 86 (Tex. Crim. App. 2002). "Any person who is involved in an offense with a defendant, who sees the defendant committing an offense, or who hears the defendant discuss committing an offense is a 'prospective witness' in the prosecution of that defendant because he 'may' testify. *Id*.

13. Murder while incarcerated

The evidence of guilt was legally sufficient where the evidence showed that three or more persons, including appellant, collaborated to kill the victim. *Canales v. State*, 98 S.W. 3d 690, 694 (Tex. Crim. App. 2003).

14. Manner and means

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

b. "The prosecution satisfied the 'due diligence' requirement when it proved through one of the grand jurors that the grand jury was unable to find out what object caused the various injuries. In addition, the jury was charged in the disjunctive and the evidence is sufficient to support a finding that appellant killed the victim with a knife." *Rosales v. State*, 4 S.W. 3d 228, 231 (Tex. Crim. App. 1999).

c. "Because the evidence is inconclusive as to the instrumentality that was responsible for the deceased's death, the State need not prove that the grand jury used due diligence in attempting to ascertain the murder weapon. Moreover, the indictment's various allegations of the alternative possible instrumentalities that might have caused the deceased's death evidences the grand jury's efforts in attempting to ascertain the actual cause of death." *Hicks v. State*, 860 S.W. 2d 419, 425 (Tex. Crim. App. 1993). *Cf. Rosales v. State*, 4 S.W. 3d 228, 231 (Tex. Crim. App. 1999)("the rule in cases like *Hicks* is no longer viable in light of our decision in *Malik*").

15. Lawful discharge of duty

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

b. "[T]he 'lawful discharge' of official duties in this context means that the public servant is not criminally or tortiously abusing his office as a public servant by acts of, for example, 'official oppression' or 'violations of the civil rights of a person in custody' or the use of unlawful, unjustified force." *Hall v. State*, 158 S.W. 3d 470, 474-75 (Tex. Crim. App. 2005).

16. Corroboration of extrajudicial confessions

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

b. "Independent evidence that a crime has been committed must corroborate a defendant's extrajudicial confession to capital murder as to both the murder and underlying felony." *Cardenas v. State*, 30 S.W. 3d 384, 390 (Tex. Crim. App. 2000). In capital murder cases, extrajudicial confessions must be corroborated as to the underlying felony offense, since it is part of the *corpus delicti*. That is, there must be some evidence which renders commission of the underlying offense more probable than it would be without the evidence. *Chambers v. State*, 866 S.W. 2d 9, 15 (Tex. Crim. App. 1993)(ample evidence corroborating appellant's confession as to sexual assault); *see also Williams v. State*, 958 S.W. 2d 186, 190 (Tex. Crim. App. 1997); *Emery v. State*, 881 S.W.2d 702, 705 (Tex. Crim. App. 1994); *Gribble v. State*, 808 S.W.2d 65, 71 (Tex. Crim. App. 1990).

17. Corpus delicti

a. "The *corpus delicti* rule is a rule of evidentiary sufficiency that can be summarized as follows: an extrajudicial confession of wrongdoing, standing alone, is not enough to support a conviction; there must exist other evidence showing that a crime has in fact been committed. [citation omitted] This other evidence need not be sufficient by itself to prove the offense: 'all that is required is that there be some evidence which renders the commission of the offense more probable than it would be without the evidence.' [citations omitted] We have held that, in a capital murder case, the *corpus delicti* requirement extends to both the murder and the underlying offense." *Rocha v. State*, 16 S.W. 2d 1, 4 (Tex. Crim. App. 2000).

b. "[T]he corpus delicti of murder is established if the evidence shows the death of a human being caused by the criminal act of another, and the State is not required to produce and identify the body or remains of the decedent." *McDuff v. State*, 939 S.W. 2d 607, 615 (Tex. Crim. App. 1997).

c. The court may consider accomplice witness testimony when determining whether the corpus delicti has been established. *McDuff v. State*, 939 S.W. 2d 607, 614 (Tex. Crim. App. 1997).

18. No waiver

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

19. Specific intent

a. "Opening fire with an automatic rifle, at close range, on a group of people supports the conclusion that appellant acted with the specific intent to kill." *Medina v. State*, 7 S.W. 3d 633, 637 (Tex. Crim. App. 1999).

20. Voluntary intoxication

a. "[U]nder Texas Penal Code, Section 8.04, voluntary intoxication cannot constitute any defense to the commission of a crime. Appellant's argument that his intoxication made him incapable of forming the necessary intent is not viable under a legal or factual sufficiency analysis. It is clear under section 8.04 that voluntary intoxication is not to an excuse to commission of any crime, and therefore may not be considered as having negated an element of an offense." *Rojas v. State*, 986 S.W. 2d 241, 247 (Tex. Crim. App. 1998)(citations omitted).

21. Killing An Unborn Child

a. It does not contravene the restrictions of *Roe v. Wade* to prosecute appellant for killing an unborn child. *Flores v. State*, 2008 WL 375421 (Tex. Crim. App. 2008).

b. Appellant argued that, because it was impossible for him to know the woman was pregnant, he lacked the specific intent to cause the unborn child's death, an essential element of the offense. The Court of Criminal Appeals agreed. Because the state alleged that appellant intentionally and knowingly caused the death of the unborn child, it was required to prove beyond a reasonable doubt that culpable mental state with regard to the death of the child, regardless of any intent to kill the mother. *Roberts v. State*, 273 S.W. 3d 322, 329 (Tex. Crim. App. 2008).

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

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

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

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

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

3. A defendant may be convicted as a party to capital murder even though his indictment does not allege that he acted as a party. *Goff v. State*, 931 S.W. 2d 537, 544 n.5 (Tex. Crim. App. 1996); *Duff-Smith v. State*, 685 S.W. 2d 26, 34 (Tex. Crim. App. 1985); *Green v. State*, 682 S.W. 2d 271, 291 (Tex. Crim. App. 1984).

4. When the evidence shows that two or more persons actively participated in the crime, but that the participation of the appellant was "sufficient in and of itself" to sustain the conviction, no parties submission is required. Where there is evidence that the conduct of the defendant is not sufficient, in and of itself, to sustain a conviction, then parties must be submitted. *Goff v. State*, 931 S.W. 2d 537, 545 (Tex. Crim. App. 1996)(parties submission proper where there was evidence to support the inference that appellant acted as a party, even though "defendant as the principal actor" was the theory best supported by the evidence). *See Etheridge v. State* , 903 S.W.2d 1,13 (Tex. Crim. App. 1994)(where evidence of appellant's conduct is sufficient "in and of itself" to sustain his conviction, the trial court does not err in refusing to instruct on the law of parties). *See also Ransom v. State*, 920 S.W. 2d 288, 302 (Tex. Crim. App. 1996) (parties submission proper).

5. In *Stewart v. State*, 686 S.W. 2d 118, 124 (Tex. Crim. App. 1984), the defendant objected to the jury charge at the guilt/innocence phase because it did not require the jury to specify whether it found defendant

guilty as a party or a primary actor. The court held that this was not error.

6. Because it is not an enumerated defense under the Texas Penal Code, the trial court need not instruct the jury on the defensive theory of "independent impulse." It is only necessary that the instruction track § 7.02(b) of the penal code. *Solomon v. State*, 49 S.W. 3d 356, 368 (Tex. Crim. App. 2001).

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

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

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

10. In the abstract portion of the charge, the court instructed the jury on party liability as a conspirator, pursuant to § 7.02(b). The court failed, however, to apply this portion of the law to the facts of the case, over appellant's objection. The trial court erred in denying appellant's request to apply the law of conspiracy to the facts of the case in the application paragraph of the charge. *Campbell v. State*, 910 S.W. 2d 475 (Tex. Crim. App. 1995). The error was harmless, though, because the state chose to proceed on a theory of party liability under § 7.02(a)(2). *Id*. at 478. Failure of the charge to apply the law of parties described in the abstract portion of the charge is not error unless timely and sufficiently objected to. *McFarland v. State*, 928 S.W. 2d 482, 515 (Tex. Crim. App. 1996).

11. The trial court errs in charging the jury on the law of parties where the evidence is insufficient to support such an instruction. The error may be harmless, though. "[B]ecause there was no evidence tending to show appellant's guilt as a party, the jury almost certainly did not rely upon the parties instruction in arriving at its verdict, but rather based the verdict on the evidence tending to show appellant's guilt as a principal actor." *Ladd v. State*, 3 S.W. 3d 547, 564-65 (Tex. Crim. App. 1999).

12. *Apprendi* does not require the law of parties to be pled in the indictment. *Sorto v. State*, 173 S.W. 3d 469, 476 (Tex. Crim. App. 2005).

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

1. TEX. PENAL CODE ANN. § 6.04 provides:

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

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

(1) a different offense was committed; or

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

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

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

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

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

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

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

6. "Transferred intent may be used as to a second death to support a charge of capital murder that alleges the deaths of more than one individual during the same criminal transaction only if there is proof of intent to kill the same number of persons who actually died, e.g., with intent to kill both Joe and Bob, the defendant killed Joe and Lou. It may also be used if, intending to kill both Joe and Bob and being a bad shot, the defendant killed Mary and Jane." Here, "[a]ppellant intended to kill A, and did so. If he is to be charged with also intentionally and knowingly killing a second person, in this case the embryo, by killing the mother, there must be a separate specific intent to do so. [citation omitted] It is undisputed that appellant did not know [the mother] was pregnant. Lacking knowledge of the embryo's existence, appellant could not form a separate specific intent to kill the embryo, as is required by statute." *Roberts v. State*, 273 S.W. 3d 322, (Tex. Crim. App. 2008)(overruling *Norris v. State*, 902 S.W. 2d 428 (Tex. Crim. App. 1995)).

7. There is no need to give a causation charge where the evidence shows that appellant must have fired at least one fatal shot. *McFarland v. State*, 928 S.W. 2d 482, 516 (Tex. Crim. App. 1996).

8. Overruling appellant's complaint on appeal that the trial court committed egregious error in instructing the jury on the law of transferred intent, the court held: "But if appellant is correct that a finding of guilt upon a transferred intent theory would be irrational under the evidence, then it would appear highly unlikely that a correctly framed transferred intent instruction would result in a jury verdict on that theory." Thus, appellant failed to show egregious harm. *Medina v. State*, 7 S.W. 3d 633, 638 (Tex. Crim. App. 1999).

9. Even assuming that the conduct of the treating physicians was clearly sufficient to cause the death of the complainant, "the conduct of appellant was not 'clearly insufficient' so as to absolve him of criminal responsibility under § 6.04." *Thompson v. State*, 93 S.W. 3d 16, 21 (Tex. Crim. App. 2001).

G. Gruesome Photographs

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

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

3. In making a Rule 403 analysis, the court generally considers the following factors: "(1) how probative is the evidence; (2) the potential of the evidence to impress the jury in some irrational, but nevertheless indelible way; (3) the time the proponent needs to develop the evidence; and (4) the proponent's need for the evidence." *Solomon v. State*, 49 S.W. 3d 356, 366 (Tex. Crim. App. 2001).

4. Although the standard has changed, it still remains virtually impossible to reverse a conviction because photographs were erroneously introduced. *E.g.*, *Gallo v. State*, 2007 WL 3d 2781276 *3 (Tex. Crim. App. 2007)*; Ripkowksi v. State*, 61 S.W. 3d 378, 392-93 (Tex. Crim. App. 2001); *Hicks v. State*, 860 S.W. 2d 419, 427 (Tex. Crim. App. 1993); *see also Wyatt v. State*, 23 S.W. 3d 18, 29-30 (Tex. Crim. App. 2000)*; *Chamberlain v. State*, 998 S.W. 2d 230, 238 (Tex. Crim. App. 1999)*; *Ladd v. State*, 3 S.W. 3d 547, 568 (Tex. Crim. App. 1999)*; *Rojas v. State*, 986 S.W. 2d 241, 250 (Tex. Crim. App. 1998)*; *Jones v. State*, 982 S.W. 2d 386, 394 (Tex. Crim. App. 1998)*; *Williams v. State*, 958 S.W. 2d 186, 195-96 (Tex. Crim. App. 1997); *Williams v. State*, 937 S.W. 2d 479, 487-88 (Tex. Crim. App. 1996); *Santellan v. State*, 939 S.W. 2d 155, 172-73 (Tex. Crim. App. 1997); *Matamoros v. State*, 901 S.W. 2d 470, 476 (Tex. Crim. App. 1995); *Etheridge v. State*, 903 S.W.2d 1, 21 (Tex. Crim. App. 1994); *Emery v. State*, 881 S.W.2d 702, 710 (Tex. Crim. App. 1994); *Barnes v. State*, 876 S.W.2d 316, 326 (Tex. Crim. App. 1994); *Richardson v. State*, 879 S.W. 2d 874, 880-881 (Tex. Crim. App. 1993); *McFarland v. State*, 845 S.W. 2d 824, 840-41 (Tex. Crim. App. 1993); *Narvaiz v. State*, 840 S.W. 2d 415, 429-430 (Tex. Crim. App. 1992); *Jones v. State*, 843 S.W.2d 487, 501 (Tex. Crim. App. 1992); *Green v. State*, 840 S.W.2d 394, 410-411 (Tex. Crim. App. 1992); *Fuller v. State*, 829 S.W.2d 191, 206, 207 (Tex. Crim. App. 1992).

5. One death penalty case has been reversed. In *Reese v. State*, 33 S.W. 3d 238 (Tex. Crim. App. 2000), the court held that Rule 403 was violated where the trial court admitted at the punishment phase a photograph of the victim and her unborn child lying in the casket together at their wake. Assuming the photograph was relevant, it was substantially more prejudicial than probative. "In the context of the trial court's admitting a photograph, we should consider: the number of photographs, the size of the photograph, whether it is in color or black and white, the detail shown in the photograph, whether the photograph is gruesome, whether the body is naked or clothed, and whether the body has been altered since the crime in some way that might enhance the gruesomeness of the photograph to the appellant's detriment." *Id*. at 241. Here, the court found that the second and fourth factors weighed heavily in favor of appellant and, although the first and third weighed in favor of the state, these were not enough to overcome the prejudicial qualities of the photos and the state's limited need for it, in light of the contested issues. *Id*. at 242-43. And, the error was harmful, since "we have no fair assurance that the error did not influence the jury, or had but a slight effect." *Id*. at 244; *see also Erazo v. State*, 144 S.W. 3d 487, 496 (Tex. Crim. App. 2004)(reversing murder conviction where court admitted photo of unborn child removed from victim during autopsy).

6. In *Prible v. State*, 175 S.W. 3d 724 (Tex. Crim. App. 2005), the prosecutors introduced autopsy photographs of the dissected internal organs of children, purportedly to show the amount of carbon material that had entered their bodies as victims of an arson. The state did not need this evidence, and appellant was not on trial for murdering these children. The minimal probative value of these photographs was substantially outweighed by the danger of unfair prejudice, confusion, and needless presentation of cumulative evidence, and the trial court abused its discretion under Rule 403. The evidence was harmless, though. *Id*. at 735-37.

7. There may be a constitutional objection to the introduction of exceedingly gruesome photographs. In *Tucker v. Kemp*, 481 U.S. 1063, 1063 (1987), Justice Brennan, dissenting, would have granted a stay of execution, believing that "Tucker's petition for certiorari raises the question whether inflammatory and prejudicial photographs of the victim's body introduced at trial violated his constitutional right to 'fundamental fairness and a reliable sentencing determination.'" Justice Brennan predicted that that very issue would be decided in *Thompson v. Oklahoma*, in which the Court had earlier granted certiorari. As it turned out, the *Thompson* Court did not reach that issue, finding that the Eighth Amendment prohibited the execution of the 16 year old defendant. *See Thompson v. Oklahoma*, 487 U.S. 815 (1988). It is significant, though, that once the Court deemed this question cert-worthy.

8. "'Autopsy photographs are generally admissible unless they depict mutilation of the victim caused by the autopsy itself.'" *Salazar v. State*, 38 S.W. 3d 141, 151 (Tex. Crim. App. 2001)(photos of surgically removed organs admissible here, where necessary to show extent of injuries inflicted, and where not offered to encourage resolution on inappropriate emotional basis); *accord Hayes v. State*, 85 S.W. 3d 809, 816 (Tex. Crim. App. 2002). Photos reflecting autopsy alterations may be admissible where these are "fully explained to the jury as necessary to a thorough examination of the injuries." *Rayford v. State*, 125 S.W. 3d 521, 530 (Tex. Crim. App. 2003).

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

admitted the evidence." *Id*; *accord Chamberlain v. State*, 998 S.W. 2d 230, 237 (Tex. Crim. App. 1999); *Paredes v. State*, 129 S.W. 3d 530, 540 (Tex. Crim. App. 2004); *see also Hall v. State*, 67 S.W. 3d 860, 876 (Tex. Crim. App. 2002)("defendant cannot successfully say, 'You must not be outraged by my outrageous behavior'"). "While the photos may be graphic, they depict the realities of the crime committed." *Rayford v. State*, 125 S.W. 3d 521, 530 (Tex. Crim. App. 2003). "Although a crime scene photograph may be gruesome, that fact alone will rarely render the photograph necessarily inadmissible under Rule 403." *Jones v. State*, 982 S.W. 2d 386, 394 (Tex. Crim. App. 1998). In *Shuffield v. State*, 189 S.W. 3d 782, 788 (Tex. Crim. App. 2006), the court rejected appellant's Rule 403 complaint because the photos were "no more gruesome than would be expected."

10. Appellant's failure to explain why the photographs are inflammatory or unfairly prejudicial constitutes inadequate briefing under Rule 74(f) of the Texas Rules of Appellate Procedure. *Williams v. State*, 937 S.W. 2d 479, 487 (Tex. Crim. App. 1996).

11. Preservation of error regarding videotapes requires that appellant specifically object at trial to that portion of the video which he believes is inadmissible, and that he designate the video for inclusion in the appellate record. *Sonnier v.State*, 913 S.W. 2d 511, 518 (Tex. Crim. App. 1995). The same is true for photographs. *Williams v. State*, 958 S.W. 2d 186, 196 n.10 (Tex. Crim. App. 1997).

12. What about when the defense wants gruesome photographs of extraneous offenses in to prove that anyone who did this must be insane? The trial court did not err when it excluded photographs of crime scenes concerning extraneous offenses that were relevant to the question of insanity, but that were likely to distract the jury from the facts of the charged crime and were therefore inadmissible under Rule 403. *Resendiz v. State*, 112 S.W. 3d 541, 545-46 (Tex. Crim. App. 2003).

H. Future Hardship

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

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

1. In general

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

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

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

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

2. Held admissible

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

a. Evidence of needle marks was admissible, since appellant's drug use was relevant to show his motive in committing capital murder. *Etheridge v. State*, 903 S.W.2d 1, 10-11 (Tex. Crim. App.1994); *see Ladd v. State*, 3 S.W. 3d 547, 568 (Tex. Crim. App. 1999)(that

appellant had smoked cocaine the night of the killing was admissible to prove motive for killing, namely to obtain victim's property to exchange it for cocaine); *Knox v. State*, 934 S.W. 2d 678, 683 (Tex. Crim. App. 1996)(evidence of prior drug usage relevant to show appellant's motive for robbery/murder at pharmacy).

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

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

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

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

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

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

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

i. A murder that occurred in the same continuous transaction as the instant offense may be proven. *Lincecum v. State*, 736 S.W. 2d 673, 681 (Tex. Crim. App. 1987); *Mann v. State*, 718 S.W. 2d 741, 743 (Tex. Crim. App. 1986); *see Wyatt v. State*, 23 S.W. 3d 18, 25-26 (Tex. Crim. App. 2000)(evidence of sexual assault and murder part of same transaction contextual evidence); *Cantu v. State*, 939 S.W. 2d 627, 636 (Tex. Crim. App. 1997)(evidence of murder, robbery, sexual assault admissible as part of same transaction contextual evidence).

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

k. Evidence of an extraneous robbery was admissible on the question of identity where there were distinguishing characteristics common to the offenses. *Castillo v. State*, 739 S.W. 2d 280, 291 (Tex. Crim. App. 1987); *see also Johnson v. State*, 68 S.W. 3d 644, 650-51 (Tex. Crim. App. 2002); *Lane v. State*, 933 S.W. 2d 504, 519-20 (Tex. Crim. App. 1996).

l. Evidence of medical and surgical procedures used to repair the stab wounds and remove an eye of a surviving witness were necessary to prove the aggravated assault on that witness, which was the underlying felony of the burglary alleged in the indictment. *Nobles v. State*, 843 S.W.2d 503, 512-13 (Tex. Crim. App. 1992). Although admissible under those circumstances, the court acknowledged that "evidence of the nature complained of could, under some circumstances, be considered extraneous and improper." *Id*.

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

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

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

p. Evidence that appellant solicited the help of another to commit a robbery before the instant offense

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

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

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

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

t. Evidence of a recent prior murder was admissible to show intent, identity, motive, and to rebut a defensive theory. *Taylor v.State*, 920 S.W. 2d 319, 322 (Tex. Crim. App. 1996).

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

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

w. Evidence that appellant abused the corpse of his victim was admissible as a part of the same transaction as the capital murder and was relevant to the state's proof of specific intent to kidnap. *Santellan v. State*, 939 S.W. 2d 155, 168 (Tex. Crim. App. 1997). Nor was this evidence excludable under Rule 403. *Id*. at 169-70.

x. One extraneous offense was admissible to rebut appellant's claim that his confession to another offense was inaccurate and involuntary. *Lane v. State*, 933 S.W. 2d 504, 520 (Tex. Crim. App. 1996).

y. Testimony that appellant had expressed to his friends his thoughts about killing and raping women did not implicate Rule 404(b), because it "pertained to appellant's thoughts, not conduct." *Massey v. State*, 933 S.W. 2d 141, 153-54 (Tex. Crim. App. 1996).

z. Three gang-related offenses which occurred at the complainant's home, the site of the offense, in the months preceding the offense, were relevant to explain the context of gang rivalries in which the primary offense occurred, and to further the state's theory that the home was a target of appellant's gang, which had some tendency to show motive to shoot and kill people there. *Medina v. State*, 7 S.W. 3d 633, 643 (Tex. Crim. App. 1999). An altercation earlier in the night with a rival gang was relevant to appellant's motive and intent. *Medina v. State*, 7 S.W. 3d 633, 643-44 (Tex. Crim. App. 1999). "[G]ang-affiliation is relevant to show a motive for a gang-related crime." *Vasquez v. State*, 67 S.W. 3d 229, 239 (Tex. Crim. App. 2002). Gang membership was admissible for a number of non-character reasons, including, to prove motive and to rebut defensive theories. *Ortiz v. State*, 93 S.W. 3d 79, 94 (Tex. Crim. App. 2002). Gang evidence was not extraneous where the state was required to prove that appellant was a member of a combination that murdered another for advancement in prison. *Canales v. State*, 98 S.W. 3d 690, 697 (Tex. Crim. App. 2003).

aa. The sexual assault of a three year old was admissible as the motive for the murder. *Wyatt v. State*, 23 S.W. 3d 18, 26 (Tex. Crim. App. 2000).

bb. *Feldman v. State*, 71 S.W. 3d 738, 755 (Tex. Crim. App. 2002)(admissible to show motive and scheme).

cc. *Johnson v. State*, 68 S.W. 3d 644, 651 (Tex. Crim. App. 2002)(extraneous robberies admissible to show appellant's scheme of robbing women who traveled alone, which was relevant to prove that the instant murder was committed in the course of committing theft, and not as a mere afterthought).

dd. *Prible v. State*, 175 S.W. 3d 724, 731-32 (Tex. Crim. App. 2005)(three extraneous murders admissible to corroborate appellant's confession to jail house informant and because they were same transaction, contextual evidence).

ee. *Sorto v. State*, 173 S.W. 3d 469, 491 (Tex. Crim. App. 2005)(extraneous murder admissible on hotly contested question of intent or knowledge).

3. Held inadmissible

Occasionally, the court of criminal appeals reverses for the improper admission of an extraneous offense at the guilt/innocence phase of a capital trial. All

these cases, except one, were decided before *Montgomery*.

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

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

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

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

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

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

4. Held harmless

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

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

c. The trial court erred in admitting evidence of gang membership which had no tendency to make more probable any fact of consequence. Rather, the evidence was simply an attempt to connect appellant to gangs in order to show he had a bad character. *Pondexter v. State*, 942 S.W. 2d 577, 584-5 (Tex. Crim. App. 1996). The error was harmless, though.

5. Waiver

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

6. Limiting Instruction

a. If the trial court admits an extraneous offense for a limited purpose, the defendant is entitled to an instruction to the jury so limiting the use of the offense.

See Crank v. State, 761 S.W.2d 328, 347 (Tex. Crim. App. 1988).

b. This limiting instruction should be requested contemporaneously, at the time of the evidence is admitted, pursuant to Rule 105 of the Texas Rules of Evidence. *Rankin v.* State, 974 S.W.2d 707, 713 (Tex. Crim. App. 1996). A request that the instruction be given "at the appropriate time" does not sufficiently request a contemporaneous instruction. Giving the instruction in the jury charge is "appropriate." *Wilson v. State*, 7 S.W. 3d 136, 144 (Tex. Crim. App. 1999).

c. One case suggests that counsel waived his right to a limiting instruction at the end of the case because he did not request a contemporaneous limiting instruction. *Wesbrook v. State*, 29 S.W. 3d 103, 114 n. 8 (Tex. Crim. App. 2000).

d. No limiting instruction is required where the extraneous offenses in question are "same transaction contextual evidence." *Camacho v. State*, 864 S.W. 2d 524, 535 (Tex. Crim. App. 1993); *accord Wesbrook v. State*, 29 S.W. 3d 103, 115 (Tex. Crim. App. 2000).

e. Where the defendant is entitled to a limiting instruction, counsel may be ineffective for not requesting it. *Ex parte Varelas*, 45 S.W. 3d 627, 636 (Tex. Crim. App. 2001).

7. Texas Code of Criminal Procedure Article 38.36

a. "In all prosecutions for murder, the state or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense." TEX. CODE CRIM. PROC. ANN. art. 38.36(a).

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

8. Guilt/Innocence versus punishment

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

J. Shackling and Guards

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

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

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

4. No harm from shackling is shown where the record does not reflect that the jury saw or heard or was otherwise aware of the shackles. *Canales v. State*, 98 S.W. 3d 690, 698 (Tex. Crim. App. 2003).

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

6. Using visible restraints to shackle at the punishment phase of a death penalty trial violates due process unless the trial court takes account of the "circumstances of the particular case." A determination to shackle "must be case specific; that is to say, it should reflect particular concerns, say special security needs or escape risks, related to the defendant on trial." Because

shackling is inherently prejudicial, the defendant is not required to demonstrate actual prejudice. Rather, the state will be required to show, beyond a reasonable doubt, that the shackling error did not contribute to the verdict. *Deck v. Missouri*, 125 S. Ct. 2007, 2014-2016 (2005).

K. Jury Instructions At The Guilt/Innocence Phase

1. In general

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

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

> If the error in the charge was the subject of a timely objection in the trial court, then reversal is required if the error is "calculated to injure the rights of defendant," which means no more than that there must be *some* harm to the accused from the error. In other words, an error which has been properly preserved by objection will call for reversal as long as the error is not harmless.
> On the other hand, if no proper objection was made at trial and the accused must claim that the error was "fundamental," he will obtain a reversal only if the error is so egregious and created such harm that he "has not had a fair and impartial trial"--in short "egregious harm."

Id. at 171.

2. Lesser included offenses

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

b. The Constitution requires that the jury be instructed on any and all lesser included offenses "if the jury could rationally acquit on the capital crime and convict for the noncapital crime." *Cordova v. Lynaugh*, 838 F. 2d 764, 767 (5th Cir.), *cert. denied*, 486 U.S. 1061 (1988).

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

d. "The evidence must establish the lesser-included offense as a valid rational alternative to the charged offense." *Feldman v. State*, 71 S.W. 3d 738, 751 (Tex. Crim. App. 2002). Where there is no evidence other than the appellant's testimony that he did not intend to kill, and where the othere evidence in the case refutes that testimony, the court properly refused a lesser instruction on manslaughter, because the jury could not have rationally found that he acted recklessly. *Mathis v. State*, 67 S.W. 3d 918, 926 (Tex. Crim. App. 2002).

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

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

g. "It is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense. Rather, there must be some evidence directly germane to a lesser included offense for the fact finder to consider before an instruction on a lesser-included offense is warranted." *Cantu v. State*, 939 S.W. 2d 627, 646-47 (Tex. Crim. App. 1997).

h. The trial court properly refuses to instruct on the lesser included offense of murder where there is "no

evidence negating the underlying offense of robbery, and the evidence supporting the underlying offense is not so weak that the jury could interpret it in such a way as to give it no probative value." *Wolfe v. State*, 917 S.W. 2d 270, 278 (Tex. Crim. App. 1996).

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

(i) Felony-murder. *Ross v. State*, 861 S.W. 2d 870, 876 (Tex. Crim. App. 1993); *Adanandus v. State*, 866 S.W. 2d 210, 230 (Tex. Crim. App. 1993); *Rousseau v. State*, 855 S.W. 2d 666, 673 (Tex. Crim. App. 1993); *Allridge v. State*, 762 S.W. 2d 146, 154 (Tex. Crim. App. 1988); *Santana v. State*, 714 S.W. 2d 1, 9 (Tex. Crim. App. 1986); *but see Hernandez v. State*, 819 S.W.2d 806, 814 (Tex. Crim. App. 1991)(felony murder under § 19.02(a)(3) is not a lesser of capital murder under § 19.03(a)(5)). "The distinguishing element between felony murder and capital murder is the intent to kill. Felony murder is an unintentional murder committed in the course of committing a felony. Capital murder includes an intentional murder committed in the course of robbery. The elements of felony murder are included within the proof necessary for capital murder committed in the course of robbery. Thus, felony murder is a lesser included offense of capital murder." *Fuentes v. State*, 991 S.W. 2d 267, 272 (Tex. Crim. App. 1999)(citations omitted); *accord Threadgill v. State*, 146 S.W. 3d 654, 655 (Tex. Crim. App. 2004).

(ii) Aggravated assault. *Dowden v. State*, 758 S.W. 2d 264, 269 (Tex. Crim. App. 1988); *Weaver v. State*, 855 S.W. 2d 116, 121 (Tex. App. -- Houston [14th Dist.] 1993, no pet.). "A murder defendant is not entitled to an instruction on the lesser included offense of aggravated assault when the evidence showed him, at the least, to be guilty of a homicide. Since there was no evidence from which a rational jury could conclude that appellant did other than cause the death of the victim, the only lesser included offense that was raised by the evidence of recklessness was manslaughter." *Jackson v. State*, 992 S.W. 2d 469, 475 (Tex. Crim. App. 1999)(citations omitted). *See also Wesbrook v. State*, 29 S.W. 3d 103, 114 (Tex. Crim. App. 2000)(in light of the entire record, a jury could not have rationally concluded that appellant was guilty only of aggravated assault, where only evidence of lack of intent was from appellant).

(iii) Manslaughter. *Mathis v. State*, 67 S.W. 3d 918, 925 (Tex. Crim. App. 2002); *Adanandus v. State*, 866 S.W. 2d 210, 232 n.21 (Tex. Crim. App. 1993); *Montoya v. State*, 744 S.W. 2d 15, 28 (Tex. Crim. App. 1987).

(iv) Murder. *Moore v. State*, 969 S.W. 2d 4, 9-10 (Tex. Crim. App. 1998); *Thomas v. State*, 701 S.W. 2d 653, 656 (Tex. Crim. App. 1985); Tex. Penal Code Ann. § 19.03(c).

(v) Voluntary manslaughter. *Moore v. State*, 969 S.W. 2d 4, 9-10 (Tex. Crim. App. 1998); *Havard v. State*, 800 S.W.2d 195, 216 (Tex. Crim. App. 1989). *Lamb v. State*, 680 S.W. 2d 11, 16 (Tex. Crim. App. 1984).

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

(vii) Deadly conduct. *Flores v. State*, 2008 WL 375421 *5 (Tex. Crim. App. 2008).

j. Abuse of a corpse is *not* a lesser included offense of capital murder. *Druery v. State*, 225 S.W. 3d 491, 505 (Tex. Crim. App. 2007).

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

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

m. In an ordinary murder case, where voluntary manslaughter is raised and submitted to the jury, sudden passion should be negated in the murder application paragraph of the charge. *Cobarrubio v. State*, 675 S.W. 2d 749, 751-52 (Tex. Crim. App. 1983). There would seem to be no reason the same rule should not apply in a

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

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

o. Manslaughter is now considered a punishment issue. Ordinarily, murder is a first degree felony. TEX. PENAL CODE ANN. § 19.02(d).

> 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 ANN. § 19.02(d). Since "[c]apital murder is a species of murder," *Demouchette v. State*, 731 S.W. 2d 75, 80 (Tex. Crim. App. 1986), is one convicted of capital murder entitled to an instruction on sudden passion if raised by the evidence? The court says no. "The Legislature, through its broad power to classify crimes and those who stand accused of crimes, chose not to permit the defense of 'sudden passion' in the context of capital murder." The question of "sudden passion" can only be considered as a mitigating circumstance through the second special issue. *Wesbrook v. State*, 29 S.W. 3d 103, 112-13 (Tex. Crim. App. 2000).

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

q. Where appellant is charged with capital murder for killing two persons, he is entitled to a lesser instruction on murder only if he shows that he possessed the requisite culpable mental state for one of the victims, but not the other. There was no such evidence in this case. *Medina v. State*, 7 S.W. 3d 633, 638-39 (Tex. Crim. App. 1999).

r. "Appellant would be entitled to the lesser offenses of felony murder and manslaughter only if he showed that his culpable mental state did not rise to the level of an intentional or knowing killing or an intent to commit serious bodily injury -- such as recklessness. But there is no evidence in the record that appellant was anything less than reasonably certain that multiple people would be killed or seriously injured by his actions. Evidence that appellant did not care who he killed does not reduce his culpable mental state from knowing to mere recklessness." *Medina v. State*, 7 S.W. 3d 633, 639 (Tex. Crim. App. 1999).

s. Error in refusing to instruct on a lesser offense can be harmless where the jury is instructed on an "intervening" lesser offense, provided "the jury's rejection of that offense indicates that the jury legitimately believed that the defendant was guilty of the greater, charged offense." *Masterson v. State*, 155 S.W. 3d 167, 171-72 (Tex. Crim. App. 2005)(Tex. Crim. App. 2005)(no harm in refusing to instruct on criminally negligent homicide where jury was instructed on manslaughter).

3. Self defense

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

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

4. Culpable mental states

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

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

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

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

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

v. Although the court erred in defining "knowingly" with reference to nature of conduct and not as to result of conduct, the error did not cause appellant egregious harm. *Medina v. State*, 7 S.W. 3d 633, 639-40 (Tex. Crim. App. 1999). "[F]or knowing murders, the distinction between result of conduct and nature of conduct blurs because awareness of the result of the conduct necessarily entails awareness of the nature of the conduct as well. * * * To be aware that his conduct is reasonably certain to result in death, the actor must also be aware of the lethal nature of his conduct. * * * In short, a knowing murder under 19.02(b)(1) is a result-of-conduct offense which by definition is also a nature-of-conduct offense." *Id*.

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

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

> Now if you find from the evidence beyond a reasonable doubt that . . . Miguel A. Richardson, did intentionally

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

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

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

e. Section 8.04 of the Texas Penal Code states that voluntary intoxication is no defense. In *Skinner v. State*, 956 S.W. 2d 532, 542-44 (Tex. Crim. App. 1997), appellant contended that he was entitled to a lesser included offense of murder because intoxication prevented him from forming the necessary culpable mental state, and that § 8.04 was unconstitutional. The court rejected this contention, finding that no rational jury could have found that appellant's murders were not knowing.

5. Voluntary intoxication

a. The trial court does not err in refusing to instruct the jury that voluntary intoxication may negate the specific intent necessary to support a conviction for capital murder.

b. 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, 4 (Tex. Crim. App. 1998).

L. Submission of Alternative Theories

1. It is permissible to submit alternative theories of committing capital murder--murder in the course of robbery and murder in the course of sexual assault--in a single application paragraph. *Kitchens v. State*, 823 S.W.2d 256, 258 (Tex. Crim. App. 1991); *see generally Schad v. Arizona*, 501 U.S. 624 (1991). Allowing the jury to be split on which theory supports the verdict does not violate the unanimity requirement of article 36.29(a) of the code of criminal procedure, nor does it defeat the purpose of capital murder within § 19.03(a)(2) of the penal code. *Martinez v. State*, 129 S.W. 3d 101, 103 (Tex. Crim. App. 2004(nor is it error for the state to argue that the jury need not agree on which underlying offense appellant committed to convict him of capital murder). The *Apprendi* case does not prevent the state from charging alternative theories of capital murder in the disjunctive. *Green v. State*, No. 74,398 (Tex. Crim. App. December 1, 2004)(not designated for publication).

2. The indictment in *Cook v. State*, 741 S.W.2d 928 (Tex. Crim. App. 1987), alleged one incident of capital murder in six different counts, charging murder in the course of aggravated rape, aggravated sexual abuse, burglary of a habitation with intent to commit aggravated rape, burglary of a habitation with intent to commit aggravated sexual abuse, burglary of a habitation with intent to commit theft, and burglary of habitation with intent to commit aggravated assault. The trial court properly overruled defendant's pretrial motion to require the state to elect, since it is permissible for the state to allege one transaction of capital murder in multiple counts of a single indictment, to meet possible variations in proof. *See Hathorn v. State*, 848 S.W. 2d 101, 113 (Tex. Crim. App. 1992); *Franklin v. State*, 606 S.W.2d 818, 821 (Tex. Crim. App. 1979); *Jurek v. State*, 522 S.W.2d 934, 941 (Tex. Crim. App. 1975), *aff'd*, 428 U.S. 262 (1976). In *Cook*, five of the six original counts were submitted to the jury, which returned a general verdict. To be sufficient, the evidence need only support a finding of guilt under at least one of the counts. *Cook v. State*, 741 S.W.2d at 935. The trial court does not err in permitting the jury to return a general verdict, without designating under which count guilt was found. *Franklin v. State*, 606 S.W.2d at 822. The state may also join in a single paragraph allegations of murder in the course of burglary, and murder in the course of robbery. *Jernigan v. State*, 661 S.W.2d 936, 942 (Tex. Crim. App. 1983).

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

4. "*Kitchens* applies equally to all alternate theories of capital murder contained within § 19.03, whether they are found in the same or different subsections, so long as the same victim is alleged for the predicate murder, as was the case here." *Gamboa v. State*, 2009 WL 928552 (Tex. Crim. App. 2009)(murder in the course of robbery

of Ram and Douglas, and murder of both Ram and Douglas in the same transaction).

5. The indictment alleged that appellant committed capital murder by killing his mother and his father on different dates, but pursuant to the same scheme or course of conduct. The jury was instructed that it should find appellant guilty of the lesser offense of murder if it found that he murdered both parents, but not during the same scheme or course of conduct, or if it found that he murdered only his mother, or only his father. The jury found him guilty of murder. In neither the jury instructions nor the verdict form was the jury instructed that it must unanimously agree upon one of the three different criminal acts – murder of the mother, or murder of the father, or murder of both, but not during the same scheme or course of conduct. This was error because it violated the code of criminal procedure's requirement for a unanimous jury verdict in felony cases. *Hisey v. State*, 161 S.W. 3d 502, 503 (Tex. Crim. App. 2005); *see also Ngo v. State*, 175 S.W. 3d 738, 744 (Tex. Crim. App. 2005)(erroneous submission of credit card abuse).

6. The trial court did not err in refusing appellant's request to charge the jury that it must unanimously determine whether the murder occurred in the course of aggravated sexual assault or robbery. "We have recognized before that the jury in a capital murder case need not agree unanimously as to which underlying felony offense the defendant committed." *Minjarez v. State*, 2005 WL 3061981 *10-11 (Tex. Crim. App. 2005)(not designated for publication).

7. Appellant was indicted for the capital murder of Aubrey Hawkins. The jury was authorized to convict if it found appellant caused Mr. Hawkins death as a party, or as a co-conspirator, and if it happened during the course of a robbery, or during the lawful discharge of the duties of a peace officer. Appellant's request that the state be required to elect was denied, and this decision was affirmed on appeal. "There is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict, such as the manner and means by which one offense was committed. The appellant was charged with one offense, the capital murder of Aubrey Hawkins. The alleged theories of culpability and party liability were merely alternate methods or means by which the appellant committed one charged offense." *Murphy v. State*, 2006 WL 1096924 *21 (Tex. Crim. App. 2006)(not designated for publication).

M. The Merger Doctrine (Bootstrapping)

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

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

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

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

N. Opening Statement

1. Article 36.01 does not apply to the punishment phase of a trial, and article 37.071 is silent as to whether the state or the defense has the right to make an opening statement. Assuming, though, that article 36.01 applies, the defense only has the right to open if the state has opened. Where the state does not open, the defense has no right to open either. *Penry v. State*, 903 S.W. 2d 715, 760 (Tex. Crim. App.), *cert. denied*, 516 U.S. 977 (1995).

2. Nothing in the case law or the statutes prevents the trial court from permitting the parties to make an opening statement at the punishment phase of a capital trial. *Garcia v. State,* 2003 WL 22669744 *1 (Tex. Crim. App. 2003)(not designated for publication).

O. Summation

1. In *Wilson v. State*, 938 S.W. 2d 57 (Tex. Crim. App. 1996), the state made the following argument during the first phase of the trial:

I have taken a very sacred oath, in my opinion, to see that justice is done in every case I prosecute.

* * *

> *[Defense Counsel] has no such oath, and what he wishes is that you turn a guilty man free. That's what he wishes, and he can wish that because he doesn't have the obligation to see that justice is done in this case.*
>
> * * *
>
> *But see, it's not important to seek truth and justice under his oath. It is under mine.*

Id. at 58(emphasis in original). Appellant's objection that this argument struck at the defendant over the shoulders of his counsel was overruled. The court found this argument to be "outside the record, manifestly improper, harmful and prejudicial to the rights of the accused." *Id*. at 60. Nor was it invited by the argument of the defense which referred to Hitler. *Id*. at 61. And, the argument was harmful. Accordingly, the judgment was reversed. *Id*. at 62.

2. In *Janecka v. State,* 937 S.W. 2d 456, 474 (Tex. Crim. App. 1996), the court refused to hear appellant's complaints that the state had made several improper arguments at the guilt-innocence phase of the trial. "Without timely and specific objections, the question of allegedly improper closing arguments is not preserved for review unless manifestly improper."

3. The prosecutor argued in his summation that an expert witness called by the defense "was hired by those men for one purpose and that was to come in here and take the stand and mislead you and lie to you and tell you that their client did not give that confession. And you should be appalled by that." Appellant did not object to this argument at trial. Another, similar argument was made, and although appellant objected, he failed to get an adverse ruling. The court acknowledged older cases which held that some arguments could be so prejudicial as to amount to fundamental error, thus obviating the need for an objection. These older cases were expressly overruled. "Therefore, we hold a defendant's failure to object to a jury argument or a defendant's failure to pursue to an adverse ruling his objection to a jury argument forfeits his right to complain about the argument on appeal." *Id*. at 89. The court also found the argument harmless. *Cockrell v. State*, 933 S.W. 2d 73, 89 (Tex. Crim. App. 1996). The court has declined to overrule *Cockrell*, because it is "a case perfectly in line with Rule of Appellate Procedure 33.1 and the policies underlying preservation of error." *Mathis v. State*, 67 S.W. 3d 918, 927 (Tex. Crim. App. 2002).

4. Assuming that the state improperly argued that the defense wanted to "divert" the jury, considering the "mildness" of the argument, and the strength of the state's case, this argument was harmless. *Mosley v. State*, 983 S.W. 2d 259-260 (Tex. Crim. App. 1998).

5. The state's argument that appellant's co-defendant was on death row -- assuming it was not based on evidence in the record -- was cured by a prompt instruction to disregard, and therefore does not require reversal. *Guidry v. State*, 9 S.W. 3d 133, 154 (Tex. Crim. App. 1999).

6. Appellant forfeited his right to complain that the trial court erred in limiting his time for closing argument to 45 minutes. Counsel used only 38 minutes. "Counsel was not cut-off by the trial court, he did not request additional time, nor did he identify matters that he was unable to discuss with the jury. Therefore, appellant fails to establish why he required more than the time allotted." *Wyatt v. State*, 23 S.W. 3d 18, 29 (Tex. Crim. App. 2000).

7. An argument which used "colorful speech to convey the idea that the defendant would kill again and that the jury had responsibility to prevent that occurrence through its verdict" was not objectionable. *Rocha v. State,* 16 S.W. 2d 1, 21-22 (Tex. Crim. App. 2000).

8. Referring to the defense's arguments as "hogwash" is merely colorful language and does not merit reversal for attacking the morals and integrity of counsel. *Garcia v. State*, 126 S.W. 3d 921, 925 (Tex. Crim. App. 2004).

P. Competency to Stand Trial

1. Under article 46.02, § 1 of the code of criminal procedure, the trial court must empanel a separate jury to determine the defendant's competency if "there is some evidence, a quantity more than none or a scintilla, that rationally could lead to a determination of incompetency." The evidence must be sufficient to create a *bona fide* doubt in the mind of the judge that the defendant meets the legal test for incompetency. "On appeal the standard of review is whether the trial court abused its discretion by failing to empanel a jury for the purpose of conducting a competency hearing." *Moore v. State*, 999 S.W. 2d 385, 393-97 (Tex. Crim. App. 1999). In *Moore* the court of criminal appeals held that counsel's allegations of "unspecified difficulties in communicating with the defendant," "repeated outbursts in the courtroom," and, evidence of a tendency toward depression, mental impairment and a family history of mental impairment did not sufficiently raise the question of incompetency so as to require a hearing. Appellant's decision to represent himself twice during the trial do not bolster the notion that the trial court should have held a hearing. "[T]here is no easy test for determining when evidence meets the deceptively simple *bona fide* standard." *Id*.

Q. The Vienna Convention

1. Article 36 of the Vienna Convention provides as follows:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. *The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;*

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article Shall be exercised in conformity with the laws and regulations of the receiving State, subject to the provisio, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended. *Vienna Convention on Consular Relations*, Apr. 24, 1963, art. 36, 21 U.S.T. 77, 100-01; 596 U.N.T.S. 261, 292(emphasis supplied).

3. The United States ratified the Vienna Convention on November 24, 1969. *Vienna Convention on Consular Relations*, Nov. 24, 1969, 21 U.S.T. 77. Some assert that a federal treaty is the law of the land. U.S. Const. art. VI, cl.2. "Courts must protect the right of consular access because it is guaranteed by a multilateral treaty to which the United States is a party, the Vienna Convention on Consular Relations (Vienna Convention). The Vienna Convention is the major worldwide treaty on the topic of consular relations. Drafted at the United Nations, the Convention regulates all aspects of the relationship of consuls to a host government and sets the framework for a consul's activities." S.A. Shank & J. Quigley, *Foreigners on Texas' Death Row and the Right of Access to a Consul*, 26 St. Mary's L.J. 719, 727 (1995).

4. "The Vienna Convention on Consular Relations grants a foreign national who has been arrested, imprisoned or taken into custody a right to contact his consulate and requires the arresting government authorities to inform the individual of this

right "without delay." Article 38.23(a) provides that evidence obtained in violation of a federal or state law or constitutional provision shall not be admitted against the accused and mandates that the jury be instructed to disregard evidence obtained in violation of the law if the issue is raised by the evidence. Under the Supremacy Clause of the United States Constitution, states must adhere to United States treaties and give them the same force and effect as any other federal law. Thus, a violation of this treaty would arguably fall under the language in Article 38.23(a) if the issue is raised by the evidence." *Maldonado v. State*, 998 S.W. 2d 239, 246-47 (Tex. Crim. App. 1999)(citations omitted). No instruction was required in *Maldonado*, however, because there was no evidence that appellant was a Mexican citizen. *Id*. at 247.

5. In *Rocha v. State*, 16 S.W. 2d 1, 18 (Tex. Crim. App. 2000), it was undisputed that appellant was a Mexican citizen, and the court was forced to deal with the merits of a Vienna Convention claim. It rejected the claim, holding that a treaty is not a "law" as contemplated by article 38.23, and thus cannot lead to excludable evidence under the state exclusionary rule. The court did concede, however, that, if the United States Supreme Court should in the future hold that this treaty must be enforced through an exclusionary rule, "then this Court would be bound, under the Supremacy Clause, to give effect to that holding." *Id*. at 19.

6. In *Medellin v. Dretke*, 371 F.3d 270 (5th Cir. 2004), the Fifth Circuit denied petitioner's request for a certificate of appealability, holding that it was bound by its own precedent and precedent from the Supreme Court to disregard *LaGrand* and *Avena* – two cases from the International Court of Justice concerning the rights of foreign nationals under the Vienna Convention. The Supreme Court initially granted certiorari to determine two questions: (1) whether a federal court is bound by a ruling from the International Court of Justice that United States courts must reconsider petitioner's claim for relief under the Vienna Convention without regard to the doctrine of procedural default; and (2) whether a federal court should give effect to the International Court of Justice's judgment as a matter of judicial comity and uniform treaty interpretation. Subsequently, Medellin filed sought state habeas relief based on a memorandum from President Bush that said that the United States would discharge its international obligations under the *Avena* judgment by having state courts give effect to the International court's judgment regarding the 51 Mexican citizens addressed in that decision. The Supreme Court dismissed its writ of certiorari as improvidently granted. "In light of the possibility that the Texas courts will provide Medellin with the review he seeks pursuant to the *Avena* judgment and the President's memorandum, and the potential for review in this Court once the Texas courts have heard and decided Medellin's pending action, we think it would be unwise to reach and resolve the multiple hindrances to dispositive answers to the questions here presented." *Medellin v. Dretke*, 544 U.S. 660, 666-67 (2005).

7. After *Medellin* was dismissed in the Supreme Court, the court of criminal appeals agreed that applicant's subsequent application for writ of habeas corpus was "ripe for consideration" in that court. The court expressed concern, though, that state law might preclude consideration of the claim. "Therefore, as a threshold matter, we order applicant to brief the issue of whether he meets the requirements for consideration of a subsequent application for writ of habeas corpus under the provisions of Article 11.071, section 5, of the Texas Code of Criminal Procedure." *Ex parte Medellin*, 206 S.W. 3d 584, 586 (Tex. Crim. App. 2005). The court held that "*Avena* and the President's memorandum do not preempt section 5 and do not qualify as previously unavailable factual or legal bases." *Ex parte Medellin*, 223 S.W. 3d 315, 321 (Tex. Crim. App. 2006). The court also accused the President of violating separation of powers "by intruding into the domain of the judiciary. . . . " *Id*. at 335.

8. In *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), held that suppression is not a proper remedy for statements obtained in violation of the Vienna Convention. *Id*. at 2682. The Court also held that Vienna Convention claims may be procedurally defaulted if not properly objected to at trial. *Id*. at 2687. The Court found it unnecessary to decide whether the Vienna Convention granted individuals enforceable rights. *Id*. at 2677-78. The Court recognized, though, that a defendant could "raise an Article 36 claim as part of a broader challenge to the voluntariness of his statements to police." *Id*. at 2682. *Accord Sierra v. State*, 218 S.W. 3d 85, 88 (Tex. Crim. App. 2007)("suppression is not an appropriate remedy for violations of the Vienna Convention").

9. In *Sorto v. State*, 173 S.W. 3d 469, 481 (Tex. Crim. App. 2005), the court found it unnecessary to decide whether Article 36 confers personal rights which can be remedied by suppression of evidence under article 38.23, because, even assuming it does, "appellant has not shown: (1) that any of the rights he claims under the Vienna Convention were violated; or (2) that any purported treaty violation either caused him to do anything he would not otherwise have done or affected the fairness of his trial in any way."

R. The Murder Of A Child Under Six

1. Section 19.03(a)(8) of the Texas Penal Code makes it capital murder to "murder[ ] an individual under six years of age.

2. The child-capital murder statute does not violate equal protection because the demarcation of six year olds is arbitrary. *Henderson v. State,* 962 S.W.2d 544, 562-63 (Tex. Crim. App. 1997); *accord Ripkowksi v. State,* 61 S.W. 3d 378, 392 (Tex. Crim. App. 2001).

3. The child-capital murder statute does not violate state or federal equal protection because it does not require the state to allege or prove that the defendant knew the child was under six years of age. *Black v. State,* 26 S.W. 3d 895, 898-99 (Tex. Crim. App. 2000); *accord Ripkowksi v. State,* 61 S.W. 3d 378, 392 (Tex. Crim. App. 2001).

4. *Jurek* is not violated by the Texas statute that makes it a capital offense to "knowingly" murder a child under six. *Renteria v. State,* 206 S.W. 3d 689, 707 (Tex. Crim. App. 2006).

S. Videotaping Jury Deliberations

In *State of Texas ex rel. Rosenthal v. Poe*, 98 S.W. 3d 194 (Tex. Crim. App. 2003), the trial court signed an order allowing the videotaping and broadcast, at a later time, of all the proceedings — including jury deliberations — of the capital murder trial of Cedric Ryan Harrison, and the state sought mandamus relief. The court conditionally granted relief, holding that Texas law "clearly and indisputably prohibits the videotaping of jury deliberations." Interestingly, the court also noted that, while "the chief function of our judicial machinery is to ascertain the truth . . . [t]he use of television . . . cannot be said to contribute materially to this objective. Rather its use amounts to the injection of an irrelevant factor into court proceedings. In addition experience teaches that there are numerous situations in which it might cause actual unfairness--some so subtle as to defy detection by the accused or control by the judge." *Id*. at 201-202.

T. Venue

In *Murphy v. State*, 112 S.W. 3d 592 (Tex. Crim. App. 2003), appellant argued that, in a capital murder case, venue is proper only in the county in which the murder was committed. The court rejected this argument. "Venue will stand if it is sufficient under any one of the venue provisions the jury was instructed upon." Here, the jury was instructed on various venue theories, including that Dallas County was the county of his residence. The evidence was sufficient to prove this. *Id* at 605.

U. Double Jeopardy

1. "[T]he Double Jeopardy Clause of the Fifth Amendment was violated when the State charged appellant with three separate counts of capital murder under Section 19.03(a)(7)(A) because the charges rely on the same three murders for each charge." *Saenz v. State*, 166 S. W. 3d 270, 274 (Tex. Crim. App. 2005).

2. Count one of the indictment charged the capital murder of six persons during the same criminal transaction. Count two charged the capital murder of the same six persons during a robbery. Appellant was convicted and sentenced to death under both counts. "Both counts, however, arise from the same conduct on the same date involving the same victims. The same evidence that formed the basis for 'the same criminal transaction' element in Count One also formed the basis for the robbery element in Count Two. There is only one 'allowable unit of prosecution' under the statute in this circumstance." The court agreed that appellant was subjected to multiple punishments for the same offense in violation of the federal and state double jeopardy provisions. *Ramirez v. State,* 2007 WL 4322007 (Tex. Crim. App. 2007)(not designated for publication).

3. It does not violate double jeopardy to assess multiple punishments for a defendant convicted in a single trial of capital murder and capital murder as a member of a criminal street gang. *Garza v. State*, 213 S.W. 3d 338, 352 (Tex. Crim. App.2007).

V. Organized Criminal Activity

A person may be convicted of capital murder as a member of a criminal street gang, but the first degree felony, not the capital felony, punishment range applies. *Garza v. State*, 213 S.W. 3d 338, 351 (Tex. Crim. App. 2007).

XIV. THE PUNISHMENT PHASE OF A CAPITAL MURDER TRIAL: TEXAS'S RESPONSE TO FURMAN V. GEORGIA

A. Furman v. Georgia

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

B. Texas's Response To Furman

1. Immediately after *Furman*, many state legislatures amended their death penalty schemes in an effort to create a constitutional means by which to

execute persons. Texas's effort was article 1257 of the Texas Penal Code, which later became Tex. Penal Code Ann. § 19.03 and Tex. Code Crim. Proc. Ann. art. 37.071.

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

3. The Texas scheme has been held not *facially* unconstitutional. *Jurek v. Texas*, 428 U.S. 262, 276 (1976); *see also Pulley v. Harris*, 465 U.S. 37, 51 (1984); *Barefoot v. Estelle*, 463 U.S. 880, 906 (1983). Despite its arguable *facial* constitutionality, the peculiarity of our statute has several times caused the United States Supreme Court to render decisions which threatened to clear Texas death row of inmates. *See Penry v. Lynaugh*, 492 U.S. 302 (1989)*; Estelle v. Smith*, 451 U.S. 454 (1981); *Adams v. Texas*, 448 U.S. 38 (1980). In response to these not so subtle hints, the Texas legislature modified our statute to try and make it comply with the Constitution.

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

5. For offenses committed prior to September 1, 1991, article 37.0711 governs.

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

A. Jurek Through Eddings

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

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

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

B. Franklin v. Lynaugh Portends Constitutional Trouble

1. In *Franklin v. Lynaugh*, 487 U.S. 164 (1988). There, the defendant contended that the special issues deprived the jury of any procedure for considering and expressing the conclusion that the mitigating evidence called for a sentence less than death. A plurality of the Supreme Court rejected this claim, because it did not believe that the Texas special issue system "precluded jury consideration of any relevant mitigating circumstances *in this case*, or otherwise unconstitutionally limited the jury's discretion *here*." *Id*. at 183 (emphasis supplied). As the emphasized language indicates, the *Franklin* decision was expressly limited to its facts. Franklin presented two mitigating circumstances -- "residual doubt" about his guilt and his good behavior in prison. All nine justices rejected "residual doubt" as a constitutionally mandated mitigating circumstance. And, the majority found that since Franklin's prison record was fully considered by the jury when answering the second special issue, no further jury instruction was required. *Id*. at 176-77.

2. Three justices dissented in *Franklin*, believing that the Texas system did indeed prevent the jury from considering and giving mitigating effect to the defendant's good record in prison. *Id*. at 189 (Stevens, J., dissenting, joined by Brennan, J., and Marshall, J.).

3. Most significant about *Franklin* was the concurring opinion, authored by Justice O'Connor and joined by Justice Blackmun. The concurring justices expressed doubts that the Texas scheme could "constitutionally limit the ability of the sentencing authority to give effect to mitigating evidence relevant to a defendant's character or background or to the circumstances of the offense that mitigates against the death penalty." *Id*. at 183. Justices O'Connor and Blackmun concurred in the judgment *only* because the prison-record evidence relied on by Franklin related solely to one of the special issue questions. This critical distinction, however, was raised:

> If, however, petitioner had introduced mitigating evidence about his background or character or the circumstances

> of the crime that was not relevant to the special verdict questions, or that had relevance to the defendant's moral culpability beyond the scope of the special verdict questions, the jury instructions would have provided the jury with no vehicle for expressing its "reasoned moral response" to that evidence. If this were such a case, then we would have to decide whether the jury's inability to give effect to that evidence amounted to an Eighth Amendment violation.

Id. at 185.

C. Penry v. Lynaugh

1. One week after *Franklin* was decided, the Court granted certiorari in *Penry v. Lynaugh*, 832 F. 2d 915 (5th Cir. 1987), *cert. granted*, 487 U.S. 1233 (1988). It turned out to be just the sort of case Justices O'Connor and Blackmun seemed to yearn for in *Franklin*.

2. Penry was mildly to moderately mentally retarded and had himself been the victim of extensive child abuse. *Penry v. Lynaugh*, 492 U.S. 302, 307-308 (1989). At trial he objected to the punishment charge on several grounds. He complained because the first special issue failed to define "deliberately" and because the second special issue failed to define "probability," "criminal acts of violence," and "continuing threat to society." He also objected that the charge failed to "authorize a discretionary grant of mercy based upon the existence of mitigating circumstances;" because it "failed to require as a condition to the assessment of the death penalty that the State show beyond a reasonable doubt that any mitigating circumstances found to exist outweigh any mitigating circumstances;" and, because the charge failed to tell the jury that it could take into consideration all of the evidence, whether mitigating or aggravating, submitted in the full trial of the case. The objections to the charge were overruled, and, consistent with Texas law, the jury was instructed on the bare special issues, without elaboration. *Id*. at 310-11.

3. Two questions were presented to the Supreme Court in *Penry*. The second question--whether the Eighth Amendment categorically prohibits the execution of the mentally retarded--will be discussed below. The first question--and the one which had a profound effect on Texas capital jurisprudence --was whether Penry was "sentenced to death in violation of the Eighth Amendment because the jury was not adequately instructed to take into consideration all of his mitigating evidence and because the terms in the Texas special issues were not defined in such a way that the jury could consider and give effect to his mitigating evidence in answering them." *Id*. at 313.

4. Penry argued that the mitigating evidence of his mental retardation, and his childhood abuse had "relevance to his moral culpability beyond the scope of the special issues, and that the jury was unable to express its 'reasoned moral response' to that evidence in determining whether death was the appropriate punishment." The Court, in a 5-4 decision on this issue, agreed. *Id*. at 322. Unlike in *Franklin*, Penry's particular circumstances had mitigating relevance beyond the purview of the three special issues.

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

a. Although Penry's retardation was relevant to the deliberation inquiry posed by the first special issue, "it also 'had relevance to [his] moral culpability beyond the scope of the special verdict questio[n]. Personal culpability is not solely a function of a defendant's capacity to act 'deliberately.'" *Id*. at 322 (citations omitted). "In the absence of jury instructions defining 'deliberately' in a way that would clearly direct the jury to consider fully Penry's mitigating evidence as it bears on his personal culpability, we cannot be sure that the jury was able to give effect to the mitigating evidence of Penry's mental retardation and history of abuse in answering the first special issue. * * * Thus, we cannot be sure that the jury's answer to the first special issue reflected a 'reasoned moral response' to Penry's mitigating evidence." *Id*. at 323.

b. Evidence of Penry's retardation was relevant to the second special issue, but, since it rendered him unable to learn from his mistakes, "it is relevant only as an *aggravating* factor because it suggests a 'yes' answer to the question of future dangerousness. * * * Penry's mental retardation and history of abuse is thus a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future. * * * The second special issue, therefore, did not provide a vehicle for the jury to give mitigating effect to Penry's evidence of mental retardation and childhood abuse." *Id*. at 324. A perfect example of a venireperson who perceived the two-edged value of potentially mitigating evidence occurred in *Cuevas v. State*,

742 S.W. 2d 331 (Tex. Crim. App. 1987). The defense lawyer asked venireperson Dunn whether he would consider as mitigating the fact that the hypothetical defendant had a limited mental capacity and was under the control and domination of the triggerman. Mr. Dunn said these factors would not necessarily be mitigating because "if one person could easily fall under the control and domination of another person that would lead to them committing a violent crime, that perhaps the probability of that occurring again could be high." *Id*. at 345. In this pre-*Penry* case, the court held there was no error in overruling defendant's challenge for cause to Mr. Dunn. "The law only requires that the defendant be permitted to introduce relevant mitigating evidence. Contrary to appellant's contention, the law does not require the jurors to consider his two hypothetical factors as mitigating." *Id*. at 346. As Justice O'Connor pointed out in *Penry*, however, the problem with Texas law is that some factors, like retardation, though potentially mitigating, can only be seen as aggravating under the narrow Texas special issues. In this way, Texas law precludes consideration of mitigating factors, in violation of the Constitution. *See Madden v. State*, 799 S.W.2d 683, 694 n.17 (Tex. Crim. App. 1990)(court notes the double edged nature of defendant's substantial mitigating evidence).

c. Nor did the third special issue require the jury to consider Penry's particular mitigating evidence. "Even if a juror concluded that Penry's mental retardation and arrested emotional development rendered him less culpable for his crime than a normal adult, that would not necessarily diminish the 'unreasonableness' of his conduct in response to 'the provocation, if any, by the deceased.' Thus, a juror who believed Penry lacked the moral culpability to be sentenced to death could not express that view in answering the third special issue if she also concluded that Penry's action was not a reasonable response to provocation." *Id*. at 324-25.

6. The Court also rejected the state's contention that, the three special issues aside, Penry was free to introduce and argue the significance of his mitigating evidence to the jury. "In light of the prosecutor's argument, and in the absence of appropriate jury instructions, a reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence." *Id*. at 326.

7. The Court also disagreed that sustaining Penry's request to permit the jury to render a "discretionary grant of mercy," or to say "no" to the death penalty based on his mitigating circumstances would return to the sort of unbridled discretion condemned in *Furman v. Georgia*. "'In contrast to the carefully defined standards that must narrow a sentencer's discretion to *impose* the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence.'" *Id*. at 327. Full consideration of mitigating circumstances insures that the sentence constitutes the "reasoned moral response" required by the Constitution. *Id*.

8. Penry's conviction and sentence were reversed and remanded for a new trial. "In this case, in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision." *Id*. at 328.

9. "Special instructions are necessary when the jury could not otherwise give *meaningful effect* to a defendant's mitigating evidence." *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654, 1668 n.14 (2007). In that case, the Supreme Court held that the two special issues submitted prevented jurors from giving meaningful consideration to constitutionally relevant mitigating evidence – namely, to defendant's unhappy childhood, and to possible neurological damage. *Id*. at 1674.

10. The two special issues submitted failed to permit meaningful consideration of defendant's history of mental illness and drug abuse, even though this mitigating evidence was not as compelling as Penry's. "Nowhere in our *Penry* line of cases have we suggested that the question whether mitigating evidence could have been adequately considered by the jury is a matter purely of quantity, degree, or immutability. Rather, we have focused on whether such evidence has mitigating relevance to the special issues and the extent two which it may diminish a defendant's moral culpability for the crime." *Brewer v. Quarterman*, 127 S. Ct. 1706, 1712-13 (2007).

11. Evidence that applicant's parents were neglectful, that his father was abusive and beat him nightly, and that once his father killed his pet dog and horse and forced him to bury the dog, and that his father was violent and carried a gun was sufficient to raise the need for an instruction outside the narrow special issues.

Ex parte Hathorn, 2009 WL 929095 (Tex. Crim. App. 2009)(error not waived by failure to request instruction at trial); *See Ex parte Moreno*, 245 S.W.3d 419 (Tex. Crim. App. 2008)(troubled childhood).

D. Article 37.071

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

a. The defendant and his counsel are permitted to present "evidence of the defendant's background or character or the circumstances of the offense that mitigates against the imposition of the death penalty. TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(a).

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

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

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

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

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

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

XVI. THE FUTURE DANGEROUSNESS SPECIAL ISSUE

A. Article 37.071 § 2(b)(1)

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

B. Probability Beyond A Reasonable Doubt: Execrable And Absurd

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

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

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

4. Texas's requirement that there be a "probability" of future dangerousness is not constitutionally deficient.

The *Apprendi* and *Ring* cases do not mandate a finding of future dangerousness beyond a reasonable doubt. *Rayford v. State*, 125 S.W. 3d 521, 534 (Tex. Crim. App. 2003).

5. *Ring* and *Apprendi* do not require that the state allege in the indictment the aggravating factor of future dangerousness. *Renteria v. State*, 206 S.W. 3d 689, 709 (Tex. Crim. App. 2006).

C. Factors To Be Considered By The Jury

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

a. the circumstances of the offense, including the defendant's state of mind and whether he was acting alone or with other parties;
b. the calculated nature of the defendant's acts;
c. the forethought and deliberateness exhibited by the crime's execution;
d. the existence of a prior criminal record, and the severity of that record;
e. the defendant's age and personal circumstances at the time of the offense;
f. whether the defendant was acting under duress or the domination of another at the time of the commission of the offense;
g. psychiatric evidence;
h. character evidence.

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

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

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

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

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

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

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

Id. at 382-83.

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

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

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

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

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

12. "Although appellant's criminal history consisted only of numerous burglaries committed years earlier, a rational jury could have inferred from the apparent randomness and unpredictability of the instant crime that there was indeed a probability that appellant would commit future criminal acts of violence that would constitute a continuing threat to society." *Burton v. State*, No. 73,204 (Tex. Crim. App. May 19, 2004)(not designated for publication).

D. Sufficiency Of The Evidence

1. Formerly it was thought that sufficiency of the evidence to support the future dangerousness issue was a pure legal sufficiency analysis under *Jackson v. Virginia.* Thus, the question on appeal was whether any rational trier of fact could have found beyond a reasonable doubt that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. *Burns v. State*, 761 S.W. 2d 353, 355-56 (Tex. Crim. App. 1988). In *Burns*, the defendant's participation in a robbery/murder was "senseless," but not "so shocking or heinous as to evince a particularly 'dangerous aberration of character.'" *Id*. at 354. In addition to the circumstances of the offense, the state proved that he had participated as a party in another murder, had taken an active role in an aggravated assault and kidnapping, had a bad reputation for peaceableness, and had arguably shown a dispassionate, or even prideful, view of his part in the instant murder. *Id*. The sufficiency challenge in *Burns* was rejected, though "not without some trepidation."

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

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

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

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

Kunkle v. State, 771 S.W.2d 435, 449 (Tex. Crim. App. 1986); *accord Willingham v. State*, 897 S.W.2d 351, 356 (Tex. Crim. App. 1995)(that appellant burned home with three children inside and played music and laughed afterwards was sufficient alone to justify an affirmative answer to the second special issue); *cf. Hughes v. State*, 897 S.W. 2d 285, 291 (Tex. Crim. App. 1994)("subject offense did not involve facts which, alone, would justify an affirmative answer to the second issue"). The facts of the crime alone may be sufficient to sustain a death penalty, even under the new statute. *Sonnier v.State*, 913 S.W. 2d 511, 517 (Tex. Crim. App. 1995).

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

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

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

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

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

6. The Texas Court of Criminal Appeals has reversed for insufficient proof of future dangerousness, but it does "not do so lightly." *Berry v. State*, 233 S.W. 3d 847, 864(Tex. Crim. App. 2007). *See Berry v. State*, 233 S.W. 3d 847, 864 (Tex. Crim. App. 2007)*; Ellason v. State*, 815 S.W.2d 656, 663 (Tex. Crim. App. 1991). *Smith v. State*, 779 S.W.2d 417, 419-422 (Tex. Crim. App. 1989); *Huffman v. State*, 746 S.W.2d 212, 225 (Tex. Crim. App. 1988); *Beltran v. State*, 728 S.W. 2d 382, 390 (Tex. Crim. App. 1987); *Keeton v. State*, 724

S.W.2d 58, 64 (Tex. Crim. App. 1987); *Roney v. State*, 632 S.W.2d 598, 603 (Tex. Crim. App. 1982); *Garcia v. State*, 626 S.W.2d 46, 52 (Tex. Crim. App. 1981); *Wallace v. State*, 618 S.W.2d 67, 69 (Tex. Crim. App. 1981); *Brasfield v. State*, 600 S.W.2d 288, 294 (Tex. Crim. App. 1980); *Warren v. State*, 562 S.W.2d 474, 477 (Tex. Crim. App. 1978). Most of these cases have several things in common, including a defendant with no prior record for violent crimes, a lack of credible psychiatric testimony, and a lack of bad character evidence. Additionally, although any capital crime is senseless and brutal, these were not the sorts of crimes which, on their face, proved a probability of future dangerousness. *Cf. e.g.*, *Green v. State*, 682 S.W.2d 271, 289 (Tex. Crim. App. 1984), *cert. denied*, 470 U.S. 1034 (1985); *McMahon v. State*, 582 S.W.2d 786, 792 (Tex. Crim. App. 1978), *cert. denied sub nom. McCormick v. Texas*, 444 U.S. 919 (1979); *Duffy v. State*, 567 S.W.2d 197, 208 (Tex. Crim. App. 1978), *cert. denied*, 439 U.S. 991 (1978).

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

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

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

10. *Marras v. State*, 741 S.W.2d 395 (Tex. Crim. App. 1987), is exceptional. In that case substantial evidence of extraneous violent offenses was proven at the punishment phase. *Id*. at 400. However, the trial judge erroneously charged the jury that it could consider these offenses only to determine the defendant's intent regarding the offense charged in the indictment. *Id*. at 407. The appellate court presumed that the jury followed this erroneous instruction, and therefore, in assessing the sufficiency of the punishment evidence, the court excluded the extraneous offenses. Without these offenses, the remainder of the evidence was found to be insufficient. *Id*. at 408.

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

12. In *Hughes v. State*, 897 S.W. 2d 285 (Tex. Crim. App. 1994), appellant contended that the court should adopt a more rigorous standard -- against the overwhelming weight of the evidence -- when reviewing evidence of future dangerousness under the Texas Constitution. The court found it unnecessary to "decide today whether or not this Court should adopt a different standard of sufficiency review under the Texas Constitution because even under the type of factual suffi-

ciency review urged by appellant, the overwhelming weight of the evidence would *not* lead to the conclusion that the jury's affirmative finding on the second issue was not rational." *Id*. at 293.

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

14. A *factual* sufficiency review of the jury's determination of the probability of future dangerousness is not done in Texas. *McGinn v. State*, 961 S.W. 2d 161, 169 (Tex. Crim. App. 1998). *Accord Roberts v. State*, 220 S.W. 3d 521, 526 (Tex. Crim. App. 2007)*; Blue v. State*, 125 S.W. 3d 491, 496 (Tex. Crim. App. 2003)*; Manns v. State*, 122 S.W. 3d 171, 194 (Tex. Crim. App. 2003)*; Conner v. State*, 67 S.W. 3d 192, 199 (Tex. Crim. App. 2001); *Chamberlain v. State*, 998 S.W. 2d 230, 233 (Tex. Crim. App. 1999); *Brooks v. State*, 990 S.W. 2d 278, 285 (Tex. Crim. App. 1999)*; Whitaker v. State*, 977 S.W. 2d 595, 599 (Tex. Crim. App. 1998). In *McGinn*, Judge Baird wrote the following: "In light of the majority's resolution of these points of error, and our decision in *Martinez v. State*, 924 S.W.2d 693, 694-98 (Tex.Cr.App. 1996), this Court now provides no meaningful appellate review of the punishment issues of art. 37.071. The failure to do so violates the Eighth Amendment." *McGinn v. State*, 961 S.W. 2d at 173 (Baird, J., concurring and dissenting). Judge Womack believes that "[t]he Court should review the factual sufficiency of the evidence to support the jury's verdict on the probability that the appellant would commit criminal acts of violence that would constitute a continuing threat to society." *Chamberlain v. State*, 998 S.W. 2d 230, 238 (Tex. Crim. App. 1999)(Womack, J., concurring).

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

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

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

16. Appellant complained that there is no meaningful review of the first special issue because every capital murder has circumstances which can support an affirmative finding to this issue. The court rejected this claim, "[b]ecause there are situations in which the circumstances of the offense alone would not support a finding of future dangerousness. . . ." *Valle v. State*, 109 S.W. 3d 500, 503 (Tex. Crim. App. 2003).

17. Appellant testified that he would defend himself if incarcerated, and admitted that he would probably not last "even a month" before becoming violent again. On appeal, appellant conceded his future dangerousness, but argued that, since he was so obviously dangerous, he would be placed in lockdown to protect the guards and other inmates from him, and that someone so dangerous would never be paroled. "Appellant's argument appears to be that he is so dangerous that he is not dangerous. His contention is ingenious but unpersuasive. If accepted, it would stand the capital punishment scheme on its head, giving relief to the most dangerous offenders. We will not speculate, for legal sufficiency purposes, about the effectiveness of the prison and parole authorities' methods of protecting society from those who are intent on committing future criminal acts of violence." *Masterson v. State*, 155 S.W. 3d 167, 174 (Tex. Crim. App. 2005).

18. At appellant's first trial in 1992, Dr. Quijano testified for the state that appellant constituted a future danger. His sentence was reversed, and at his next trial in 2003, Dr. Quijano testified for the defense that, in light

of his subsequent 12 year prison record appellant would not constitute a future danger inside the prison system. He admitted on cross-examination that appellant would constitute a danger in free society. The court of criminal appeals held that the evidence was sufficient. *Broxton v. State*, No. 71,488 (Tex. Crim. App. June 29, 2005)(not designated for publication).

E. Definitions And Instructions

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

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

Cuevas v. State, 742 S.W.2d at 347(citations omitted). *Cf. Smith v. State*, 779 S.W.2d 417, 421 (Tex. Crim. App. 1989)("the second special issue calls for proof of more than a bare chance of future violence"). The *Cuevas* court was not asked to, and did not, say that a defendant is entitled to such a definition. In other cases, however, the court has held that "probability" need not be defined. *E.g., Renteria v. State*, 206 S.W. 3d 689, 706 (Tex. Crim. App. 2006)*; Goff v. State*, 931 S.W. 2d 537, 551 (Tex. Crim. App. 1996)*; Bigby v. State*, 892 S.W. 2d 864, 890 (Tex. Crim. App. 1994); *Wicker v. State*, 667 S.W. 2d 137, 143 (Tex. Crim. App. 1984); *Barefoot v. State*, 596 S.W. 2d 875, 887 (Tex. Crim. App. 1980); *King v. State*, 553 S.W. 2d 105, 107 (Tex. Crim. App. 1977).

2. "Deliberately," "probability" and "criminal acts of violence" need not be defined, even though it would be helpful to the jury. *Caldwell v. State*, 818 S.W.2d 790, 797 (Tex. Crim. App. 1991); *see also Druery v. State*, 225 S.W. 3d 491, 509 (Tex. Crim. App. 2007)*; Newbury v. State*, 135 S.W. 3d 22, 45 (Tex. Crim. App. 2004).*; Turner v. State*, 87 S.W. 3d 111, 118 (Tex. Crim. App. 2002); *Feldman v. State*, 71 S.W. 3d 738, 757 (Tex. Crim. App. 2002); *Ladd v. State*, 3 S.W. 3d 547, 572-73 (Tex. Crim. App. 1999)*; Chamberlain v. State*, 998 S.W. 2d 230, 238 (Tex. Crim. App. 1999)*; Brooks v. State*, 990 S.W. 2d 278, 287 (Tex. Crim. App. 1999); *Patrick v. State*, 906 S.W. 2d 481, 494 (Tex. Crim. App. 1995); *Chambers v. State*, 903 S.W. 2d 21, 35 (Tex. Crim. App. 1995); *Clark v. State*, 881 S.W. 2d 682, 698, 699 (Tex. Crim. App. 1994); *Earhart v. State*, 877 S.W. 2d 759, 768 (Tex. Crim. App. 1994); *Burks v. State*, 876 S.W. 2d 877, 910-911 (Tex. Crim. App. 1994); *Robertson v. State*, 871 S.W. 2d 701, 713 (Tex. Crim. App. 1993; *Coble v. State*, 871 S.W. 2d 192, 207 (Tex. Crim. App. 1993); *Camacho v. State*, 864 S.W. 2d 524, 536 (Tex. Crim. App. 1993); *Corwin v. State*, 870 S.W. 2d 23, 36 (Tex. Crim. App. 1993); *Zimmerman v. State*, 860 S.W. 2d 89, 101 (Tex. Crim. App. 1993), *vacated on other grounds*, 114 S.Ct. 374 (1993); *Rousseau v. State*, 855 S.W. 2d 666, 687 (Tex. Crim. App. 1993); *Goss v. State*, 826 S.W. 2d 162, 171 (Tex. Crim. App. 1992). Also, this claim is procedurally defaulted if not raised in the trial court. *Turner v. State*, 87 S.W. 3d 111, 118 (Tex. Crim. App. 2002).

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

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

is cured by an instruction to disregard. *Felder v. State*, 848 S.W. 2d 85, 97 (Tex. Crim. App. 1992). The trial court does not violate the Eighth or Fourteenth Amendments by refusing to define "society." *Resendiz v. State*, 112 S.W. 3d 541, 546 (Tex. Crim. App. 2003).

5. "A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion." *Stringer v. Black*, 503 U.S.. 222, 235 (1992). "In Texas, the aggravating factor is contained in the definition of the crime and in our requirement at punishment that the jury find the defendant to be a continuing threat to society." *McFarland v. State*, 928 S.W. 2d 482, 520 (Tex. Crim. App. 1996); *see also Hankins v. State*, 132 S.W. 3d 380, 385 (Tex. Crim. App. 2004)("The future-dangerousness issue asks the jury to consider all the evidence and determine whether there are certain aggravating factors beyond a reasonable doubt.").

6. In *Arave v. Creech*, 507 U.S. 463 (1993), the Court considered the constitutionality of an Idaho aggravator which asked whether the defendant "exhibited utter disregard for human life." The Court found that this phrase did pass constitutional muster because the Idaho courts had adopted a limiting construction, concluding that it was the action of a "cold-blooded, pitiless slayer." Cold-blooded and pitiless are not subjective, but instead describe a defendant's state of mind, ascertainable from the surrounding facts. The Court acknowledged that the question was close. *Id*. at 475. In Texas, of course, the court of criminal appeals has consistently refused to require any limiting construction at all for the words and phrases contained in the three special issues. *E.g., Cantu v. State*, 939 S.W. 2d 627, 643 (Tex. Crim. App. 1997).

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

8. The future dangerousness special issue is not unconstitutionally vague because "probability," "criminal acts of violence," and"continuing threat to society" are undefined. *Sells v. State*, 121 S.W. 3d 748, 767 (Tex. Crim. App. 2003). *See also Murphy v. State*, 112 S.W. 3d 592, 606 (Tex. Crim. App. 2003); *Rayford v. State*, 125 S.W. 3d 521, 532 (Tex. Crim. App. 2003).

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

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

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

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

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

14. The trial court does not err in refusing a limiting instruction that directs the jury to separately consider the evidence of each extraneous offense, or that each extraneous offense must be proven beyond a reasonable doubt, or that appellant is presumed innocent of each extraneous offense until the state proves the same. The jury was told that the state had the burden of proving

future dangerousness beyond a reasonable doubt, and "beyond a reasonable doubt" was defined. "Given this, it was not error for the trial judge to refuse to give any of the requested instructions." *Skinner v. State*, 956 S.W. 2d 532, 545-46 (Tex. Crim. App. 1997).

15. "[A]ppellant was not entitled to an instruction limiting the consideration of extraneous offenses to the future dangerousness issue, because those offenses were also relevant to the mitigation special issue." *Jackson v. State*, 992 S.W. 2d 469, 478 (Tex. Crim. App. 1999); *accord Murphy v. State*, 112 S.W. 3d 592, 606 (Tex. Crim. App. 2003); *see Prystash v. State*, 3 S.W. 3d 522, 533 (Tex. Crim. App. 1999).

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

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

F. Constitutional Questions

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

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

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

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

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

6. Appellant argued that the future dangerousness special issue was unconstitutional because, in a capital punishment context, the jurors will tolerate virtually no risk in assessing future danger. The court disagreed, because the jury was properly instructed on the burden of proof beyond a reasonable doubt, and appellant presented no evidence to rebut the presumption that the jury followed the trial court's instruction. *Resendiz v. State*, 112 S.W. 3d 541, 546 (Tex. Crim. App. 2003); *accord Masterson v. State*, 155 S.W. 3d 167, 175 (Tex. Crim. App. 2005).

G. Expert Testimony

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

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

3. The trial court did not abuse its discretion when it found that "testimony that inmate violence can occur under current prison conditions had some relevance to, and would have aided the jury in determining, appellant's future dangerousness, such as considering whether a life-sentenced appellant, with his history of assaultive behavior, would have opportunities to commit violent acts in prison." *Lucero v. State*, 2008 WL 375416 *8 (Tex. Crim. App. 2008).

4. The state's expert was allowed to give his opinion that the appellant would probably be dangerous in the future even though he did not know what his error rate was. The majority affirmed, holding that the fact that the expert did not know his error rate was not dispositive. Judge Womack, joined by Judge Johnson, dissented. "The fact that there seems to be no evidence at all, anywhere, of the reliability of these predictions of future dangerousness should be dispositive." The dissent quoted a law review article that questioned whether future dangerousness testimony could "withstand Daubert . . . ." The dissenters then said:

> It wouldn't be very hard to research how many persons convicted of capital murder committed acts of violence after being sentenced. It must always be remembered that the capital murderer who is not sentenced to death will be sentenced to prison for life without parole. So the relevant question is whether they will commit violent acts in prison.
>
> Our laws permit people with communicable diseases to be quarantined. The laws are based on scientific research that has shown that, without quarantining, the diseases will be spread. Before we accept an opinion that a capital murderer will be dangerous even in prison, there should be some research to show that this behavior can be predicted. *Espada v. State*, 2008 WL 4809235 (Tex. Crim. App. 2008)(Womack, J., dissenting)(not designated for publication)

5. The trial court did not err in excluding testimony from the defense's expert, Dr. John Sorenson, who would have testified that appellant presented only an average chance of committing a serious violent act if given a life sentence:

> In reaching his conclusion that appellant, who had been convicted of capital murder, would present only a 23.8 percent chance of committing violent acts in the future, Sorenson relied on a study that only marginally included capital murderers against whom the State had sought the death penalty. Sorenson also restricted his definition of serious crime, relying only on what the Texas Department of Criminal Justice classifies as a Level I violation, which excludes many offenses that constitute acts of violence. When specifically evaluating appellant, Sorenson did not take into consideration appellant's actions of assaulting another inmate or creating weapons while housed in the county jail. Further, Sorenson's methodology has not been critically evaluated in any published material. We cannot disagree with the trial court's determination that the evidence appellant sought to introduce through Sorenson's testimony was not sufficiently reliable to assist the jury in its decision of whether appellant posed a continuing threat to society. The trial court did not abuse its discretion in excluding Sorenson's proposed testimony. *Mendoza v. State*, 2008 WL 4803471 *22 (Tex. Crim. App. 2008)(not designated for publication).

H. Lay Testimony

1. The state conceded that the trial court erred in excluding nine lay witnesses from giving their opinion that appellant would not pose a danger in the future. The only question was harm. This was a life-or-death question. The state was allowed to present an expert who gave an opinion based on a hypothetical question. "The opinions of nine lay witnesses who actually knew the appellant were erroneously withheld, while the contrary opinion of an expert as to a hypothetical person was admitted. This shows a degree of harm that is intolerable in a death-penalty case." *Davis v. State*, 2007 WL 1704071 *9 (Tex. Crim. App. 2007)(not designated for publication).

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

3. The majority in *Holiday v. State*, 2006 WL (Tex. Crim. App. 2006)(not designated for publication), held that the trial court properly permitted Dr. Gripon to give his expert opinion that appellant would probably commit acts of criminal violence that constitute a danger in the future. Judge Womack dissented. It cannot be shown that predictions of dangerous have validity. "If it cannot be validated, it's not science. Not even soft science. It

may be soft, as many things are, but it's not science." Judge Womack would not exclude opinions on medical or psychiatric issues that have been validated. "But predicting dangerousness is not medicine or psychiatry." The requirements for admission of expert testimony have been raised since earlier cases admitting opinions about future dangerousness. "I do not believe that those "experts" would pass muster today, and I do not agree that Dr. Gripon should. When he said that his predictions were immune from being proved right or wrong, he should have been shown to a seat next to the others whose "expert" opinions have been admitted in the past, but should be excluded today." *Holiday v. State*, at *1 (Womack, J., dissenting).

4. "Why doesn't somebody ask an expert witness, has he (or any other "expert") bothered to look at the records? If he has, how did the predictions turn out? If no one has looked, why not? Isn't science the careful and systematic study of observations, and tests of the conclusions that are based on the observations?" *Allen v. State*, 2006 WL 1751227 *8 (Tex. Crim. App. 2006)(not designated for publication)(Womack, J., concurring).

XVII. THE ANTI-PARTIES SPECIAL ISSUE

A. Article 37.071 § 2(b)(2)

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

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

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

B. Case Law

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

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

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

4. In *Lawton v. State*, 913 S.W. 2d 542 (Tex. Crim. App. 1995), appellant complained that article 37.071 § 2(b)(2) violated the principles set forth in *Tison v. Arizona* and *Enmund v. Florida* because it permits a death penalty upon the mere finding that appellant anticipated that a human life would be taken. The court disagreed, noting that appellant could not even have been convicted of capital murder unless the jury had already found that he harbored the specific intent to promote or assist the commission of intentional murder. "In short, that the jury may have found that appellant only anticipated that death would result under Article 37.071 is inconsequential to *Enmund* and *Tison* concerns; the jury had already found that appellant intended to at least promote or assist in the commission of *an intentional murder*." *Id*. at 555 (emphasis in original); *accord Cantu v. State*, 939 S.W. 2d 627, 644-45 (Tex. Crim. App. 1997)*; see Ladd v. State*, 3 S.W. 3d 547, 573 (Tex. Crim. App. 1999).

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

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

7. In *Valle v. State*, 109 S.W. 3d 500, 503-504 (Tex. Crim. App. 2003), the court acknowledged that, in some cases, a finding of guilt is the functional equivalent of affirmative answer to the anti-parties issue, this is not always the case. "A defendant may be convicted of capital murder under §7.02(b) without having the intent or actual anticipation that a human life would be taken that is required for an affirmative answer to the anti-parties issue. The fact that the anti-parties issue is redundant in this case does not mean it cannot be afforded meaningful appellate review, as it is amenable to both factual and legal sufficiency review and does provide assessment of deathworthiness." *Id*. at slip op. 3-4.

8. Rejecting appellant's argument that the anti-parties special issue violated the requirements of *Ring* because it authorized the death penalty merely upon a finding that appellant "anticipated that a human life would be taken." *Ring* and *Apprendi* have no application to article 37.071. *Sorto v. State*, 173 S.W. 3d 469, 489-90 (Tex. Crim. App. 2005).

9. The court of criminal appeals can conduct factual and legal sufficiency reviews of the anti-parties special issue. *Young v. State*, 2005 WL 2374669 *5 (Tex. Crim. App. 2005)(not designated for publication)(evidence found to be legally and factually sufficient).

10. The evidence was legally and factually sufficient where appellant participated in the planning of a robbery, prepared the weapons, programmed police frequencies into his scanner, knew that his colleagues were armed, was uneasy about the large number of employees at the store and the likelihood of a quick response by the police, alerted his colleagues about the presence of police and provided their precise location, and believed he was to "initiate a firefight" if pursued by the police. *Murphy v. State*, 2006 WL 1096924 *6 (Tex. Crim. App. 2006)(not designated for publication).

XVIII. THE MITIGATION SPECIAL ISSUE

A. Mitigating Circumstances

1. Article 37.071 § 2(e)(1)

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

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

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

2. Article 37.071 § 2(f)(4)

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

3. Burden of proof: Mitigating circumstances

a. A frequent challenge leveled at the statute is that it is unconstitutional because it does not assign a burden of proof regarding mitigating evidence. The court has rejected this challenge. *E.g*., *Druery v. State*, 225 S.W. 3d 491, 508 (Tex. Crim. App. 2007)*; Renteria v. State*, 206 S.W. 3d 689, 707 (Tex. Crim. App. 2006)*; Valle v. State*, 109 S.W. 3d 500, 504 (Tex. Crim. App. 2003); *Ladd v. State*, 3 S.W. 3d 547, 573-74 (Tex. Crim. App. 1999); *Medina v. State*, 7 S.W. 3d 633, 644 (Tex. Crim. App. 1999); *Jackson v. State*, 992 S.W. 2d 480-81 (Tex. Crim. App. 1999); *Brooks v. State*, 990 S.W. 2d 278, 288 (Tex. Crim. App. 1999); *Raby v. State*, 970 S.W. 2d 1, 8-9 (Tex. Crim. App. 1998); *Cantu v. State*, 939 S.W. 2d 627, 641 (Tex. Crim. App. 1997); *Shannon v. State*, 942 S.W. 2d 591, 600 (Tex. Crim. App. 1996); *Matchett v. State*, 941 S.W. 2d 922, 936 (Tex. Crim. App. 1996); *Morris v. State*, 940 S.W. 2d 610, 614 (Tex. Crim. App. 1996); *Anderson v. State*, 932 S.W. 2d 502, 508 (Tex. Crim. App. 1996) *McFarland v. State*, 928 S.W. 2d 482, 497 (Tex. Crim. App. 1996); *Eldridge v. State*, 940 S.W. 2d 646, 654 (Tex. Crim. App. 1996).

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

1995). *See also Sells v. State*, 121 S.W. 3d 748, 767 (Tex. Crim. App. 2003).

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

d. "Nothing in the statute requires the defendant to prove mitigation." *Woodard v. State*, No. 74,080 (Tex. Crim. App. October 20, 2004)(not designated for publication)("the appellant does not have the burden of proof with respect to mitigation").

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

f. In *Prystash v. State*, 3 S.W. 3d 522, 535 (Tex. Crim. App. 1999), appellant argued "that the mitigation special issue permits the introduction of nonstatutory aggravating evidence in addition to mitigating evidence, and this nonstatutory aggravating evidence is not subject to a burden of proof in violation of *Walton v. Arizona*, 497 U.S. 639 (1990). The court of criminal appeals disagreed.

g. The mitigation special issue does not violate the Eighth Amendment because it omits a burden of proof, or because meaningful appellate review of the jury's determination is impossible. Nor is this error under *Apprendi v. New Jersey*. *Apprendi* does not require the state to prove beyond a reasonable doubt that the mitigation issue should be answered in the negative. *Resendiz v. State*, 112 S.W. 3d 541, 549-50 (Tex. Crim. App. 2003); *see Russeau v. State*, 171 S.W. 3d 871, 886 (Tex. Crim. App. 2005); *Hankins v. State*, 132 S.W. 3d 380, 386 (Tex. Crim. App. 2004)*; Rayford v. State*, 125 S.W. 3d 521, 533 (Tex. Crim. App. 2003)*; Blue v. State*, 125 S.W. 3d 491, 501 (Tex. Crim. App. 2003)*; Jones v. State*, 119 S.W. 3d 766, 791 (Tex. Crim. App. 2003); *see also Paredes v. State*, 129 S.W. 3d 530, 541 (Tex. Crim. App. 2004)(did not violate appellant's Sixth Amendment right to a jury trial). *Apprendi* does not mandate that the mitigation special issue require the state to prove beyond a reasonable doubt the absence of sufficient mitigating circumstances. *Newbury v. State*, 135 S.W. 3d 22, 45 (Tex. Crim. App. 2004). *See also Crutsinger v. State*, 206 S.W. 3d 607, 613 (Tex. Crim. App. 2006).

h. In *Perry v. State*, 158 S.W. 3d 438 (Tex. Crim. App. 2004), appellant argued that *Blakely v. Washington*, 124 U.S. 2531 (2004), called into question prior decisions from the court of criminal appeals that declined to apply *Apprendi* and *Ring* to the mitigation special issue. The court disagreed, holding that its prior decisions that the trial court need not instruct the jury that the state is required to prove beyond a reasonable doubt that the jury should answer "no" to the mitigation special issue "are consistent with *Apprendi*, *Ring*, and *Blakely*." *Id*. at 448. *See also Woods v. State*, 152 S.W. 3d 105, 121 (Tex. Crim. App. 2004). *Ring* and *Apprendi* do not require that the state assume the burden of proving beyond a reasonable doubt that the mitigation issue should be answered in the negative. *Francois v. State*, 2006 WL 2615306 *1(Tex. Crim. App. 2006)(not designated for publication).

i. The statute is not unconstitutional because it shifts the burden of proof to the accused to prove the existence of a mitigating circumstance. *Threadgill v. State*, 146 S.W. 3d 654, 671 (Tex. Crim. App. 2004).

j. "The mitigation special issue does not send 'mixed signals' because it permits a capital sentencing jury to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant." *Perry v. State*, 158 S.W. 3d 438, 448 (Tex. Crim. App. 2004).

k. Appellant's proposed mitigation instructions were similar to those required in federal cases, but are not based on Texas law and "would not be a permissible manner in which to address the mitigation issue in Texas." *Bigby v. State*, 2008 WL 4531979 (Tex. Crim. App. 2008)(not designated for publication).

4. Burden of proof: Aggravating circumstances

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

b. In *Williams v. State*, 937 S.W. 2d 479 (Tex. Crim. App. 1996), the court rejected appellant's argument that the mitigation special issue is unconstitutional because it fails to place on the state the burden of proving aggravating circumstances. "Because Texas law imposes the burden of proof upon the State to prove certain prescribed aggravating elements, a burden of proof need not be prescribed for aggravating circumstances that might be considered in conjunction with Texas' open-ended mitigation issue." *Id*. at 491. *Accord Moore v. State*, 999 S.W. 2d 385, 408 (Tex. Crim. App. 1999).

5. What is mitigating evidence?

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

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

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

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

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

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

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

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

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

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

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

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

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

xiii. An IQ of 79. *Smith v. Texas*, 125 S. Ct. 400, 405 (2004).

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

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

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

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

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

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

iv. Evidence of a co-defendant's conviction and sentence cannot mitigate defendant's culpability for the crime. *Evans v. State*, 656 S.W. 2d 65, 67 (Tex. Crim. App. 1983). Evidence that the state chose not to seek the death penalty against appellant's two co-defendants is not constitutionally relevant mitigating evidence. *Morris v. State*, 940 S.W. 2d 610, 613 (Tex. Crim. App. 1996); *accord Joubert v. State*, 235 S.W. 3d 729, 734 (Tex. Crim. App. 2007)(evidence that co-defendant received a 30 year, plea-bargained sentence is not mitigating).

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

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

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

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

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

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

xi. The trial court does not err in excluding "execution-impact" evidence – that is, evidence that appellant's execution would adversely effect one of his loved ones. *Roberts v. State*, 220 S.W. 3d 521, 532 (Tex. Crim. App. 2007).

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

f. An instruction on voluntary intoxication pursuant to § 8.04 of the Texas Penal Code may impermissibly limit consideration of mitigating circumstances, but a defendant who requests such instruction is precluded from complaining on appeal if his request is granted. *See Tucker v. State*, 771 S.W. 2d 523, 534 (Tex. Crim. App. 1988); *accord Matchett v. State*, 941 S.W. 2d 922, 938 (Tex. Crim. App. 1996). *Cf. Cantu v. State*, 939 S.W. 2d 627, 647-48 (Tex. Crim. App. 1997)(instruction is not egregiously harmful under *Almanza* where appellant's jury is also instructed on mitigating evidence under article 37.071, § 2(e)). In *Williams v. State*, 937 S.W. 2d 479, 489-90 (Tex. Crim. App. 1996), the trial court instructed the jury, at the guilt-innocence phase of the trial, that voluntary intoxication was not a defense. Appellant complained that he was entitled to an instruction at punishment that voluntary intoxication was mitigating, so that the jury would not be confused. "We have previously held that the federal constitution does

not require an instruction concerning voluntary intoxication as it might relate to mitigation of punishment." Appellant was not entitled to argue to the jury, nor was he entitled to have the jury instructed, that the jury was required to consider voluntary intoxication in mitigation of punishment. *Raby v. State*, 970 S.W. 2d 1, 6 (Tex. Crim. App. 1998)(trial court does not err in refusing to instruct the jury that voluntary intoxication may negate the specific intent necessary to support a conviction for capital murder). Absent evidence that the appellant used drugs at or before the offense, or that he was intoxicated at the time of the offense, he is not entitled to an instruction on the mitigating effect of voluntary intoxication. *Martinez v. State*, 17 S.W. 3d 677, 691 (Tex. Crim. App. 2000).

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

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

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

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

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

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

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

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

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

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

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

r. The trial court did not err in refusing to instruct the jury that evidence of youth and mental health history could not be considered as aggravating evidence. *Raby v. State*, 970 S.W. 2d 1, 7-8 (Tex. Crim. App. 1998).

s. The evidence must concern characteristics peculiar to appellant. *Mosley v. State*, 983 S.W. 2d 249, 266 (Tex. Crim. App. 1998). Evidence which does not relate to appellant's characteristics and background is not admissible. *Id*.

t. "Evidence that the appellant himself was sexually abused is relevant and probative when a jury is considering evidence in mitigation of the death penalty." Evidence that others in appellant's family were abused, however, is not relevant. *Shuffield v. State*, 189 S.W. 3d 782, 793 (Tex. Crim. App. 2006).

u. The trial court properly disallowed appellant's medical doctor from testifying that his use of cocaine and alcohol caused him to commit the capital murder he had been convicted of, where appellant failed to show that the doctor's opinion was reliable under Rule 702. *Roberts v. State*, 220 S.W. 3d 521, 528-531 (Tex. Crim. App. 2007).

6. Sufficiency Review

a. "Because the weighing of 'mitigating evidence' is a subjective determination undertaken by each individual juror, we decline to review that evidence for 'sufficiency.'" *McFarland v. State*, 928 S.W. 2d 482, 498 (Tex. Crim. App. 1996); *accord Russeau v. State*, 171 S.W. 3d 871, 886 (Tex. Crim. App. 2005); *Rojas v. State*, 986 S.W. 2d 241, 247 (Tex. Crim. App. 1998); *Fuentes v. State*, 991 S.W. 2d 267, 280 (Tex. Crim. App. 1999); *Brooks v. State*, 990 S.W. 2d 278, 285 (Tex. Crim. App. 1999); *Griffith v. State*, 983 S.W. 2d 282, 289 (Tex. Crim. App. 1998); *Nenno v. State*, 970 S.W. 2d 549, 552 (Tex. Crim. App. 1998); *McGinn v. State*, 961 S.W. 2d 161, 166 (Tex. Crim. App. 1998); *Morris v. State*, 940 S.W. 2d 610, 614 (Tex. Crim. App. 1996); *Moore v. State*, 935 S.W. 2d 124, 128 (Tex. Crim. App. 1996); *Green v. State*, 934 S.W. 2d 92, 106 (Tex. Crim. App. 1996); *Colella v. State*, 915 S.W. 2d 834, 845 (Tex. Crim. App. 1995). "The determination as to whether mitigating evidence calls for a life sentence is a value judgment left to the discretion of the factfinder." *Dewberry v. State*, 4 S.W. 3d 735, 740 (Tex. Crim. App. 1999). Because appellant is the beneficiary of mitigating evidence, he bears the burden of production. If the jury verdict is against him, he "can only argue that the verdict was against the great weight and preponderance of the evidence." *McFarland v. State*, 928 S.W. 2d at 497 n. 9. Appellant did not make this argument in this case. *Accord Eldridge v. State*, 940 S.W. 2d 646, 652 n. 9 (Tex. Crim. App. 1996). In *Bell v. State*, 938 S.W. 2d 35, 43-44 (Tex. Crim. App. 1996), though, the court held that it could not review mitigation evidence either *de novo or for factual sufficiency* "because it is a subjective determination left exclusively to the jury." (emphasis supplied).

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

c. Although it is impossible to conduct a meaningful appellate review of the mitigation special issue, this does not render our capital punishment scheme unconstitutional. *Lawton v. State*, 913 S.W. 2d 542, 557 (Tex. Crim. App. 1995). *Accord Valle v. State*, 109

S.W. 3d 500, 503 (Tex. Crim. App. 2003); *Sells v. State*, 121 S.W. 3d 748, 767 (Tex. Crim. App. 2003); *Tong v. State*, 25 S.W. 3d 707, 715 (Tex. Crim. App. 2000); *Wood v. State*, 18 S.W. 3d 642, 649 (Tex. Crim. App. 2000); *Prystash v. State*, 3 S.W. 3d 522, 536 (Tex. Crim. App. 1999); *Ladd v. State*, 3 S.W. 3d 547, 573 (Tex. Crim. App. 1999); *Jackson v. State*, 992 S.W. 2d 469, 481 (Tex. Crim. App. 1999); *Moore v. State*, 999 S.W. 2d 385, 407-408 (Tex. Crim. App. 1999); *Baker v. State*, 956 S.W. 2d 19, 21 (Tex. Crim. App. 1997); *Jones v. State*, 944 S.W. 2d 642, 649 (Tex. Crim. App. 1996); *Shannon v. State*, 942 S.W. 2d 591, 599 (Tex. Crim. App. 1996); *Pondexter v. State*, 942 S.W. 2d 577, 588 (Tex. Crim. App. 1996); *Eldridge v. State*, 940 S.W. 2d 646, 652 (Tex. Crim. App. 1996); *Bell v. State*, 938 S.W. 2d 35, 44 (Tex. Crim. App. 1996); *Williams v. State*, 937 S.W. 2d 479, 492 (Tex. Crim. App. 1996); *Janecka v. State*, 937 S.W. 2d 456, 474 (Tex. Crim. App. 1996); *Green v. State*, 934 S.W. 2d 92, 107 (Tex. Crim. App. 1996); *Lane v. State*, 933 S.W. 2d 504, 508 (Tex. Crim. App. 1996); *Cockrell v. State*, 933 S.W. 2d 73, 92 (Tex. Crim. App. 1996).

d. Article 44.251(a) of the code of criminal procedure provides that the court of criminal appeals shall reform a death sentence if there is insufficient evidence to support a negative answer to the mitigation special issue. The court of criminal appeals agrees that article 44.251(a) is "problematic," because it implies, on its face "that what we have held to be unnecessary if not impossible is possible." *Lawton v. State*, 913 S.W. 2d 542, 557 n.13 (Tex. Crim. App. 1995). Problematic, maybe, but not unconstitutional. "[W]e are convinced that the flaw in Article 44.251(a) is unimportant to the constitutionality of our capital punishment scheme in general and to the constitutionality of Article 37.071 in particular. So long as the jury is not precluded from hearing and effectuating mitigating evidence, our capital punishment scheme is constitutional regardless of whether appellate review of the jury's mitigation verdict is possible." *Id*. at 557; *see Prystash v. State*, 3 S.W. 3d 522, 536 (Tex. Crim. App. 1999); *Eldridge v. State*, 940 S.W. 2d 646, 652 (Tex. Crim. App. 1996); *Cantu v. State*, 939 S.W. 2d 627, 648 (Tex. Crim. App. 1997); *Bell v. State*, 938 S.W. 2d 35, 44 (Tex. Crim. App. 1996); *Janecka v. State*, 937 S.W. 2d 456, 474 (Tex. Crim. App. 1996).

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

f. The court rejected appellant's constitutional challenge in *Allen v. State*, 108 S.W. 3d 281 (Tex. Crim. App. 2003). "We do not review the sufficiency of the evidence to support a jury's negative answer to the mitigating evidence special issue, and we have repeatedly declined to conduct a factual sufficiency review of the future dangerousness special issue." *Id*. at 285. Judge Womack concurred, noting that, in his view, the court should review the evidence of future dangerousness for factual sufficiency. *Id*. at 287. Judge Meyers concurred, because, in his opinion, considering *Atkins v. Virginia*, 536 U.S. 304 (2002), "the Court will be forced to conduct both legal and factual sufficiency reviews for the mitigation special issue." *Id*. at 287.

7. Proportionality review

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

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

> The federal Constitution requires more than the minimal safeguard of a comparative proportionality review to ensure the fair imposition of the death penalty. Because death is qualitatively different from any other punishment, the federal Constitution requires the highest degree of reliability in the determination that it is the appropriate punishment. To ensure this reliability, the United States Constitution imposes requirements of

> proportionality of offense to punishment, of a narrowly defined class of death eligible defendants, and of an opportunity for each juror to consider and give effect to circumstances mitigating against the imposition of the death sentence. In short, the due process principles governing the imposition of a sentence of death are distinct and more onerous than those governing the imposition of a civil judgment.
>
> It is for good reason, therefore, that the United States Supreme Court has not held that due process requires a comparative proportionality review of the sentence of death, but instead has held that such a review would be "constitutionally superfluous."

Id. at 509-09.

8. Constitutionality, in general

a. The mitigation issue is not unconstitutional because it permits open-ended discretion condemned in *Furman*. *E.g., Sells v. State*, 121 S.W. 3d 748, 767-68 (Tex. Crim. App. 2003); *Hall v. State*, 67 S.W. 3d 860, 877 (Tex. Crim. App. 2002); *Moore v. State*, 999 S.W. 2d 385, 408 (Tex. Crim. App. 1999)*; Brooks v. State*, 990 S.W. 2d 278, 288 (Tex. Crim. App. 1999)*;King v. State*, 953 S.W. 2d 266, 274 (Tex. Crim. App. 1997); *Jones v. State*, 944 S.W. 2d 642, 656 (Tex. Crim. App. 1996); *Shannon v. State*, 942 S.W. 2d 591, 598 (Tex. Crim. App. 1996); *Pondexter v. State*, 942 S.W. 2d 577, 587 (Tex. Crim. App. 1996); *Morris v. State*, 940 S.W. 2d 610, 614 (Tex. Crim. App. 1996); *Williams v. State*, 937 S.W. 2d 479, 491 (Tex. Crim. App. 1996).

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

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

d. The statutory definition of "mitigating evidence" is not facially unconstitutional because it limits the Eighth Amendment concept of "mitigation" to factors that render a capital defendant less morally "blameworthy" for commission of the capital murder. *King v. State*, 953 S.W. 2d 266, 274 (Tex. Crim. App. 1997)("moreover, appellant fails to specify what if any evidence he presented which was mitigating but the jury was unable to consider"); *accord Renteria v. State*, 206 S.W. 3d 689, 707 (Tex. Crim. App. 2006)*; Ladd v. State*, 3 S.W. 3d 547, 574 (Tex. Crim. App. 1999); *See Moore v. State*, 999 S.W. 2d 385, 408 (Tex. Crim. App. 1999)*; Raby v. State*, 970 S.W. 2d 1, 8 (Tex. Crim. App. 1998); *see also Prystash v. State*, 3 S.W. 3d 522, 535 (Tex. Crim. App. 1999)(statutory requirement that jury consider all the evidence provides the jury with a vehicle to respond to a broader range of mitigating circumstances than those which merely reduce moral blameworthiness).

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

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

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

h. In *Allen v. State*, 108 S.W. 3d 281, (Tex. Crim. App. 2003), appellant claimed that the mitigation special issue was unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466 (2001), because it fails to place on the state the burden of proving aggravating circumstances beyond a reasonable doubt. The court disagreed. "*Apprendi* applies to facts that increase the penalty beyond the 'prescribed statutory maximum. Under Texas Penal Code sections 12.31 and 19.03, the 'prescribed statutory maximum' for capital murder is fixed at death. Nothing the jury or judge decided during the punishment phase could have enhanced appellant's sentence beyond the

prescribed range. Further, *Apprendi* did not address who bears the burden of proof but focused on who should be the fact-finder for sentence enhancement." *Id*. at 286. *see*

i. The statute is not unconstitutional "because it allows the jury too much discretion and lacks the minimal standards and guidelines necessary to avoid an arbitrary and capricious imposition of the death penalty." *Jones v. State*, 119 S.W. 3d 766, 790 (Tex. Crim. App. 2003).

j. The statute is not unconstitutional because it gives the state unfettered discretion in deciding to seek the death penalty. *Rayford v. State*, 125 S.W. 3d 521, 534 (Tex. Crim. App. 2003). *See also Woods v. State*, 152 S.W. 3d 105, 121(Tex. Crim. App. 2004).

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

> In point of error one, appellant provides a laundry list of contentions on why the current death penalty scheme is unconstitutional. All of these contentions have been decided adversely to his position. He complains that the term "probability" in the future dangerousness special issue is not defined. We rejected that claim in *Camacho v. State*, 864 S.W.2d 524, 536 (Tex. Crim. App. 1993), *cert. denied*, 510 U.S. 1215 (1994). He claims that the mitigation special issue impermissibly shifts the burden of proof on mitigating circumstances. We rejected that claim in *Matchett v. State*, 941 S.W.2d 922, 935 (Tex. Crim. App. 1996), *cert. denied*, _ U.S. _117 S. Ct. 2487 (1997). He argues, relying upon *Walton v. Arizona*, 497 U.S. 639 (1990), that the mitigation special issue impermissibly shifts the burden of proof on aggravating circumstances. We rejected that claim in *Williams v. State*, 937 S.W.2d 479, 491 (Tex. Crim. App. 1996). He contends that the mitigation issue is unconstitutional because the open-ended and unstructured nature of the issue gives the jury unfettered discretion. We rejected that claim in *King v. State*, 953 S.W.2d 266, 274 (Tex. Crim. App. 1997). He contends that the mitigation issue's failure to enumerate a list of mitigating and aggravating factors prevents meaningful appellate review. We rejected that claim in *Green v. State*, 934 S.W.2d 92, 107 (Tex. Crim. App. 1996), *cert. denied*, __ U.S. ___, 117 S. Ct. 1561 (1997). He complains that the mitigation special issue is unconstitutional because it limits mitigating factors to those that evidence moral blameworthiness. We rejected that claim in *King*, 953 S.W.2d at 274. And finally, he contends that the failure to inform a jury that a holdout vote (or hung jury) results in the automatic imposition of a life sentence violates the Eighth and Fourteenth Amendments to the United States Constitution. We rejected that claim in *Eldridge v. State*, 940 S.W.2d 646, 650 (Tex. Crim. App. 1996). Point of error one is overruled.

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

l. In *Threadgill v. State*, 146 S.W. 3d 654, 672 (Tex. Crim. App. 2004), the court rejected appellant's complaint that the Texas statutes are unconstitutional because they fail to "require" the jury to consider mitigating evidence.

m. It is not unconstitutional to instruct the jury to disregard evidence that the jurors do not find to be sufficiently connected to the crime to reduce moral blameworthiness. *Perry v. State*, 158 S.W. 3d 438 (Tex. Crim. App. 2004).

9. Consideration of all the evidence

a. In *Scheanette v. State*, 144 S.W. 3d 503 (Tex. Crim. App. 2004), the trial court "slightly amended the statutory language" and charged the jury that it should consider both mitigating and aggravating evidence when deciding the mitigation special issue. Appellant did not object and was unable to show egregious harm on appeal. It is permissible for the jury to consider all the evidence, both mitigating and aggravating when considering this special issue. *Id*. at 507.

10. Comparing the future dangerousness and the mitigation special issues

a. "In the context of the future dangerousness question, the jury considers all of the evidence in order to determine whether to 'impose' the death penalty, whereas, in the context of the mitigation issue, the jury considers the evidence in order to determine whether the jury should 'decline to impose' the death penalty." *Scheanette v. State*, 144 S.W. 3d 503, 508 (Tex. Crim. App. 2004).

11. Waiver

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

b. Or can he? In *Tong v. State*, 25 S.W. 3d 707 (Tex. Crim. App. 2000), which was decided after *Mosley*, appellant argued that he was entitled to a new punishment hearing so that he could make the choice the court had declared was available in *Mosley*. The court of criminal appeals declared this part of *Mosley* to have been mere "dicta." "It is true that the majority in *Mosley* suggested that a defendant could waive reliance upon and submission of the mitigation issue, thereby rendering victim impact and character evidence irrelevant and inadmissible. [citations omitted] However, this statement was made in connection with several points concerning victim impact evidence, and the holding under these points pertains to the admissibility of the victim impact evidence, not whether the special issue can be waived." *Id*. at 711-12. In any event, the issue is not "ripe" unless the record shows an affirmative waiver of submission of the mitigation issue. *Galloway v. State*, 2003 WL 1712559 (Tex. Crim. App. 2003)(not designated for publication).

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

12. Argument

a. The trial court does not err by denying a defense motion to close on mitigation. *Threadgill v. State*, 146 S.W. 3d 654, 673 (Tex. Crim. App. 2004).

b. Article 36.07 of the code of criminal procedure, which permits the state to open and close, applies in capital and non-capital cases alike, and the fact that neither party has the burden of proof on the mitigation issue does not give the defense the right to close. *Masterson v. State*, 155 S.W. 3d 167, 175 (Tex. Crim. App. 2005); *Roberts v. State*, 220 S.W. 3d 521, 535 (Tex. Crim. App. 2007).

13. Moral Blameworthiness

a. The trial court need not define the term "moral blameworthiness." *Druery v. State*, 225 S.W. 3d 491, 509-510 (Tex. Crim. App. 2007).

b. The mitigation instruction does not unconstitutionally narrow the jury's discretion to factors concerning only moral blameworthiness. *Lucero v. State*, 2008 WL 375416 *6 (Tex. Crim. App. 2008).

14. The Trial Court's Responsibility

a. Where a competent defendant knowingly, intelligently, and voluntarily forgoes presentation of mitigation evidence, the trial court has no constitutional obligation to inquire whether trial counsel had conducted an investigation of mitigation evidence, and, if so, what the results of the investigation revealed. *Shore v. State*, 2007 WL 4375939 *10 (Tex. Crim. App. 2007)(not designated for publication). Nor does the trial court have any duty to conduct a "colloquy" to ensure that the defendant's decision to waive presentation of mitigating evidence was "a voluntary, intelligent, and knowing choice." Instead, the judge may assume waiver from the defendant's conduct, and here, the record demonstrates a valid waiver. *Id*. at

b. Article 37.071, § 2(f)(3) requires that the trial court instruct the capital sentencing jury that "need not agree on what particular evidence supports an affirmative finding on the [mitigation special] issue." In this case the jurors were not given this statutorily required instruction. They did, however, unanimously find that no sufficient mitigating circumstances warranted a life sentence, and the foreman signed the answer stating that the jury

unanimously found the answer to the mitigating special issue to be "no." "Because no juror believed there was a circumstance or circumstances that warranted a life sentence, there was no possibility that the jurors would be confused about a need to agree on a particular circumstance or circumstances." Appellant was not deprived of his right to a unanimous jury, he did not suffer egregious harm, and he was not denied a fair trial. *Young v. State*, 2009 WL 1066912 (Tex. Crim. App. 2009).

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

A. The Statutes

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

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

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

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

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

TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(f)(2).

B. Case Law

1. In *Lawton v. State*, 913 S.W. 2d 542 (Tex. Crim. App. 1995), appellant contended that articles 37.071 § 2(d) & 37.071 § 2(f) are unconstitutional because they require that at least 10 jurors agree before a life sentence can be imposed. The court disagreed. "[W]hile it is true that the jury is instructed that they may not answer any of the special issues in a manner that would result in a life sentence unless ten jurors agree to that answer, this instruction follows the instruction that the jury may not answer any of the special issues in a manner resulting in capital punishment unless the verdict is unanimous. Under these facts, appellant's argument that jurors will be misled lacks merit; every juror knows that capital punishment cannot be imposed without the unanimous agreement of the jury on all three special issues. The jury is not informed of the consequences of a hung jury, but each juror will know that without his or her vote the death sentence cannot be imposed." *Id*. at 559; *see Crutsinger v. State*, 206 S.W. 3d 607, 613 (Tex. Crim. App. 2006)*; Russeau v. State*, 171 S.W. 3d 871, 886 (Tex. Crim. App. 2005); *Rayford v. State*, 125 S.W. 3d 521, 532 (Tex. Crim. App. 2003)*; Murphy v. State*, 112 S.W. 3d 592, 606-07 (Tex. Crim. App. 2003); *Resendiz v. State*, 112 S.W. 3d 541, 548 (Tex. Crim. App. 2003); *Sells v. State*, 121 S.W. 3d 748, 767 (Tex. Crim. App. 2003); *Feldman v. State*, 71 S.W. 3d 738, 757 (Tex. Crim. App. 2002); *Conner v. State*, 67 S.W. 3d 192, 202 (Tex. Crim. App. 2001); *Wright v. State*, 28 S.W. 3d 526, 537 (Tex. Crim. App. 2000); *Tong v. State*, 25 S.W. 3d 707, 715 (Tex. Crim. App. 2000)*; Hughes v. State*, 24 S.W. 3d 833, 843-44 (Tex. Crim. App. 2000)*; Prystash v. State*, 3 S.W. 3d 522, 536-37 (Tex. Crim. App. 1999)*; Ladd v. State*, 3 S.W. 3d 547, 574 (Tex. Crim. App. 1999)*; see also Turner v. State*, 87 S.W. 3d 111, 118 (Tex. Crim. App. 2002); *Jackson v. State*, 17 S.W. 3d 664, 677 (Tex. Crim. App. 2000)*; Chamberlain v. State*, 998 S.W. 2d 230, 238 (Tex. Crim. App. 1999)*; Jackson v. State*, 992 S.W. 2d 469, 481 (Tex. Crim. App. 1999); *Cantu v. State*, 939 S.W. 2d 627, 644 (Tex. Crim. App. 1997); *Williams v. State*, 937 S.W. 2d 479, 490 (Tex. Crim. App. 1996).

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

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

A. Article 37.071(g)

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

B. Article 37.071 § 2(a)

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

C. Case Law

1. Article 37.071(g), which prohibits the parties and the court from informing the jury about the effect of a hung jury, is not unconstitutional. *Davis v. State*, 782 S.W.2d 211, 222 (Tex. Crim. App. 1989); *accord Masterson v. State*, 155 S.W. 3d 167, 175-76 (Tex. Crim. App. 2005); *Moore v. State*, 935 S.W. 2d 124, 129 (Tex. Crim. App. 1996); *Cockrell v. State*, 933 S.W. 2d 73, 93 (Tex. Crim. App. 1996); *Lawton v. State*, 913 S.W. 2d 542, 558-59 (Tex. Crim. App. 1995).

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

3. Article 37.071, §2(a) is constitutional. *Cantu v. State*, 939 S.W. 2d 627, 644 (Tex. Crim. App. 1997)("same analysis applies to the new statute and appellant has given us no reason to revisit this issue"). *See Sorto v. State*, 173 S.W. 3d 469, 492 (Tex. Crim. App. 2005); *Resendiz v. State*, 112 S.W. 3d 541, 548 (Tex. Crim. App. 2003); *Sells v. State*, 121 S.W. 3d 748, 767 (Tex. Crim. App. 2003); *Tong v. State*, 25 S.W. 3d 707, (Tex. Crim. App. 2000)*; Brooks v. State*, 990 S.W. 2d 278, 288 (Tex. Crim. App. 1999)*; Raby v. State*, 970 S.W. 2d 1, 6-7 (Tex. Crim. App. 1998); *Shannon v. State*, 942 S.W. 2d 591, 600 (Tex. Crim. App. 1996). *See also Morris v. State*, 940 S.W. 2d 610, 615 (Tex. Crim. App. 1996)(the same is true regarding article 37.0711(3)(i)).

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

5. The statutory "prohibition on informing the jury about the effects of their answers to the special issues regarding the death penalty only poses a constitutional problem when the jury is led to believe that they do not have ultimate responsibility for punishment." *Lagrone v. State*, 942 S.W. 2d 602, 620 (Tex. Crim. App. 1997)(constitutional validity of the statute has been "consistently affirmed" absent misrepresentations about punishment responsibility). *See also Threadgill v. State*, 146 S.W. 3d 654, 673 (Tex. Crim. App. 2004).; *Prystash v. State*, 3 S.W. 3d 522, 536-37 (Tex. Crim. App. 1999).

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

7. Although it was error for the trial court to inform the jury in *voir dire* that a non-unanimous jury would result in a hung jury, this error was harmless under Rule 81(b)(2). The court refused to address the contention on appeal that the trial court had "misinformed" the jury (apparently because a non-unanimous verdict means a life sentence, not a mistrial) because this specific contention was not made at trial. *Sattiewhite v. State*, 786 S.W.2d 271, 278-79 (Tex. Crim. App. 1989); *see Rousseau v. State*, 855 S.W. 2d 666, 676 (Tex. Crim. App. 1993)(trial court did not err in quashing jury panel after panel was improperly instructed under article 37.071(g)); *see also Clark v. State*, 881 S.W. 2d 682, 691 (Tex. Crim. App. 1994)(prosecutor erred in in-

forming the jury that a single no vote would prevent a death sentence, but the error was harmless).

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

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

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

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

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

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

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

XXI. WHAT EVIDENCE IS ADMISSIBLE AT THE PUNISHMENT PHASE?

A. Unadjudicated Offenses

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

2. Unadjudicated extraneous offenses are admissible at the punishment phase of a capital trial, in the absence of surprise. *Gentry v. State*, 770 S.W. 2d 780, 793 (Tex. Crim. App. 1988); *accord Tong v. State*, 25 S.W. 3d 707, 711 (Tex. Crim. App. 2000)*; Jackson v. State*, 992 S.W. 2d 469, 479 (Tex. Crim. App. 1999); *Pondexter v. State*, 942 S.W. 2d 577, 587 (Tex. Crim. App. 1996); *Matchett v. State*, 941 S.W. 2d 922, 937-38 (Tex. Crim. App. 1996); *Cantu v. State*, 939 S.W. 2d 627, 648 (Tex. Crim. App. 1997); *Bell v. State*, 938 S.W. 2d 35, 55 n. 30 (Tex. Crim. App. 1996); *Cockrell v. State*, 933 S.W. 2d 73, 94 (Tex. Crim. App. 1996). To be admissible, it must be proven beyond a reasonable doubt that appellant committed the offense; the offense must be relevant to appellant's deathworthiness, and its prejudicial or inflammatory potential must not substantially outweigh its probative value. *Rachal*

v.State, 917 S.W. 2d 799, 807 n. 4 (Tex. Crim. App. 1996); *see Lewis v. State*, 911 S.W. 2d 1, 5 (Tex. Crim. App. 1995); *Rumbaugh v. State*, 629 S.W.2d 747, 754 (Tex. Crim. App. 1982); *see also Lawton v. State*, 913 S.W. 2d 542, 560 (Tex. Crim. App. 1995)(article 37.071, not article 37.07, applies in capital cases); *McFarland v. State*, 928 S.W. 2d 482, 512 (Tex. Crim. App. 1996); *but see Autry v. Estelle*, 706 F.2d 394, 406 n.5 (5th Cir. 1983)(admission of extraneous offenses must be closely watched); *Davis v. State*, 597 S.W.2d 358, 361 (Tex. Crim. App. 1980)(Clinton, J., dissenting)(constitutional warning); *accord McManus v. State*, 591 S.W.2d 505, 532 (Tex. Crim. App. 1979)(Phillips, J., dissenting). *Cf. Sharp v Texas*, 488 U.S. 872, 872 (1988)(Marshall, J., dissenting)(admission of unadjudicated criminal conduct cannot be reconciled with the heightened need for reliability in criminal cases); *Williams v. Lynaugh*, 484 U.S. 935 (1987)(Marshall, J., joined by Brennan, J., dissenting from denial of certiorari)(dissenters contend that admission of extraneous offenses raises "serious constitutional issue"); *Unreliable and Prejudicial: The Use of Extraneous Unadjudicated Offenses in the Penalty Phases of Capital Trial*, 93 COLUM.L.REV. 1249 (1993). Before an extraneous offense is admissible, however, "the State must 'clearly prove' that an offense was committed and that the accused was its perpetrator." *Kemp v. State*, 846 S.W. 2d 289, 307 (Tex. Crim. App. 1992); *accord Burks v. State*, 876 S.W. 2d 877, 898-900 (Tex. Crim. App. 1994); *see Harris v. State*, 827 S.W.2d 949, 961 (Tex. Crim. App. 1992)(to be relevant, state must present evidence that, if believed, establishes that appellant himself committed the extraneous misconduct). Admission of such evidence, which might be inadmissible in a non-capital trial, does not violate equal protection or due process of law. *Felder v. State*, 848 S.W. 2d 85, 98 (Tex. Crim. App. 1992).

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

4. The jury need not be instructed that it cannot consider unadjudicated extraneous offenses unless it believes they occurred beyond a reasonable doubt. It is sufficient if the charge merely instructs the jury that the state has to prove future dangerousness beyond a reasonable doubt. *Fuentes v. State*, 991 S.W. 2d 267, 280 (Tex. Crim. App. 1999). "The State has the burden of proof on punishment issues, and the evidence offered to support the special issues is subsumed within that burden. To the extent there are questions concerning whether Appellant actually committed the extraneous offenses, the jury can take such questions into account in deciding the special issues. The trial judge performs a limited gatekeeping function with respect to extraneous offenses before allowing the admission of such offenses into evidence (and hence their placement before the jury), the trial judge must determine that there is clear proof that the offenses were committed and that the defendant was the perpetrator." *Kutzner v. State*, 994 S.W. 2d 180, 188 (Tex. Crim. App. 1999)(not error to instruct the jury that it could not consider extraneous offenses unless it found by clear proof that appellant committed same). *See Garcia v. State*, 57 S.W. 3d 436, 442 (Tex. Crim. App. 2001); *Tong v. State*, 25 S.W. 3d 707, 711 (Tex. Crim. App. 2000).

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

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

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

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

unfairly surprised where he was given full notice of the state's intent to prove prior misconduct together with the witness's written account of the incident).

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

10. The admission of unadjudicated offenses does not violate the notion of heightened reliability in capital cases. *Paredes v. State*, 129 S.W. 3d 530, 541 (Tex. Crim. App. 2004)(Tex. Crim. App. 2004).

11. In *Saenz v. State*, 166 S. W. 3d 234, 247 (Tex. Crim. App. 2005), the court held that the corpus delicti doctrine is inapplicable to extraneous offenses offered at the punishment phase of the trial.

B. Other Evidence Against The Defendant

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

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

3. Juvenile records. *East v. State*, 702 S.W.2d 606, 614 (Tex. Crim. App. 1985); *Goodman v. State*, 701 S.W. 2d 850, 867 (Tex. Crim. App. 1985); *see also Corwin v. State*, 870 S.W. 2d 23, 36 (Tex. Crim. App. 1993)(testimony of juvenile misconduct is admissible).

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

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

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

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

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

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

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

11. Psychiatric testimony from qualified witnesses. *Barefoot v. Estelle*, 463 U.S. 880, 906 (1983); *see McBride v. State*, 862 S.W. 2d 600, 608 (Tex. Crim. App. 1993)(Dr. Clay Griffith was qualified under Rule 702 of the Texas Rules of Criminal Evidence). This testimony can be in the form of hypothetical questions. *See Nethery v. State*, 692 S.W. 2d 686, 709 (Tex. Crim. App. 1985); *but cf. Garcia v. State*, 626 S.W.2d 46, 51 (Tex. Crim. App. 1981)(ludicrous testimony from psychologist who silently observed defendant for 30 minutes); *Holloway v. State*, 613 S.W.2d 497, 503 (Tex. Crim. App. 1981)(doctor's testimony must be based on factor

within his personal knowledge or assumed from common or judicial knowledge, or established by evidence); *Sanne v. State*, 609 S.W.2d 762, 774 (Tex. Crim. App. 1980)(error in allowing unqualified forensic pathologist to testify was harmless under facts); *see also Fuller v. State*, 829 S.W.2d 191, 195 (Tex. Crim. App. 1992)(court refuses to re-examine its rulings under the rules of evidence, "principally because the issue is neither well presented by the trial record . . . nor well joined in the appellate briefs"). "Although the hypothetical question must be based on facts in evidence, there is no requirement in the rules of criminal evidence that these facts have been proved beyond a reasonable doubt. This Court has long recognized that a trial court may admit, *for whatever value it may have to a jury*, psychiatric testimony concerning the defendant's future behavior at the punishment phase of a capital murder trial." *McBride v. State*, 862 S.W. 2d 600, 610 (Tex. Crim. App. 1993).

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

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

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

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

16. "Evidence of gang membership is relevant to show a defendant's bad character if the State can prove (1) the gang's violent and illegal activities and (2) the defendant's membership in the gang." *Garcia v. State*, 126 S.W. 3d 921, 928 (Tex. Crim. App. 2004). Evidence that appellant was affiliated with the Texas Syndicate prison gang is admissible because it shows his lawless nature and rejection of rehabilitation during prior incarceration. *Hernandez v. State*, 819 S.W.2d 806, 817 (Tex. Crim. App. 1991); *see Fuller v. State*, 829 S.W.2d 191, 196 (Tex. Crim. App. 1992)("membership in the Aryan Brotherhood is not a right of free association protected by the First Amendment"); *accord Mason v. State*, 905 S.W.2d 570, 577 (Tex. Crim. App. 1995); *Jones v. State*, 944 S.W. 2d 642, 652-53 (Tex. Crim. App. 1996)(gang membership admissible to prove appellant's character); *cf. Dawson v. Delaware*, 503 U.S. 159, 166-67 (1992)(mere proof of defendant's membership in the Aryan Brotherhood, without more, showed only his "abstract belief," and therefore violated his First Amendment right of association).

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

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

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

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

21. That appellant was a truancy problem in high school is probative of his propensity to commit future acts of violence. *Cooks v. State*, 844 S.W. 2d 697, 735 (Tex. Crim. App. 1992).

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

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

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

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

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

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

28. Evidence that appellant tattooed the word "Satan" on his wrist after the murder, and drew a picture of Jesus with horns was admissible at the punishment phase. *Banda v. State*, 890 S.W. 2d 42,61-62 (Tex. Crim. App. 1994); *see also Robles v. State*, 2006 WL 1096971 *7(Tex. Crim. App. 2006)(not designated for publication)(tattoo depicting demon eating the brains of Christ was relevant to character and had a bearing on future dangerousness); *Conner v. State*, 67 S.W. 3d 192, 201 (Tex. Crim. App. 2001)("testimony concerning the meaning behind appellant's tattoos was relevant to appellant's character and hence to punishment").

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

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

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

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

33. Where appellant had been convicted of raping and killing a seven year old girl, evidence that he had once patted a nine year old on her "butt" was relevant. *Nenno v. State*, 970 S.W. 2d 549, 564 (Tex. Crim. App. 1998).

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

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

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

37. When the defense put on a prison warden to testify about the classification system, pictures of bombs and weapons made by other inmates in prison were "at least marginally relevant to the testimony concerning inmate violence within various classifications in the prison society." *Threadgill v. State*, 146 S.W. 3d 654, 671 (Tex. Crim. App. 2004).

38. *Beatty v. State*, 2009 WL 619191 (Tex. Crim. App. 2009)(not designated for publication)("appellant's

possession of the handcuff key makes it more probable that he would constitute a continuing threat to both prison and free society").

39. Appellant's character was in issue because of the mitigation special issue. The state introduced a photo closely resembling appellant reclining with the head of a woman situated in his lap, with these words written on the back: "Me getting head." This photo was properly admitted. "The fact that appellant had such a photograph of himself and the unidentified woman is as least mildly probative of his attitude toward sex." *Mendoza v. State*, 2008 WL 4803471 *20 (Tex. Crim. App. 2008)(not designated for publication).

C. Evidence For The Defendant

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

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

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

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

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

D. Not Everything Is Admissible

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

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

3. The trial court erred when it admitted as business records "incident reports" from TDCJ and the county jail that described misconduct in graphic detail. Because these reports contained "testimonial" statements – "solemn declaration[s] made for the purpose of establishing some fact" – the state had to show the declarants were unavailable, and that the defendant had the opportunity to cross-examine. The court was unable to say that the evidence was harmless because of the highly damaging nature of the evidence and the prosecutor's repeated emphasis during closing argument. *Russeau v. State*, 171 S.W. 3d 871, 881 (Tex. Crim. App. 2005). *But see Smith v. State*, 2009 WL 1212500 *13 (Tex. Crim. App. 2009)(TDCJ records reflecting, among other things, that appellant had been disciplined for fighting and exposing himself, were improperly admitted under *Crawford*, but the error was harmless beyond a reasonable doubt, since the prosecutors did not emphasize the evidence, concentrating their arguments instead on the heinousness of the crime and appellant's complete disregard for anyone but himself).

4. In *West v. State*, 720 S.W. 2d 511 (Tex. Crim. App. 1986), defendant objected to a Florida pen packet because it did not contain a jury waiver, arguing that the existence of such a waiver could not be presumed from a silent record. The court found that this was a collateral attack on the Florida judgment, and that therefore, the defendant bore the burden of either introducing all the papers in that cause to prove that there was no waiver, or to prove that Florida law requires the judgment to reflect a jury waiver on its face. Since defendant failed to carry this burden, the contention was rejected. *Id*. at 518-19. *West* is also interesting because of the way it treated the state's fall back position (which, as it turned out, was not needed), that the Florida conviction would have been admissible in any event because of the liberal admissi-

bility of unadjudicated offenses at the punishment phase. The court rejected this argument, because it "ignores the fact that, should the judgment reflected by them be shown to be void, the papers would offer no more than mere hearsay as to the commission of the acts constituting the offense; although the State may, by proper evidence, demonstrate that appellant did commit the offense, a void judgment would not constitute proper evidence." *Id*. at 519 n.10.

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

6. The trial court abused its discretion in admitting the opinion testimony of Dr. Grigson where that testimony was based on "facts and circumstances gleaned by him from ex-parte statements of third persons, and not established by legal evidence before a jury trying the ultimate issue to which the opinion relates." The opinion should instead be based on facts either within the personal knowledge of the witness, or assumed from common or judicial knowledge or established by the evidence. *Holloway v. State*, 613 S.W. 2d 497, 503 (Tex. Crim. App. 1981); *see also Sanne v. State*, 609 S.W. 2d 762, 773-774 (Tex. Crim. App. 1980)(trial court erred in permitting forensic pathologist to testify about future dangerousness in absence of qualifications to render expert opinion, and without a showing that he had sufficient firsthand familiarity with defendant, but error was harmless).

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

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

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

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

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

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

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

14. Although an expert may testify that appellant will or will not be dangerous in the future, he may not testify that appellant should receive a life or a death sentence. Testimony as to the appropriate punishment is of no assistance to the jury, and would only tend to confuse. *Sattiewhite v. State*, 786 S.W. 2d 271, 291 (Tex. Crim. App. 1989).

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

16. It was sufficient that Dr. Quijano was permitted to testify that appellant and the complainant had a dependent relationship, that appellant had a history of alcoholism and that appellant had a stable work history. The trial court is not required to permit him to state his opinion that these factors are mitigating. *Reyes v. State*, 84 S.W. 3d 633, 639 (Tex. Crim. App. 2002).

17. An article in the American Bar Association Journal critical of the death penalty had no relevance to the special issues and was therefore inadmissible. *Canales v. State*, 98 S.W. 3d 690, 699 (Tex. Crim. App. 2003).

18. In *Sells v. State*, 121 S.W. 3d 748 (Tex. Crim. App. 2003), the defense sought to introduce a 57 minute videotape depicting life in administrative segregation in the Michael Unit of TDCJ, and the trial court excluded it, finding that, even assuming this tape had marginal relevance, it was inadmissible under Rule 403. The court of criminal appeals agreed, also finding that exclusion of the tape did not violate the Eighth or Fourteenth Amendments. *Id*. at 766.

E. Remorse

1. The general rule is that a defendant's "self-serving, out-of-court declarations of remorse" are inadmissible. Even if remorse is mitigating under the Eighth Amendment, "it must be presented in a form acceptable to the law of evidence" before a defendant is entitled to its admission. *Renteria v. State*, 206 S.W. 3d 689, 697 (Tex. Crim. App. 2006). In *Renteria*, though, the state opened the door and this otherwise inadmissible evidence became admissible to correct a false impression for which it was responsible. There, the state initially created the false impression by repeatedly asking its expert witness whether an unremorseful hypothetical person would be a future danger to society. And the state emphasized this during its closing arguments. The exclusion of evidence that appellant had expressed remorse in a statement to the police "rose to the level of constitutional error because it meets *Tennard's* low threshold for constitutionally relevant mitigating evidence. In addition, with the State having opened the door to appellant's remorse evidence, the exclusion of this evidence violated due process by preventing appellant from rebutting the State's evidence and argument that appellant was unremorseful." *Id*. at 697-98.

XXII. FOR CASES OCCURRING BEFORE SEPTEMBER 1, 1991

A. Article 37.0711

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

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

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

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

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

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

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

4. It was not an ex post facto violation to instruct the jury as provided by article 37.0711, where the case occurred before Penry I. "[A]ppellant has been afforded greater constitutional protections under the current law than he was afforded under the previous provision." Bigby v. State, 2008 WL 4531979 (Tex. Crim. App. 2008)(not designated for publication).

B. Case Law

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

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

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

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

5. In *Smith v. State*, 74 S.W. 3d 868 (Tex. Crim. App. 2002), the deliberateness special issue was not submitted at his second trial, and, as a result, the court reversed and remanded for a new punishment phase. On appeal, appellant made several assertions. First, appellant claimed that the court's failure to reverse and remand for an entirely new trial after the second trial violated the constitution, and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The court disagreed. Deliberateness is not an element of capital murder. Even if it were, deliberateness was answered by the jury and proved by the state beyond a reasonable doubt. And, *Apprendi* does not require the same jury to hear guilt and punishment. "We may reverse and remand any capital case for a punishment hearing alone before a new jury." *Id*. at 874. Second, the state did not waive its right to submission of this special issue at the third trial, since it did nothing to prevent its submission at the second trial. *Id*. Third, the doctrine of collateral estoppel does not prevent submission of the deliberateness issue at the third trial, because this issue was not determined at the second trial. *Id*. at 875.

C. Penry II

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

2. *Penry II* will clearly have very limited application. All cases tried after September 1, 1991 are governed by article 37.0711, which requires an instruction much different than that given by the trial

court in *Penry II*. If your case was tried before that date, however, read *Penry II* to learn how not to instruct the jury on mitigating evidence.

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

4. The statutory mitigation instruction does not send "mixed signals" because of its lack of clarity regarding the burden of proof, and is not unconstitutional. *Jones v. State*, 119 S.W. 3d 766, 790 (Tex. Crim. App. 2003); *accord Woods v. State*, 152 S.W. 3d 105, 121 (Tex. Crim. App. 2004); *Scheanette v. State*, 144 S.W. 3d 503, 506 (Tex. Crim. App. 2004); *Escamilla v. State*, 143 S.W. 3d 814, 828 (Tex. Crim. App. 2004).

5. The following supplemental instruction was held "constitutionally inadequate" in *Smith v. Texas*, 125 S. Ct. 400, 407 (2004):

> "You are instructed that you shall consider any evidence which, in your opinion, is mitigating. Mitigating evidence is evidence that reduces the Defendant's personal or moral culpability or blameworthiness, and may include, but is not limited to, any aspect of the Defendant's character, record, background, or circumstances of the offense for which you have found him guilty. Our law does not specify what may or may not be considered as mitigating evidence. Neither does our law provide a formula for determining how much weight, if any, a mitigating circumstance deserves. You may hear evidence which, in your judgment, has no relationship to any of the Special Issues, but if you find such evidence is mitigating under these instructions, you shall consider it in the following instructions of the Court. You, and each of you, are the sole judges of what evidence, if any, is mitigating and how much weight, if any, the mitigating circumstances, if any, including those which have no relationship to any of the Special Issues, deserves.
>
> In answering the Special Issues submitted to you herein, if you believe that the State has proved beyond a reasonable doubt that the answers to the Special Issues are 'Yes,' and you also believe from the mitigating evidence, if any, that the Defendant should not be sentenced to death, then you shall answer at least one of the Special Issues 'No' in order to give effect to your belief that the death penalty should not be imposed due to the mitigating evidence presented to you. In this regard, you are further instructed that the State of Texas must prove beyond a reasonable doubt that the death sentence should be imposed despite the mitigating evidence, if any, admitted before you.
>
> You are instructed that you may deliberate as a body about mitigating circumstances, but you are not required to reach a unanimous verdict as to their existence or weight. When you vote about the Special Issues, each of you must decide for yourself whether mitigating circumstances exist and, if so, how much weight they deserve."

6. The Supreme Court in *Smith* held that there was "no principled distinction, for Eighth Amendment purposes, between the instruction given to petitioner's jury and the instruction in *Penry II*. *Id*. The judgment of the court of appeals was reversed, and the case "remanded for further proceedings not inconsistent with this opinion." *Id*. On remand, the court of criminal appeals again denied Smith lost again. "We now hold that, assuming that the statutory special issues were not wholly sufficient to allow the jury to give "*full* consideration and *full* effect to mitigating circumstances," applicant has failed to show "egregious harm" under *Almanza* for this unobjected-to jury-charge error. We therefore deny relief." *Ex parte Smith*, 185 S.W. 3d 455, 472 (Tex. Crim. App. 2006).

7. The Supreme Court again reversed. "The requirement that Smith show egregious harm was predicated, we hold, on a misunderstanding of the federal right Smith asserts; and we therefore reverse." *Smith v. Texas*, 127 S. Ct. 1686 (2007). The court of criminal appeals is required to defer to the Supreme Court's finding of *Penry* error, and therefore, Smith was entitled to relief under Texas's harmless-error framework. *Id*. at 1699. *See also Ex parte Martinez*, 233 S.W. 3d 319, 323-24 (Tex. Crim. App. 2007)(nullification instruction

inadequate to give meaningful consideration to constitutionally relevant mitigating evidence of mental impairment and troubled childhood).

D. Penry III

1. And still they can't get it right. Penry was tried a third time and his lawyers complained that the trial court's fourth special issue, which was the mitigation issue from article 37.0711, precluded the jury from giving effect to evidence of mental impairment that did not amount to retardation. *Penry v. State*, 178 S.W. 3d 782, 783-84 (Tex. Crim. App. 2005). The jury was instructed to answer the fourth special issue "yes" if it believed Penry was mentally retarded. "If the jury found that the appellant was not mentally retarded, the jury was instructed to 'follow the Court's instructions previously given herein concerning the appropriate answer to Special Issue No. 4 and consider whether *any other* mitigating circumstance or circumstances exist as defined herein.'" *Id*. at 785 (emphasis in original). Appellant argued that, under this instruction, if the jury found he was not retarded, it could then consider as mitigating only circumstances other than mental impairment and mental deficiencies. The court of criminal appeals agreed. "[W]e conclude that there is a reasonable likelihood that the jury believed that it was not permitted to consider mental impairment outside of determining whether the appellant is mentally retarded. As a result, the instructions in this case fell short of the constitutional requirement that the jury be provided a vehicle to give effect to its reasoned moral response to the appellant's mitigating circumstances." *Id*. at 788.

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

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

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

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

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

B. Reversals For Smith Error

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

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

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

4. Defendant's Fifth and Sixth Amendment rights were violated where he was not informed that he did not have to participate, that he could remain silent, that his statements could be used at the punishment phase of his trial, and where his attorneys were not notified in

advance that the examination was being made to prepare the psychiatrist to testify on future dangerousness. *Ex parte English*, 642 S.W.2d 482, 482 (Tex. Crim. App. 1982)(habeas relief denied on rehearing after Governor commuted sentence to life).

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

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

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

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

9. Merely warning the defendant that he has a right to remain silent and that anything he says can be used against him does not satisfy *Smith*. "To apprise a capital defendant fully of his Fifth Amendment rights before subjecting him to a court-ordered psychiatric examination, the defendant must be told that it will 'be used to gather evidence necessary to decide whether, if convicted, he should be sentenced to death.'" *Gardner v. Johnson*, 247 F.3d 551, 558 (5th Cir. 2001). This requirement is not met by warning the defendant that he is being evaluated for dangerousness, and to determine if he is a continuing threat to society.

C. No Error Under Smith

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

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

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

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

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

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

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

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

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

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

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

D. Waiver

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

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

3. *Smith* error is waived where the defendant raises the affirmative defense of insanity at the first phase of the trial, then asks the jury to reconsider the insanity evidence at the punishment phase. *Penry v. State*, 691 S.W.2d 636, 652 (Tex. Crim. App. 1985); *see Buchanan v. Kentucky*, 483 U.S. 402, 424-25 (1987)(neither Fifth nor Sixth Amendment violated when prosecution rebuts defendant's psychological evidence with reports from an examination requested by the defendant); *see also Ripkowksi v. State*, 61 S.W. 3d 378, 387 (Tex. Crim. App. 2001)(appellant loses under the Fifth Amendment where he contacted the jail mental health experts asking for help, and the state called these witnesses to rebut expert testimony put on by appellant; appellant relinquished his right to counsel under the Sixth Amendment when he sought out mental health treatment on his own).

4. Calling this a case of first impression, the court held that *Smith* error is waived where the defendant introduces psychiatric testimony on the issue of insanity at the guilt-innocence phase of the trial. *Powell v. State*, 742 S.W. 2d 353, 357-58 (Tex. Crim. App. 1987), *vacated and remanded*, 487 U.S. 1230 (1988), *aff'd on remand*, 767 S.W. 2d 759 (1989), *rev'd*, 492 U.S. 680 (1989). The court also noted that the defendant waived any *Smith* error by asking the jury to consider this evidence in answering the special issues. *Id*. at 358-59. Finally, the court found error, if any, to be harmless. *Id*. at 359-60. Powell again went to the Supreme Court, and the Court again reversed the court of criminal appeals. The Court found that a defendant clearly does not waive his *Sixth Amendment* right--notice to counsel--by putting on a sanity defense. *Powell v. Texas*, 492 U.S. 680, 686 (1989). The Court also noted that "[n]othing in *Smith*, or any other decision of this Court, suggests that a defendant opens the door to the admission of psychiatric evidence on future dangerousness by raising an insanity

defense at the guilt stage of the trial." *Id*. at 685 n.3. *But see Mays v. State*, 653 S.W. 2d 30, 31- 35 (Tex. Crim. App. 1983)(reversing for *Smith* error where defendant had injected competency and sanity issues *prior to* the psychiatric interview, but where no such evidence was presented at trial).

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

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

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

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

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

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

E. Harmless Or Harmful?

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

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

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

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

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

F. Commutation

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

G. The Contemporaneous Objection Rule

1. Generally a contemporaneous objection is necessary to preserve *Smith* error. And, the objection at trial must be quite specific and must comport with the objection on appeal. *Gardner v. State*, 733 S.W. 2d 195, 201, 203 (Tex. Crim. App. 1987); *see Tompkins v. State*,

774 S.W.2d 185, 214 (Tex. Crim. App. 1987)(*Miranda* objection does not specifically invoke *Smith*).

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

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

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

H. Retroactivity

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

I. Other Issues Relating To Psychiatric Evidence

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

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

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

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

5. The state's psychiatrist testified that he was unable to evaluate appellant because he refused to cooperate. The trial court then disallowed one of appellant's experts from testifying at the punishment phase. This was not error. "Limiting the testimony of the defendant's rebuttal expert to the same extent that the State's expert was limited due to the defendant's failure to cooperate is a fair and reasonable sanction. Just as the defendant's Fifth Amendment rights no longer protect him from being ordered to submit to an examination in these circumstances, neither do they protect him from the trial court's ability to enforce such order." *Soria v. State*, 933 S.W. 2d 46, 59 (Tex. Crim. App. 1996). The court in *Soria* refused to follow a plurality decision in *Bradford v. State*, 873 S.W. 2d 15 (Tex. Crim. App. 1993). *Bradford* was overruled in *Lagrone v. State*, 942 S.W. 2d 602, 610 (Tex. Crim. App. 1997), where the court held that if the defense introduces or demonstrates the intent to put on expert testimony concerning future dangerousness, the trial court may order the defendant to submit to an independent, state-sponsored psychiatric exam prior to the actual presentation of the defense's expert testimony. *Id*. "The essential principles as work in *Lagrone* and *Soria* are waiver and parity. . . ." *Chamberlain v. State*, 998 S.W. 2d 230, 234 (Tex. Crim. App. 1999). In *Chamberlain*, the trial court entered a pre-trial order that appellant submit to psychiatric examination by the state if he intended to introduce psychiatric testimony based on an examination by a defense expert. At the punishment phase, the state called an expert who testified hypothetically, based on the facts of the case, rather than an examination of appellant. Afterwards, the defense announced its intent to rebut the state's expert with its own expert, who had interviewed appellant. The trial court barred any testimony based on an interview unless appellant submitted to an interview

with the state's witness. This decision was affirmed on appeal. It is immaterial that appellant sought to introduce his testimony in rebuttal to the state's evidence. "Appellant cannot claim a fifth amendment privilege in refusing to submit to the State's psychiatric examinations and then introduce evidence gained through his participation in his own psychiatric examination." *Id*. at 233-34.

6. In *Ward v. State*, 2007 WL 1492080 (Tex. Crim. App. 2007)(not designated for publication), appellant attempted to distinguish *Lagrone*, arguing that in his case, his psychiatric testimony concerned mitigating evidence, not future danger. The court disagreed. "The nature of the psychiatric testimony to be presented is immaterial-that it is being presented by the defendant is enough to trigger the rule."

7. In *Saldano v. State*, 232 S.W. 3d 77 (Tex. Crim. App. 2007), the state put on evidence at the punishment phase that appellant had committed various acts of misconduct while incarcerated on death row. The defense wanted to present expert testimony that appellant's misconduct while on death row was attributable to the isolation of death row. The court ruled that if appellant wanted to present that testimony, he would have to submit to an evaluation by the state's mental health expert. Appellant objected to the so-called *Lagrone* examination, and, alternatively argued that any testimony by the state's witness should be limited to rebutting the defense's testimony, and not for proving future dangerousness. The trial court declined to limit the testimony, and the defense advised that it was not going to call its expert, and that appellant would take the fifth if interviewed by the state's witness. On appeal, the court of criminal appeals argued that appellant failed to preserve the error by a specific, timely objection. Additionally, according to the court, preservation would require that the defense "submit to the *Lagrone* examination and suffer any actual use by the State of the results of this examination." *Id*. at 90.

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

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

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

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

J. Dr. Grigson

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

2. In *Clark v. State*, 881 S.W. 2d 682 (Tex. Crim. App. 1994), the court held that the trial court had erred under Rule 612(a) in not permitting appellant to impeach Dr. Grigson with prior inconsistent testimony about how many people he had examined and testified about over the years. *Id*. at 695. The error was harmless, though. *Id*. at 697.

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

XXIV. THE LAW OF PARTIES AT THE PUNISHMENT PHASE

A. Enmund And Tison In General

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

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

B. The Effect Of Enmund And Tison In Texas

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

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

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

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

3. In *Lawton v. State*, 913 S.W. 2d 542 (Tex. Crim. App. 1995), appellant complained that article 37.071 § 2(b)(2) violated the principles set forth in *Tison* and *Enmund* because it permits a death penalty upon the mere finding that appellant anticipated that a human life would be taken. The court disagreed, noting that appellant could not even have been convicted of capital murder unless the jury had already found that he harbored the specific intent to promote or assist the commission of intentional murder. "In short, that the jury may have found that appellant only anticipated that death would result under Article 37.071 is inconsequential to *Enmund* and *Tison* concerns; the jury had already found that appellant intended to at least promote or assist in the commission of *an intentional murder*." *Id*. at 555. *See Joubert v. State*, 235 S.W. 3d 729, 735 (Tex. Crim. App. 2007).

XXV. VICTIM IMPACT EVIDENCE

A. *Booth* And *Payne*

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

2. *Booth* was at least partially overruled in *Payne v. Tennessee*, 501 U.S. 808 (1991), where the Court held that a jury is entitled to have before it evidence of the

specific harm caused by the defendant. "A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." *Id*. at 827. The *Payne* Court did not pass upon, and thus did not overrule, that part of *Booth* which precluded evidence "of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence." *Id*. at 830 n.2.

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

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

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

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

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

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

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

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

in a footnote." *Jackson v. State*, 33 S.W. 3d 828, 834 (Tex. Crim. App. 2000)(Meyers, J., concurring).

5. "Victim impact evidence is not subject to a burden of proof because it is relevant to the mitigation special issue instead of to a statutory aggravator found in the definitions of capital murder." *Prystash v. State*, 3 S.W. 3d 522, 536 (Tex. Crim. App. 1999).

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

7. Medical records of a third party wounded by appellant do not constitute victim impact evidence. The records reveal the wounded person's medical condition, and say nothing about his good character or how others were affected by the death of the victim named in the indictment. *Garcia v. State*, 126 S.W. 3d 921, 929 (Tex. Crim. App. 2004).

C. Held Admissible

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

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

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

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

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

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

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

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

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

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

11. Evidence that the victim was a very loving child, that she liked to play on monkey bars, and that she was an excellent child in pre-kinder school was properly

admitted, where it did not compare the victim's worth to others in society, and where the evidence had little, if any, effect, on the jury's verdict. *Renteria v. State*, 206 S.W. 3d 689, 706 (Tex. Crim. App. 2006).

12. The trial court did not err in permitting more than one witness to give victim impact testimony. Additionally, it is not the law in Texas that the defendant must be aware of the effects when he committed the crime. Here, moreover, the defendant was aware of the impact his crime would have had in every case but one, and then the defendant's objections was not specific enough. *Roberts v. State*, 220 S.W. 3d 521, 531-32 (Tex. Crim. App. 2007).

D. Held Inadmissible

1. "Victim," in the phrase "victim impact evidence," means the victim of the crime for which appellant is indicted and tried. The trial court erred in permitting the state to elicit victim impact evidence from the mother of Ms. Pena, when the indictment named only Ms. Ertman as the complainant. *Payne* does not contemplate admission of evidence concerning a person who is not the victim for whose death appellant has been indicted and tried. This evidence is irrelevant under Rule 401 and article 37.071, and the danger of unfair prejudice from "extraneous victim impact evidence" is unacceptably high. Nonetheless, the evidence here was harmless beyond a reasonable doubt. *Cantu v. State*, 939 S.W. 2d 627, 635-38 (Tex. Crim. App. 1997). *See Tong v. State*, 25 S.W. 3d 707, 713 (Tex. Crim. App. 2000)(impact testimony from victims of an extraneous offense is not contemplated by *Mosley* and *Payne*). *But cf. Guevara v. State*, 97 S.W. 3d 579, 583-84 (Tex. Crim. App. 2003)(not error for state to ask witness what was different about victim after appellant attacked him). *See also Roberts v. State*, 220 S.W. 3d 521, 531 (Tex. Crim. App. 2007)(suggesting that evidence of the impact on the victim of an extraneous offense is not victim impact evidence, and is therefore not within the purview of the *Cantu* rule).

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

3. The court referred to *Smith v. State*, 919 S.W. 2d 96 (Tex. Crim. App. 1996), as a case of first impression. There witnesses testified that the complainant had been a very dedicated, hard working special education teacher whose students had been very affected by her death, and that she had been very artistic and musically inclined, and that she was an animal lover, well educated and a member of the National Guard Reserves. *Id*. at 97. A plurality of the court found that this evidence was irrelevant to the special issues and therefore inadmissible, to the extent it was not directly related to the circumstances of the offense or necessary for rebuttal. *Id*. at 102. The court went on to find, however, that the error was harmless. *Id*. at 103. Five judges concurred in the result.

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

5. In *Simpson v. State*, 119 S.W. 3d 262 (Tex. Crim. App. 2003), a relative of the victim testified that the family "unanimously" wanted the death penalty for appellant. Appellant's objection was sustained and the jury was instructed to disregard, but his motion for mistrial was denied. The prosecutor made reference to this testimony in his summation, and again, the objection was sustained, the jury was instructed to disregard, but the motion for mistrial was denied. The court of criminal appeals held that the trial court properly sustained appellant's objections. "The wishes of the victim's family members as to the defendant's fate fall beyond the parameters of victim-impact evidence and are not admissible." *Id*. at 272. The court did not, however, abuse its discretion by denying appellant's motion for mistrial, because the instruction to disregard cured any prejudice, particularly in light of the "very substantial" evidence that supported the death sentence. *Id*.

6. Where appellant was charged with possession of cocaine, the trial court erred when it permitted the mother of a person killed by appellant's codefendant to give victim impact testimony. Since appellant's indictment did not identify a victim, this testimony was irrelevant under Rule 401. *Haley v. State*, 173 S.W. 3d 510, 518 (Tex. Crim. App. 2005).

E. Reverse Victim Impact Testimony

1. In *Goff v. State*, 931 S.W. 2d 537 (Tex. Crim. App. 1996), appellant wanted to offer "reciprocal victim impact evidence," concerning the complainant's homosexuality. The court of criminal appeals disallowed

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

2. Nor does *Payne* permit the *defense* to put on evidence concerning the impact of his execution on his family and friends. "This type of evidence is objectionable because it does not pertain to appellant's background, character, or record, or the circumstances of the offense." *Gallo v. State*, 2007 WL 2781276 *18 (Tex. Crim. App. 2007).

F. Waiver

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

2. Some of the cases distinguish between victim impact evidence – that is, evidence about the effect the victim's death had on the survivors – and victim character evidence – that is, evidence about the victim's good character. This seemingly minor difference can be extraordinarily important. In *Renteria v. State*, 206 S.W. 3d 689, 706 (Tex. Crim. App. 2006), the court held that the appellant's victim impact error did not preserve error that really related to victim character.

G. Curing The Error

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

H. The Failure To Designate Victim Impact Witnesses

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

XXVI. THE LAW OF PAROLE AT THE PUNISHMENT PHASE

A. The Statutes

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

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

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

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

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

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

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

3. In *Ross v. State*, 133 S.W. 3d 618 (Tex. Crim. App. 2004), the court found that the trial court erred when it instructed the jury concerning good time, even though no such language is found in article 37.071 § 2(e)(2). This error was harmless, though, because the jury was not misled into thinking that a life-sentenced defendant would be released in less than 40 years. *Id*. at 623-24.

4. When the trial court tracks the statute, it need not further instruct the jury that it can consider appellant's parole eligibility when determining its answer to the future dangerousness special issue. *Newbury v. State*, 135 S.W. 3d 22, 44-45 (Tex. Crim. App. 2004).

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

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

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

2. The United States Court of Appeals for the Fifth Circuit agreed. *Andrade v. McCotter*, 805 F. 2d 1190, 1192-93 (5th Cir. 1986); *O'Bryan v. Estelle*, 714 F. 2d 365, 388 (5th Cir. 1983). In *King v. Lynaugh*, 850 F.2d 1056 (5th Cir. 1988), the United States Court of Appeals for the Fifth Circuit, sitting *en banc*, held that the trial court did not err in denying the defendant the right to voir dire the jury on the Texas parole laws. The court expressly did not decide whether the jury should have been instructed on the law of parole, since defendant did not make this objection at trial, thereby procedurally defaulting. *Id*. at 1056 n.1.

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

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

D. *Simmons v. South Carolina*

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

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

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

exists, but that the court of criminal appeals is somehow not bound by it?

2. Two weeks after *Penry*, the court made a stab, at least, at distinguishing *Simmons*. In *Smith v. State*, 898 S.W. 2d 838 (Tex. Crim. App. 1995), the court overruled a host of state and federal constitutional challenges to the trial court's refusal to instruct on the law of parole. The court seemed to distinguish *Simmons* by reasoning that that case "on its face seems to be limited to states which have life without parole and not to states which have life with parole eligibility." *Smith v. State*, 898 S.W. 2d at 850; *accord Feldman v. State*, 71 S.W. 3d 738, 757 (Tex. Crim. App. 2002); *Johnson v. State*, 68 S.W. 3d 644, 656 (Tex. Crim. App. 2002); *Salazar v. State*, 38 S.W. 3d 141, 146 (Tex. Crim. App. 2001)*; Hughes v. State*, 24 S.W. 3d 833, 843 (Tex. Crim. App. 2000)*; Wilson v. State*, 7 S.W. 3d 136, 148 (Tex. Crim. App. 1999)*; Dewberry v. State*, 4 S.W. 3d 735, 756-57 (Tex. Crim. App. 1999)*; Ladd v. State*, 3 S.W. 3d 547, 570 (Tex. Crim. App. 1999)*; Chamberlain v. State*, 998 S.W. 2d 230, 235 (Tex. Crim. App. 1999)*; Kutzner v. State*, 994 S.W. 2d 180, 188 (Tex. Crim. App. 1999)*; Jackson v. State*, 992 S.W. 2d 469, 477 (Tex. Crim. App. 1999)*; Busby v. State*, 990 S.W. 2d 263, 271 (Tex. Crim. App. 1999)*; Griffith v. State*, 983 S.W. 2d 282, 289 (Tex. Crim. App. 1998); *Whitaker v. State*, 977 S.W. 2d 595, 599 (Tex. Crim. App. 1998); *Raby v. State*, 970 S.W. 2d 1, 6 (Tex. Crim. App. 1998); *Colburn v. State*, 966 S.W. 2d 511, 516 (Tex. Crim. App. 1998); *McGinn v. State*, 961 S.W. 2d 161, 166 (Tex. Crim. App. 1998); *Green v. State*, 934 S.W. 2d 92, 105 (Tex. Crim. App. 1996)*; Morris v. State*, 940 S.W. 2d 610, 613 (Tex. Crim. App. 1996)*; Williams v. State*, 937 S.W. 2d 479, 489 (Tex. Crim. App. 1996)*; Martinez v. State*, 924 S.W. 2d 693, 698 (Tex. Crim. App. 1996); *McFarland v. State*, 928 S.W. 2d 482, 523 (Tex. Crim. App. 1996); *Rhoades v. State*, 934 S.W. 2d 113, 120 (Tex. Crim. App. 1996); *Wolfe v. State*, 917 S.W. 2d 270, 278 (Tex. Crim. App. 1996); *Curry v. State*, 910 S.W. 2d 490, 498 (Tex. Crim. App. 1995)*; Lawton v. State*, 913 S.W. 2d 542, 556 (Tex. Crim. App. 1995); *Sonnier v. State*, 913 S.W. 2d 511, 521 (Tex. Crim. App. 1995); *Broxton v. State*, 909 S.W. 2d 912, 919 (Tex. Crim. App. 1995); *Green v. State*, 912 S.W. 2d 189, 194 (Tex. Crim. App. 1995). The court of criminal appeals further distinguished *Simmons* by noting that Texas, unlike South Carolina, has a number of safeguards to ensure that the law of parole is not discussed by the jury.

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

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

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

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

5. Judge Mansfield, concurring in *Whitaker v. State*, 977 S.W. 2d 595 (Tex. Crim. App. 1998)(Mansfield, J., concurring), stated that: "It does seem somewhat incongruous that juries in noncapital cases are instructed as to applicable parole law whereas in capital cases juries are not to be so instructed. Depending on the life expectancy of an individual sentenced to life imprisonment upon conviction of capital murder, the forty calendar years he must serve before becoming eligible for parole may be, effectively, a life

sentence without possibility of parole." Judge Mansfield found the *Brown* opinion to be "interesting," but also noted that, given the fact that the legislature has clearly expressed its intent that capital juries are not to be instructed on parole, "we are not free to substitute our own judgment on this matter, absent clear direction from the United States Supreme Court that we must do so." *Id*. at 601.

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

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

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

7. In a pre-statute case, the court held that the trial court does not err in instructing the jury that the defendant will not be eligible for parole until 40 years, but that it cannot consider how long a defendant might have to serve any sentence imposed. This does not instruct the jury to ignore the 40 year eligibility, but only that it cannot speculate on how long a defendant sentenced to life will have to serve. Additionally, because this trial pre-dates the statute, the defendant is not entitled to an instruction on parole eligibility. *Johnson v. State*, 68 S.W. 3d 644, 656 (Tex. Crim. App. 2002). *See also Canales v. State*, 98 S.W. 3d 690, 696 (Tex. Crim. App. 2003)(appellant not entitled to parole instruction "under then existing law").

8. Defense counsel was not ineffective for failing to object to remarks by the prosecutor during voir dire, which, when viewed in their totality, simply told venirepersons not to consider when a life-sentenced defendant should be released on parole when he becomes eligible for parole. *Turner v. State*, 87 S.W. 3d 111, 117 (Tex. Crim. App. 2002).

9. Where the trial court instructed the jury on parole eligibility before the statute mandated such instruction, it did not err in further instructing the jury that it was not to consider how the law of parole applied to appellant. According to the court, this instruction simply told the jury not to consider how long a life-sentenced defendant would have to serve after becoming eligible for parole. Also, the instruction was not harmful. *Turner v. State*, 87 S.W. 3d 111, 117 (Tex. Crim. App. 2002).

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

1. Some members of the court have noted that minimum parole eligibility *might* be constitutionally mitigating, if the defense can demonstrate relevance towards the issue of future dangerousness. *Willingham v. State*, 897 S.W.2d 351, 360 (Tex. Crim. App. 1995)(Overstreet, J. concurring). Justice Clinton suggested that if the defendant presents evidence to show that "for the duration of his lengthy incarceration he will pose no threat to the prison population or that by the time he is eligible for parole he will not pose a threat to any facet of society," then information about minimum parole eligibility is "indisputably relevant" to the second issue, and therefore, admissible. *Id*. at 359; *but see Broxton v. State*, 909 S.W. 2d 912, 919 (Tex. Crim. App. 1995)(reasons for rejecting parole information apply equally well to the exclusion of parole testimony). In *Eldridge v. State*, 940 S.W. 2d 646, 651 (Tex. Crim. App. 1996), the court referred to *Willingham* as stating the "most charitable view" under which parole information would only be required if there was some evidence, in combination with parole eligibility, which showed a lack of future dangerousness. There being no such evidence in *Eldridge*, there was no need for an instruction on parole. In *Shannon v. State*, 942 S.W. 2d 591, 594 (Tex. Crim. App. 1996), the court described its treatment of *Simmons* in *Smith* as "comprehensive." The court noted that it had distinguished *Simmons* on the grounds that paroleis traditionally not a matter for jury discussion in Texas, and because *Simmons* had not been extended to parole eligible defendants. *Id*. at 594. The court also noted that appellant in *Shannon* gave the court no "distinguishing evidence in the record" such as evidence of his ability to live peaceably in prison, or expert testimony relating to a probable decline in his propensity for violence. *Id*.

2. The court of criminal appeals expressly did not decide in *King v. State*, 631 S.W. 2d 486, 490 n.8 (Tex. Crim. App. 1982), whether capital juries would be aided

by *evidence* concerning the operation of parole in Texas. In *Jones v. State*, 843 S.W.2d 487, 495 (Tex. Crim. App. 1992), the court expressly rejected appellant's contention that he was entitled to present expert testimony regarding parole. *Accord Stoker v. State*, 788 S.W.2d 1, 16 (Tex. Crim. App. 1989), *cert. denied*, 111 S.Ct. 371 (1990).

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

G. A Parole Instruction Is "Permissible"

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

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

H. The Texas Constitution

1. In *Morris v. State*, 940 S.W. 2d 610, 613 (Tex. Crim. App. 1996), appellant argued that he was entitled under the Texas Constitution to ask proper questions of the venire concerning parole. The court held that parole ineligibility is not an issue applicable to the case, and is not therefore a proper question. "The Texas Constitution thus does not give an accused the right to ask prospective jurors in a capital murder trial questions regarding parole ineligibility." *Id*. *See Rhoades v. State*, 934 S.W. 2d 113, 119 (Tex. Crim. App. 1996); *Green v. State*, 934 S.W. 2d 92, 106 (Tex. Crim. App. 1996); *McFarland v. State*, 928 S.W. 2d 482, 505 (Tex. Crim. App. 1996); *see also Williams v. State*, 937 S.W. 2d 479, 489 n.9 (Tex. Crim. App. 1996)(overruling appellant's contention under the state constitution because he did "not explain how the protection offered by the state constitution differs from that of the federal constitution").

I. Opening The Door

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

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

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

J. Miscellaneous Issues Relating To Parole

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

appeal when determining the sufficiency of the evidence to support the issue. *Id*. at 480.

2. In *Jones v. State*, 843 S.W. 2d 487 (Tex. Crim. App. 1992), appellant argued that he was entitled to voir dire the jury on the law of parole applicable to the lesser included offense of murder. The court did not reach this question. "Because the jury found appellant guilty of capital murder and no charge was given on parole law, any error was harmless." *Id*. at 498. *But see Sells v. State*, 121 S.W. 3d 748, 756 (Tex. Crim. App. 2003)(the court assumed, but did not decide, that proper questions concerning parole might be permissible, now that a jury instruction on parole is authorized by statute).

3. Section 508.046 of the Texas Government Code says that one convicted of a capital felony may not be released on parole unless all members of the parole board vote, and at least 2/3 of those voting vote for parole, and that all those voting have received a written report on the probability of that person committing an offense if released. In *Hankins v. State*, 132 S.W. 3d 380 (Tex. Crim. App. 2004), the court held that appellant was not entitled to inform the jury of this law. "[P]recedent maintaining that parole is not a proper issue for jury consideration remains in effect except to the extent explicitly provided for in Article 37.071 § 2(e)(2)(B)." *Id*. at 385. Nor is appellant entitled to a jury instruction on this. *Id*. at 386-87; *accord Scheanette v. State*, 144 S.W. 3d 503, 509 (Tex. Crim. App. 2004).

4. It is not error for the trial court to instruct the jury not to consider or discuss any possible action by the Board of Pardons or Paroles. *Ramirez v. State*, 815 S.W.2d 636, 653 (Tex. Crim. App. 1991).

5. Rule 606(b) says that a juror may not impeach the verdict or deliberations of the jury. Judge Johnson believes that "[t]he inability to challenge jury misconduct is a violation of applicant's right to due process and a fair trial." *Ex parte Green*, 159 S.W. 3d 925, 926 (Tex. Crim. App. 2004)(Johnson, J., dissenting).

XXVII. MISCELLANEOUS ISSUES RELATING TO THE PUNISHMENT PHASE

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

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

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

Id. at 341.

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

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

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

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

6. *Caldwell* error can be cured by an instruction to disregard from the trial court. *Jones v. Butler*, 864 F. 2d

348, 360 (5th Cir. 1988); *Bell v. Lynaugh*, 828 F. 2d 1085, 1095 (5th Cir. 1987).

7. Sitting *en banc*, the Fifth Circuit has distilled the following standard: "We conclude that the inquiry is whether under all facts and circumstances, including the entire trial record, the state has misled the jury regarding its role under state law to believe that the responsibility for determining the appropriateness of defendant's death rests elsewhere." *Sawyer v. Butler*, 881 F.2d 1273-286 (5th Cir. 1989), *aff'd*, *sub. nom. Sawyer v. Smith*, 497 U.S. 227 (1990).

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

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

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

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

B. Waiver Of Error By The Testifying Defendant

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

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

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

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

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

c. In *Munoz v. State*, 853 S.W. 2d 558, 560 (Tex. Crim. App. 1993), the court refused to consider punishment phase evidence to determine whether the evidence was sufficient to sustain a verdict of guilt. "In order to determine the sufficiency of the evidence to support a conviction, an appellate court is only authorized to view the punishment phase of the trial to determine whether a defendant has, by admitting elements of the offense, waived his right to complain of error during the guilt-innocence phase. Absent a judicial confession by the defendant, evidence from the punishment phase of a trial will

> not be considered in determining the sufficiency of the evidence to support a conviction. Because appellant did not testify during the punishment phase, *DeGarmo* is not controlling." *Id.*

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

C. The Anti-Sympathy Charge

1. In *Wheatfall v. State*, 882 S.W. 2d 829 (Tex. Crim. App. 1994), the court instructed the jury "not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling in considering all the evidence before you and in answering the special issues." *Id*. at 841. Appellant's complaint that this violated *Penry* was rejected. The court of criminal appeals held that the court's instruction was sufficient to meet *Penry*'s commands concerning mitigating evidence. "Where a jury charge is sufficient to meet the commands of *Penry*, it does not violate the Eighth or Fourteenth Amendments of the United States Constitution to instruct the jury 'not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling in considering' the evidence and answering the special issues." *Id*. at 842; *accord Fuentes v. State*, 991 S.W. 2d 267, 277 (Tex. Crim. App. 1999); *Green v. State*, 912 S.W. 2d 189,195 (Tex. Crim. App. 1995); *see Prible v. State*, 175 S.W. 3d 724, 737 (Tex. Crim. App. 2005); *Jackson v. State*, 992 S.W. 2d 469, 481 (Tex. Crim. App. 1999); *Penry v. State*, 903 S.W. 2d 715, 766 (Tex. Crim. App. 1995); *See also California v. Brown*, 479 U.S. 538, 543 (1987)("An instruction prohibiting juries from basing their sentencing decisions on factors not presented at the trial, and irrelevant to the issues at the trial, does not violate the United States Constitution").

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

3. The anti-sympathy charge does not "unconstitutionally contradict mitigation instructions" and is appropriate because it "properly focus[es] the jury's attention on those factors relating to the moral culpability of the defendant." *Tong v. State*, 25 S.W. 3d 707, 711 (Tex. Crim. App. 2000).

D. Callins v. Collins

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

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

2. The court of criminal appeals refused to adopt Justice Blackmun's dissenting opinion, preferring instead "the more authoritative holdings of *Gregg*, . . . *Jurek*, . . . and . . . *Tuilaepa*. . . ." *Lawton v. State*, 913 S.W. 2d 542, 558 (Tex. Crim. App. 1995); *accord Escamilla v. State*, 143 S.W. 3d 814, 828 (Tex. Crim. App. 2004); *Rayford v. State*, 125 S.W. 3d 521, 532 (Tex. Crim. App. 2003); *Murphy v. State*, 112 S.W. 3d 592, 607 (Tex. Crim. App. 2003); *Ladd v. State*, 3 S.W. 3d 547, 575 (Tex. Crim. App. 1999); *Raby v. State*, 970 S.W. 2d 1, 7 (Tex. Crim. App. 1998); *Moore v. State*, 935 S.W. 2d 124, 128 (Tex. Crim. App. 1996); *see also Turner v. State*, 87 S.W. 3d 111, 118 (Tex. Crim. App. 2002); *Cannady v. State*, 11 S.W. 3d 205, 214 (Tex. Crim. App.

2000); *Chamberlain v. State*, 998 S.W. 2d 230, 284 (Tex. Crim. App. 1999)*; Jones v. State*, 944 S.W. 2d 642, 656 (Tex. Crim. App. 1996)*; Matchett v. State*, 941 S.W. 2d 922, 938 (Tex. Crim. App. 1996)*; Williams v. State*, 937 S.W. 2d 479, 492 (Tex. Crim. App. 1996); *Bell v. State*, 938 S.W. 2d 35, 54 (Tex. Crim. App. 1996); *Janecka v. State*, 937 S.W. 2d 456, 475 (Tex. Crim. App. 1996).

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

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

E. The Accomplice Witness Rule Is Inapplicable At Punishment

1. In *Jones v. State*, 982 S.W. 2d 386 (Tex. Crim. App. 1998), appellant complained that the trial court erred in not giving a limiting instruction concerning accomplice testimony *at the punishment phase*. The court of criminal appeals disagreed. "The accomplice witness rule embodied in Article 38.14 does not apply to testimony offered to prove extraneous offenses at the punishment stage of a capital murder trial." *Id*. at 395.

F. The Corpus Delicti Doctrine Is Inapplicable To Extraneous Offenses At Punishment

1. In *Bible v. State*, 162 S.W. 3d 234, 247 (Tex. Crim. App. 2005), the court held that the corpus delicti doctrine is inapplicable to extraneous offenses offered at the punishment phase of the trial.

G. Execution Protocol

1. In *Ex parte Hopkins*, 160 S.W. 3d 9 (Tex. Crim. App. 2004)(Price, J., dissenting), one member of the court dissented from an order denying a stay of execution. Judge Price would have stayed applicant's execution pending a determination by the court "that the current method of administering the death penalty in Texas meets all the constitutional requirements." *Id*. at 9. Judge Price noted that the Texas legislature has recently banned the use of pancuronium bromide in the euthanization of animals. If this chemical is too cruel to use on animals, is it not also inhumane for executing people? *Id*. at 10.

2. In *Bible v. State*, 162 S.W. 3d 234, 250 (Tex. Crim. App. 2005), the court refused to rule on this complaint on direct appeal, due to the "absence of litigation during the trial."

3. The Supreme Court granted certiorari in *Hill v. Crosby*, 126 S.Ct. 1189 (2006), to consider these two questions:

> 1. Whether a complaint brought under 42 U.S.C. § 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the chemicals utilized for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. § 2254.
> 2. Whether, under this Court's decision in Nelson, a challenge to a particular protocol the State plans to use during the execution process constitutes a cognizable claim under 42 U.S.C.§1983.

4. In *Ex parte O'Brien*, 190 S.W. 3d 677 (Tex. Crim. App. 2006), applicant argued that two of the three chemicals the state uses to execute – pancuronium bromide and potassium chloride – are unnecessary and create a risk of excessive pain, in violation of the Eighth Amendment. The court initially granted a stay of execution, but then lifted it two days later. Judge Cochran, joined by three others, concurred, believing that *Hill* did not require as stay, because the issue in that case was a procedural one under the federal Civil Rights Act. Furthermore, a stay is not required under *Hill* unless the movant could show both a *prima facie* case that execution under the protocol would cause torture, a lingering death, or the wanton infliction of pain, and that he did not unnecessarily delay in bringing his case. Here, movant failed to make a *prima facie* case. Judge Price dissented, joined by Judge Holcomb, and would have found no need for movant to make a *prima facie* case. These dissenters believed it unclear that execution Texas-style did not violate the Eighth Amendment, and favored giving movant "an evidentiary forum to substantiate his claim." Judge Johnson also dissented,

believing that the court should use this case to decide whether article 11.071 is the proper vehicle to challenge execution protocols, and, if not, what is?

5. A claim that the method of execution violates the Eighth Amendment is not ripe for consideration on direct appeal, because execution is not then "imminent." *Doyle v. State*, 2006 WL 1235088 *4 (Tex. Crim. App. 2006)(not designated for publication). "[T]he method in which the lethal injection is currently administered is not determinative of the way it will be administered at the moment of appellant's execution." *Id*.

6. "We must consider whether a claim that the execution chemical protocol may violate the constitutional rights of the condemned is cognizable in a writ of habeas corpus. Before making the decision in this case, we invite, applicant, the State, and the Texas Department of Criminal Justice to present their positions on the following question: Is a claim that the lethal-injection protocol violates the Eighth Amendment cognizable under Article 11.071 of the Texas Code of Criminal Procedure?" *Ex parte Alba*, 2006 WL 2706784 (Tex. Crim. App. 2006)(not designated for publication).

7. In *Baze v. Kentucky*, No. 07-5439, the United States Supreme Court granted certiorari to consider the following questions:

1. Does the Eighth Amendment to the United States Constitution prohibit means for carrying out a method of execution that create an unnecessary risk of pain and suffering as opposed to only a substantial risk of the wanton infliction of pain?

2. Do the means for carrying out an execution cause an unnecessary risk of pain and suffering in violation of the Eighth Amendment upon a showing that readily available alternatives that pose less risk of pain and suffering could be used?

3. Does the continued use of sodium thiopental, pancuronium bromide, and potassium chloride, individually or together, violate the cruel and unusual punishment clause of the Eighth Amendment because lethal injections can be carried out by using other chemicals that pose less risk of pain and suffering?

8. The court of criminal ordered the state to "address the question of whether the current method of administering lethal injection in Texas constitutes cruel and unusual punishment . . . ." *In re Chi*, 2007 WL 2852629 (Tex. Crim. App. 2007)(not designated for publication).

H. The Failure To Allege The Special Issues In The Indictment

1. The *Apprendi* case does not require that the special issues be alleged in the indictment. *Rayford v. State*, 125 S.W. 3d 521, 533 (Tex. Crim. App. 2003); *accord Roberts v. State*, 220 S.W. 3d 521, 535 (Tex. Crim. App. 2007)*; Russeau v. State*, 171 S.W. 3d 871, 885 (Tex. Crim. App. 2005); *Threadgill v. State*, 146 S.W. 3d 654, 672 (Tex. Crim. App. 2004).

2. "Since the Supreme Court decided *Apprendi* and its progeny, state courts have struggled with whether sentencing factors, including the special punishment issues, should be considered full-blown elements of an offense, requiring inclusion in an indictment. Most courts, including this one, have held that the Apprendi sentencing factors are not elements of offenses for purposes other than the Sixth Amendment jury-trial guarantee. We have specifically rejected the argument that *Apprendi* requires the State to allege the special issues in the indictment." *Joubert v. State*, 235 S.W. 3d 729, 732 (Tex. Crim. App. 2007).

3. The state constitutional right to indictment by grand jury does not require that the indictment allege the special punishment issues. *Joubert v. State*, 235 S.W. 3d 729, 733 (Tex. Crim. App. 2007); *Thompson v. State*, 2007 WL 3208755 (Tex. Crim. App. 2007)(not designated for publication).

4. In *Boyce v. State*, 2005 WL 1629807 *1 (Tex. App.–San Antonio 2005, pet. ref'd)(Stone, J., concurring)(not designated for publication), appellant argued, pursuant to *Blakely v. Washington*, 124 S. Ct. 2531 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that an indictment for capital murder must plead the aggravating factors that make him eligible for the death penalty. The Court disagreed and affirmed his conviction. Justice Stone concurred. Although she agreed that the Court of Criminal Appeals has ruled against appellant on this issue, she noted that "the issue remains one of uncertainty," in light of language in *Blakely* that requires a charging instrument to plead "every fact which is legally essential to the punishment."

I. *Bush v. Gore*

1. In *Threadgill v. State*, 146 S.W. 3d 654, 672 (Tex. Crim. App. 2004), the court rejected appellant's complaint, under *Bush v. Gore*, that the Texas death penalty scheme violates the Equal Protection Clause

because decision making varies widely from county to county. *Accord Roberts v. State*, 220 S.W. 3d 521, 535 (Tex. Crim. App. 2007).

J. Miscellaneous Miscellany

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

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

3. In *Janecka v. State*, 937 S.W. 2d 456, 476 (Tex. Crim. App. 1996), appellant asserted that it would be cruel and unusual to execute him after 15 years of confinement, spent under "relentless and severe psychological stress, anxiety, and depression." The court of criminal appeals held that there was no evidence in the record to support this contention. The court also noted that case law in other jurisdictions was against appellant. *Accord Smith v. State*, 74 S.W. 3d 868, 876 (Tex. Crim. App. 2002)("approximate thirteen years the appellant has spent challenging his conviction and sentence is not a fortiori unconstitutionally cruel and unusual"); *Bell v. State*, 938 S.W. 2d 35, 53 (Tex. Crim. App. 1996)(declining "to hold that, because of appellant's years spent awaiting his execution, his execution would violate the Eighth Amendment's ban against cruel and unusual punishment").

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

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

6. "The death penalty does not violate the Eighth Amendment." *Canales v. State*, 98 S.W. 3d 690, 700 (Tex. Crim. App. 2003); *accord Threadgill v. State*, 146 S.W. 3d 654, 672 (Tex. Crim. App. 2004).

7. The court rejected appellant's complaint that the death sentence was arbitrarily applied because larger counties with large budgets are able to seek the death penalty more frequently than poorer counties. "Appellant has made no threshold showing of disparate treatment between himself and other similarly situated defendants." *Allen v. State*, 108 S.W. 3d 281, 286-87 (Tex. Crim. App. 2003). In *Crutsinger v. State*, 206 S.W. 3d 607, 612-13 (Tex. Crim. App. 2006), the court made it clear that the threshhold showing was not the real problem with this sort of claim. The prosecutor has discretion to seek the death penalty, and the amount of resources, if a factor at all, is only one of numerous factors that may bear upon that discretion. "The exercise of prosecutorial discretion in an individual case necessarily employs the consideration of various factors including but not limited to: the facts of the case itself, the heinousness of the crime, whether the victim was defenseless, the location of the crime, the callousness of the execution, the particular defendant's history, and the level of the defendant's participation in the offense. We have held that prosecutorial discretion does not violate the Eighth and Fourteenth Amendments. [citations omitted] Given the broad discretion that a prosecutor possesses when deciding whether to pursue the death penalty, appellant cannot show that the trial court abused its discretion in failing to quash the indictment and declare the death penalty unconstitutional." *Id*. at 5.

8. "While execution of an innocent person would violate due process, the risk that another person who may be innocent will be executed does not violate appellant's due process rights. Appellant does not claim that he is innocent, and therefore fails to demonstrate that *his* rights under the Due Process Clause have been violated by application of our death-penalty statute." *Paredes v. State*, 129 S.W. 3d 530, 540 (Tex. Crim. App. 2004); *accord Scheanette v. State*, 144 S.W. 3d 503, 506 (Tex. Crim. App. 2004).

9. In *Hankins v. State*, 132 S.W. 3d 380, 388 (Tex. Crim. App. 2004), appellant was denied the right to question five district attorneys concerning his contention that our system was unconstitutional because there was no consistent statewide method for determining when the death penalty was sought. The court upheld this procedure, finding that appellant was not entitled to subpoena prosecutors and question their exercise of discretion. *Id*; *see also Russeau v. State*, 171 S.W. 3d 871, 886-87 (Tex. Crim. App. 2005).

10. Appellant was not entitled to question district attorneys and county judges regarding the exercise of prosecutorial discretion previously held to be constitutional. *Russeau v. State*, 171 S.W. 3d 871, 886-87 (Tex. Crim. App. 2005).

11. That there have been several different death penalty schemes in Texas does not violate either the Eighth Amendments or equal protection. *Threadgill v. State*, 146 S.W. 3d 654, 672 (Tex. Crim. App. 2004).

12. The trial court is not required to instruct the jury that each juror has the power to prevent assessment of the death penalty by blocking a unanimous verdict for the state. *Perry v. State*, 158 S.W. 3d 458, 449 (Tex. Crim. App. 2004).

13. Judge Price would stay the execution of an applicant who complained of problems with the Houston Crime Lab for the first time in a subsequent writ of habeas corpus that was filed after those problems came to light late in 2002. *Ex parte Green*, 159 S.W. 3d 925, 926 (Tex. Crim. App. 2004)(Price, J., dissenting).

14. Appellant's death sentence does not violate the United Nations Convention Against Torture, Articles 6 and 14 of the International Covenant on Civil and Political Rights, and the Supremacy Clause. "Although these treaties prohibit 'torture or cruel, inhuman, or degrading punishment,' the Senate filed reservations to both treaties stating that this language did not prohibit the Unites States from imposing capital punishment consistent with the Constitution." *Sorto v. State*, 173 S.W. 3d 469, 490 (Tex. Crim. App. 2005).

15. Appellant was not entitled to an instruction allowing the jury to consider "residual doubt" as a mitigating circumstance. Moreover, appellant was permitted to argue residual doubt to the jury. *Irvan v. State*, 2006 WL 1545484 (Tex. Crim. App. 2006)(not designated for publication); *accord Gallo v. State*, 2007 WL 2781276 *19 (Tex. Crim. App. 2007).

16. Due process is not violated, and the jury is not precluded from meaningfully considering mitigating evidence when it is required to answer the future dangerousness question before the mitigation question. *Renteria v. State*, 206 S.W. 3d 689, 707 (Tex. Crim. App. 2006).

17. Appellant's first death sentence was reversed and remanded for a new punishment trial. By not objecting at trial, appellant procedurally defaulted his claim that his state and federal constitutional rights to trial by jury included the right, on remand, to have the same jury determine his guilt as well as punishment. *Thompson v. State*, 2007 WL 3208755 (Tex. Crim. App. 2007)(not designated for publication).

18. Appellant has no right to give the final closing argument concerning the mitigation special issue. *Gallo v. State*, 2007 WL 2781276 *19 (Tex. Crim. App. 2007).

19. The trial court does not err by refusing to allow defendant to address the victim's family prior to sentencing, or to otherwise present mitigating evidence, free from cross-examination by the state. *Garza v. State*, 2008 WL 5049910 *12 (Tex. Crim. App. 2008)(not designated for publication).

20. "Appellant has not shown that the requested instruction-that each juror individually was to determine what a reasonable doubt meant to him or her-would have diminished the risk that the sentence would be imposed arbitrarily and capriciously and without clear and objective standards that would make the process rationally reviewable." *Garza v. State*, 2008 WL 5049910 *14 (Tex. Crim. App. 2008)(not designated for publication)

XXVIII. EXECUTION OF THE MENTALLY INFIRM

A. *Ford v. Wainwright*: Execution Of The Insane Is Prohibited

1. In *Ford v. Wainwright*, 477 U.S. 399 (1986), the Supreme Court recognized that the Eighth Amendment categorically forbids the execution of the insane. *Id*. at 410. The Court went on to condemn the procedure used in Florida to determine the condemned prisoner's sanity prior to his pending execution, finding at least three flaws. First, the procedure did not permit the prisoner to present material relevant to his sanity. Second, the prisoner had no opportunity to challenge or impeach the opinions of the state-appointed psychiatrists. Third, the ultimate decision was in the hands of the governor who, as "commander of the State's corps of prosecutors cannot be said to have the neutrality that is necessary for reliability in the factfinding proceeding." *Id*. at 415-416. In light of the inadequacy of the Florida state procedures, the Court found that the defendant was entitled to a *de novo* evidentiary hearing in federal court "on the question of his competence to be executed." *Id*. at 418. The Court left it to the states to develop "appropriate ways to enforce the constitutional restriction its execution of sentences." *Id*. at 416-417.

B. Texas Procedures After Ford

1. *Ex parte Jordan*, 758 S.W. 2d 250, 252 (Tex. Crim. App. 1988), noted "the alarming lack of any Texas statute specifying the procedures to be followed in raising and determining a defendant's execution competency and in the treatment and periodic reassessment of competency following an incompetency finding."

> Presently, and especially in light of *Ford*, there is a grave need for the re-enactment of a more specific and directive version of the old statute. We find five procedural issues presented for immediate legislative resolve: (1) how possible incompetency is to be brought to the court's attention; (2) what fact-finding procedures are necessary to determine incompetency; (3) what is the proper legal test of incompetency for execution; (4) upon a finding of incompetency, what treatment is necessitated and where such treatment is to take place; and (5) how and upon what intervals is the possibility of re-gained competency to be brought to the court's attention. We leave the task of constructing an appropriate statute to the Legislature and invite them to do so at the earliest opportunity.

Id. at 253.

2. In *Jordan* the trial court fashioned, without the aid of statutory guidelines, procedures to be followed. Once it became aware of Jordan's incompetency, the court appointed an independent psychologist to examine him. Thereafter, Jordan was afforded a full adversarial hearing, with counsel and an opportunity to be heard, to present evidence, and to cross-examine witnesses. The district judge made the ruling on competency, deciding whether Jordan was capable of comprehending the nature, pendency and purpose of his execution. Following the determination that Jordan was presently incompetent, the court ordered re-evaluations every 90 days. The court of criminal appeals found that these procedures comport with the constitutional requirements established in *Ford*. *Id*. at 254.

3. Jordan requested a transfer to Rusk State Hospital for treatment. The court of criminal appeals noted that, although his treatment at Rusk would be "more intensive and thus preferable," Texas law specifically prohibits such transfer of persons under a death sentence. The court seemed alarmed by the idea that treatment was necessary to restore Jordan to the status of competent to be executed, yet efficacious treatment was excluded by statute. In lieu of such efficacious treatment at Rusk, the court recommended available in-house psychiatric treatment "with the purpose of such treatment being that he regain competency." *Id*. at 254-55. The opinion ends with another invitation for legislative action. *Id*. at 255.

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

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

Id. at 513(emphasis in original).

5. Article 46.05 of the code of criminal procedure governs the competency to be executed.

6. This statute (which was formerly styled article 46.04) does not provide for the appointment of counsel to prepare a motion to determine competency. "Although a trial court could appoint counsel in any given case, the trial court does not abuse its discretion by failing to do so in this context." *Ex parte Caldwell*, 58 S.W. 3d 127, 130 (Tex. Crim. App. 2000). The court of criminal appeals does not have the authority to order the

trial court to conduct a hearing, or to grant counsel funds to enable him to hire an expert to prepare for the hearing. "Under the statute, this Court has authority only to review the trial court's finding that a defendant is incompetent. That occurs after the trial court makes a finding under article 46.04(k)." *Id*. "Article 46.04 provides that jurisdiction of the motion remains in the trial court and permits the Court of Criminal Appeals to review only a finding of incompetence. Under the statute, we have no other role in the process." *Id*. *See Ex parte Panetti*, 2004 WL 231461 (Tex. Crim. App. 2004)(not designated for publication)(Court of criminal appeals has no jurisdiction to review trial court's finding that appellant is competent to be executed).

7. Appellant's execution date was set aside by the trial court based on a finding that he was incompetent to be executed. No date was rescheduled, but the trial court ordered appellant to take his anti-psychotic medication because he posed a danger to himself, and taking the drugs would be in his best medical interest. Appellant appealed from this decision, arguing that it is unconstitutional for the state to compel him to take medication to restore his competency so it can execute him. The court of criminal appeals dismissed the appeal, finding no "constitutional or statutory provision or any rule that would authorize this appeal from the trial court's interlocutory order." *Staley v. State*, 233 S.W. 3d 337, 338 (Tex. Crim. App. 2007).

C. Execution Of The Retarded Is Prohibited

1. *Ford* was concerned with execution of the insane. In *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Court held that the Eighth Amendment does not categorically prohibit execution of the mentally retarded. Rather, retardation is a factor that may be considered by the jury in determining defendant's culpability. "So long as sentencers can consider and give effect to mitigating evidence of mental retardation in imposing sentence, an individualized determination of whether 'death is the appropriate punishment' can be made in each particular case." *Id*. at 340; *see Penry v. State*, 903 S.W. 2d 715, 766 (Tex. Crim. App. 1995)(it is not cruel and unusual punishment to execute one who is mentally retarded and who was brain damaged and who had been abused as a child); *Goodman v. State*, 701 S.W. 2d 850, 867 (Tex. Crim. App. 1985)(it is not cruel and unusual punishment to execute a mildly mentally retarded person); *accord Ramirez v. State*, 815 S.W.2d 636, 655 (Tex. Crim. App. 1991).

2. The majority did not rule out the possibility that execution of the mentally retarded may someday be deemed absolutely barred by the Eighth Amendment. "While a national consensus against execution of the mentally retarded may someday emerge reflecting the 'evolving standards of decency that mark the progress of a maturing society,' there is insufficient evidence of such a consensus today." *Penry v. Lynaugh*, 492 U.S. at 340; *but see Bell v. State*, 938 S.W. 2d 35, 55 (Tex. Crim. App. 1996)(rejecting appellant's argument that the fact that 10 states have banned the execution of the retarded requires a similar ban in Texs); *see also Hall v. State*, 67 S.W. 3d 860, 878 (Tex. Crim. App. 2002).

3. In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court held that "death is not a suitable punishment for a mentally retarded criminal."

> We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty. Construing and applying the Eighth Amendment in the light of our "evolving standards of decency," we therefore conclude that such punishment is excessive and that the Constitution "places a substantive restriction on the State's power to take the life" of a mentally retarded offender.

Id. at 321; *see Hall v. Texas*, 123 S. Ct. 70 (2002); *Tennard v. Cockrell*, 123 S. Ct. 70 (2002); *Bell v. Cockrell*, 122 S. Ct. 2654 (2002)(certiorari granted, judgment vacated, and case remanded to Fifth Circuit for further consideration in light of *Atkins*); *Modden v. Cockrell*, 122 S. Ct. 2654 (2002)(certiorari granted, judgment vacated, and case remanded to Texas Court of Criminal Appeals for further consideration in light of *Atkins*).

4. In *Ex parte Briseno*, 135 S.W. 3d 1 (Tex. Crim. App. 2004), applicant alleged in a subsequent writ of habeas corpus that he was mentally retarded and therefore exempt from execution. The trial court found against him, and the court of criminal appeals agreed. *Id*. at 3. Recognizing that the legislature has not set out procedures for dealing with executing the retarded, the court established several procedures.

> a. Until the legislature provides some guidance, the court will use the definitions provided by the American Association on Mental Retardation, and § 591.003(13) of the Texas Health and Safety Code. Under the AAMR, mental retardation is a disability characterized by "(1) 'significantly subaverage'

> general intellectual functioning; (2) accompanied by "related" limitations in adaptive functioning; (3) the onset of which occurs prior to the age of 18." Under § 591.003(13), mental retardation means "significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period." *Id*.. at 7. The court then set forth a number of factors that can be used in deciding whether the applicant meets the definition.

b. *Atkins* does not require a post-conviction jury determination of retardation. When an inmate sentenced to death files a cognizable *Atkins* claim, the trial judge of the convicting court will determine the factual merits of that claim and the court of criminal appeals will review that determination as it does others pursuant to article 11.071 § 11. *Id*. at 11.

c. The applicant bears the burden of proving his retardation by a preponderance of the evidence. *Id*. at 12. In *Gallo v. State*, 2007 WL 2781276 *10 (Tex. Crim. App. 2007), the court held that this is also the burden born at trial by the defense. *See also Hunter v. State*, 2007 WL 3276100 *2 (Tex. Crim. App. 2007).

5. In *Briseno*, the court held that applicant did not proved he was retarded. "In sum, we conclude that, while there is expert opinion testimony in this record that would support a finding of mental retardation, there is also ample evidence, including expert and lay opinion testimony, as well as written records, to support the trial court's finding that applicant failed to prove that he is mentally retarded. We defer to the trial court's credibility determinations, adopt the trial court's ultimate findings of fact, and, based on those findings and our independent review, we deny relief." *Id*. at 18.

6. Judge Holcomb dissented in *Briseno*, believing that "United States Supreme Court decisions and Texas legal tradition require a jury determination on the issue of mental retardation if the applicant is able to make a *prima facie* showing sufficient to raise the issue." *Id*. at 19(Holcomb, J., dissenting).

7. In *Gallo v. State*, 2007 WL 2781276 (Tex. Crim. App. 2007), the court noted that three legislative sessions have now passed and there is still no established statutory scheme or the presentation and determination of mental retardation in a capital murder trial. Accordingly, the court continues to use the "temporary judicial guidelines" that were formulated in *Briseno*. *Id*. at *9. *See also Hunter v. State*, 2007 WL 3276100 *1(Tex. Crim. App. 2007).

8. In *Gallo*, the court relied on *Briseno's* definition of retardation "as a disability characterized by" (1) 'significantly subaverage' general intellectual functioning; (2) accompanied by 'related' limitations in adaptive functioning; (3) the onset of which occurs prior to the age of 18." The *Gallo* court returned to *Briseno* for the following "evidentiary factors" that factfinders might also focus on: (a) "Did those who knew the person best during the developmental stage - his family, friends, teachers, employers, authorities - think he was mentally retarded at that time, and, if so, act in accordance with that determination?" (b) "Has the person formulated plans and carried them through or is his conduct impulsive?" (c) Does his conduct show leadership or does it show that he is led around by others?" (d) "Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?" (e) "Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?" (f) Can the person hide facts or lie effectively in his own or others' interests?" (g) Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?" *Gallo v. State*, at *9. The so-called *Briseno* factors were relied on in *Gallo* to "support" the jury's determination that appellant was not retarded, and to reject Gallo's claim on appeal that the evidence was factually insufficient on the question of retardation. *Id*. at 14. *See also Hunter v. State*, 2007 WL 3276100 (Tex. Crim. App. 2007).

9. The court of criminal appeals believes "it is important to note . . . that a jury determination of mental retardation is not required." *Gallo v. State*, at *10. Though not required, the judge submitted the issue to the punishment jury in *Gallo*, and the court of criminal appeals rejected appellant's objection to the following instruction given by the trial court:

> With respect to the second Special Issue, you are instructed that "mental retardation" means significantly sub-average general intellectual functioning that is concurrent with deficits in adaptivebehavior and originates during the developmental period, onset prior to the age of 18.

> "Adaptive behavior" means the effectiveness with or degree to which a person meets the standards of personal independence and social responsibility expected of the person's age and cultural group.
>
> "Sub-average general intellectual functioning" refers to measured intelligence on standardized psychometric instruments of two or more standard deviations below the age group mean for the tests used.
>
> * * *
>
> SPECIAL ISSUE NO. 2
>
> Do you find, taking into consideration all of the evidence, that the Defendant is a person with mental retardation?

10. The court rejected appellant's Eighth Amendment claim in *Howard v. State*, 153 S.W. 3d 382 (Tex. Crim. App. 2004). "Although experts for both the State and the defense testified that the appellant's intellectual functioning and adaptive behavior were impaired to some degree, the testimony was not sufficiently developed to establish that appellant was 'mentally retarded' under the guidelines we set in *Briseno*." *Id*. at 387.

11. The trial court found that applicant was retarded in *Ex parte Modden*, No. 74,715 (Tex. Crim. App. April 21, 2004)(not designated for publication), and the court of criminal appeals granted relief. The trial court used the criteria set out by the AAMR and the APA and its findings were supported by the record. This was not a case of "dueling experts" as all three experts who testified agreed applicant was retarded. Although there may be some evidence that applicant was not retarded, there was significant evidence that he was. Applicant's sentence was commuted to life imprisonment. *See Ex parte Valdez*, 158 S.W. 3d 438, 438 (Tex. Crim. App. 2004).

12. In *Ex parte Bell*, 152 S.W. 3d 103 (Tex. Crim. App. 2004), the trial court found that applicant was mentally retarded, and the court of criminal appeals found that "[t]he record supports the trial court's findings." His sentence was reformed to life imprisonment. Judge Keller, joined by Judges Meyers, Keasler, and Hervey, concurred and dissented, noting a suggestion by *amicus curiae* that a permanent stay of execution, not a reformation to a life sentence, is the appropriate remedy in this situation. These four judges were uncertain about the merits of the *amicus* position, but believed it should be addressed. *Id*. at 104.

13. The majority found the applicant met his burden of showing retardation in *Ex parte Van Alstyne*, 2007 WL 3375149 (Tex. Crim. App. 2007). Typically, where the record supports both a finding that the applicant has proven his retardation by a preponderance of the evidence, and a finding that he has not, the court of criminal appeals defers to the recommendation of the convicting court, "whatever that might be." Here, the trial court found that applicant was retarded, and the court of criminal appeals found no compelling reason to reject that recommendation.

14. In *Stevenson v. State*, 73 S.W. 3d 914, 917 (Tex. Crim. App. 2002), the court found no need to decide whether the constitution prevents the execution of the retarded, since the record did not prove that appellant was retarded. "A low IQ score by itself, however, does not support a finding of mental retardation." *Id*.

15. The court of criminal appeals dismissed appellant's subsequent petition for writ of habeas corpus in *Ex parte Williams*, 2003 WL 1787634 (Tex. Crim. App. 2003), without written opinion. The dissenting opinion, authored by Judge Price, and joined by Judges Johnson and Holcomb, argued that the petition should not have been dismissed because the original petition was filed before *Atkins*, a time when the legal basis for the subsequent petition was not available. *Ex parte Williams*, 2003 WL 1787634 (Tex. Crim. App. 2003)(Price, J., dissenting). The concurring opinion, by Judges Cochran and Meyers, agreed that a subsequent petition based on *Atkins* should be remanded to the trial court for further findings, but only when the petition set forth sufficient facts to raise a bona fide claim of mental retardation. *Ex parte Williams*, 2003 WL 1787634 (Tex. Crim. App. 2003)(Cochran, J., concurring).

16. Whether the issue is raised on direct appeal or on habeas corpus, the defendant bears the same burden — to prove retardation by a preponderance of the evidence. When reviewed on direct appeal, the evidence is viewed in the light most favorable to the prosecution. On habeas corpus, the court gives almost total deference to the findings of historical fact that are supported by the record. *Hall v. State*, 160 S.W. 3d 24 (Tex. Crim. App. 2004). Where there is significant evidence both that the appellant is retarded, and that he is not, and the trial court finds that he is not, the court of criminal appeals will defer to the trial court's conclusion that is supported by the record. *Id*. at 40.

17. *Atkins* does not require the state affirmatively to show that the defendant is not mentally retarded. *Escamilla v. State*, 143 S.W. 3d 814, 828 (Tex. Crim. App. 2004).

18. Judge Holcomb believes that, for cases still on direct appeal, the question of retardation must be decided by the jury. *Hall v. State*, 160 S.W. 3d 24, 46 (Tex. Crim. App. 2004(Holcomb, J., dissenting from denial of motion for rehearing).

19. Where the applicant is seeking federal habeas relief, a subsequent state writ based on *Atkins* will be dismissed without prejudice where the federal court has not stayed its proceedings. *Ex parte Goynes*, No. WR-52,487-02 (Tex. Crim. App. November 10, 2004)(not designated for publication); *accord Ex parte Tennard*, No. WR-24,622-02 (Tex. Crim. App. November 10, 2004)(not designated for publication).

20. In *Ex parte Rodriguez*, 164 S.W. 3d 400 (Tex. Crim. App. 2005), the trial court found that applicant failed to prove his retardation by a preponderance of the evidence and the court of criminal appeals agreed. *Id*. at 400. Judge Cochran, joined by Judge Price, concurred, but expressed further concern that, because the "adaptive behavior criteria are exceedingly subjective," the Supreme Court may be regressing to pre-*Furman* standards of determining eligibility for the death penalty. There may be no "clear-cut answer" to the question of who is retarded. "As school children we were taught that King Solomon weighed all of the evidence before him and made a reasoned decision; Nero divined merit on a whim and just pointed his thumb up or down. I fear that, under *Atkins* and the subjective legal definition of the 'adaptive deficits' prong of mental retardation, we are moving farther from King Solomon and closer to Nero. If there is evidence in the record to support the factfinder's conclusion, by a preponderance of the evidence, that a person does or does not suffer from significant 'deficits in adaptive behavior'-- whatever that may mean to the factfinder-that conclusion must be affirmed." *Id*. at 405-406.

21. In *Ex parte Hernandez*, No. WR-63,282-01 (Tex. Crim. App. 2006), the trial court recommended that an *Atkins* claim be denied without a live hearing. "In this case, we find that a live hearing is necessary because both applicant and the State rely heavily upon affidavits filed by experts and other persons who did not testify at trial and hence have not been subject to cross-examination. Thus, this cause is remanded to the trial court for a live hearing so that the parties can present evidence regarding the mental retardation issue."

22. In *Ex parte Blue*, 230 S.W. 3d 151 (Tex. Crim. App. 2007), petitioner filed his first writ of habeas corpus *after* the *Atkins* decision. He did not assert his retardation, though, until a subsequent writ. Even though retardation is an absolute bar to execution, an applicant like Blue will have to meet the requirements of article 11.071, § 5(a)(3). That is, he must show by clear and convincing evidence that no rational factfinder would fail to find him mentally retarded. *Id* at 163. Blue failed to meet that burden, and his subsequent application was dismissed.

23. The court of criminal appeals has adopted the definition of mental retardation found in the Persons With Mental Retardation Act. Although that same act requires that a diagnosis of retardation be made only by a licensed physician or psychologist for purposes of obtaining social services, such qualifications are not required of one who states an opinion in a criminal cases for purposes of determining whether punishment is cruel and unusual under the Eighth Amendment. *Ex parte Lewis*, 223 S.W. 3d 372, 378 (Tex. Crim. App. 2006)(Cochran, J., concurring).

24. *Atkins* protects the mentally retarded, not the mentally ill. *Sprouse v. State*, 2007 WL 283152 (Tex. Crim. App. 2007)(not designated for publication).

25. "In the absence of legislation or a constitutional requirement directing when the determination of mental retardation is to be made or by whom, the trial court committed no error in denying appellant a pretrial determination of mental retardation by a judge or jury separate from that determining guilt." *Hunter v. State*, 2007 WL 3276100 *6 (Tex. Crim. App. 2007).

26. The court of criminal appeals has granted applicant a stay of execution and ordered the trial court to conduct a hearing to consider the following: "(1) the scientific validity and reliability of the 'Flynn effect'; (2) whether clinical practitioners who are ordinarily called upon to diagnose mental retardation for purposes outside of the criminal justice system use and apply the 'Flynn effect' to I.Q. test results when making their particularized diagnoses of mental retardation; (3) whether the application of the 'Flynn effect' to individual test results is generally accepted scientific procedure in the pertinent professional community outside of the criminal justice system; and (4) the known or potential "error rate" of the 'Flynn effect' as it applies to a specific I.Q. test result." *Ex parte Cathey*, 2008 WL 4927446 (Tex. Crim. App. 2008) (not designated for publication).

D. Competency To File Writ of Habeas Corpus

1. The issue in *Ex parte Mines*, 26 S.W. 3d 910 (Tex. Crim. App. 2000), was whether a person sentenced to death must be competent to assist his counsel in filing a petition for writ of habeas corpus. The court found no such requirement in law. "In light of the absence of legislative action, the statutory context, and the differences in the nature of the rights and procedures at trial and in post-conviction proceedings, we find no justification in inferring a statutory requirement that the applicant be mentally competent for habeas corpus proceedings in the way that a defendant must be mentally competent for trial." *Id*. at 915.

E. Competency To Abandon Collateral Review

1. "[I]f the evidence before the district court raises a bona fide issue of petitioner's competency to waive collateral review of a capital conviction and death sentence, the court can afford such petitioner adequate due process by ordering and reviewing a current examination by a qualified medical or mental health expert, allowing the parties to present any other evidence relevant to the question of competency and, on the record and in open court, questioning the petitioner concerning the knowing and voluntary nature of his decision to waive further proceedings." *Mata v. Johnson*, 210 F. 3d 324, 331 (5th Cir. 2000).

XXIX. EXECUTION OF JUVENILES

A. *Roper v. Simmons*

1. "The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." *Roper v. Simmons*, 125 S. Ct. 1183, 1200 (2005). Justice Kennedy wrote the opinion for the Court, in which Justices Stevens, Souter, Ginsburg, and Breyer joined. Justices Stevens wrote a concurring opinion that was joined by Justice Ginsburg. Justices O'Connor, Rehnquist, Scalia, and Thomas dissented.

B. Texas Law

1. In *Salinas v. State*, 163 S.W. 3d 734 (Tex. Crim. App. 2005), the court noted the following evidence in the record that supported appellant's claim that he was under 18: his birthdate in his statement; the booking sheet, arrest report, arrest warrant, and trial court's docket sheet; and defense counsel's repeated references in his closing argument, to which the state did not object, to his 17 year old client. "In view of the State's implied concessions and the documents consistently reflecting appellant's birthdate, the record adequately reflects that appellant was younger than eighteen years of age at the time of the offense. Pursuant to the Supreme Court's mandate in *Simmons*, appellant's death sentence is hereby reformed to a sentence of life imprisonment." *Id*. at 743.

2. The court initially dismissed applicant's writ and the case was remanded by the Supreme Court after *Roper*. The court of criminal appeals granted relief, "because the legal basis of Applicant's claim was not available to him at the time he filed his previous applications." *Ex parte Barraza*, 2005 WL 1170499 (Tex. Crim. App. 2005)(not designated for publication).

3. After his conviction and death sentence were affirmed on direct appeal, but before the court of criminal appeals heard his 11.071 writ, the Governor commuted applicant's sentence to life imprisonment because he was under the age of 16 when he committed the crime. The trial court dismissed the writ for want of jurisdiction. The court of criminal appeals disagreed, finding that jurisdiction attached when applicant was sentenced to death, regardless of the subsequent decision to commute. The court went on to reject applicant's guilt-innocence claims. The court dismissed his punishment claims as moot. *Ex parte Jackson*, 187 S.W. 3d 416, 416-17 (Tex. Crim. App. 2005).

4. In *Young v. State*, 2005 WL 2374669 *5 (Tex. Crim. App. 2005)(not designated for publication), the court rejected appellant's contention that the Eighth Amendment prohibits the execution of persons under 22 at the time of the offense.

5. "In the punishment phase of a capital murder trial, the admission of prior offenses committed when the defendant was a juvenile does not violate the Eighth Amendment if he was assessed the death penalty for a charged offense that occurred when he was at least eighteen years old." *Matthews v. State*, 2006 WL 1752169 *7 (Tex. Crim. App. 2006)(not designated for publication).

XXX. JEOPARDY

A. Is There Death After Life?

1. In *Bullington v. Missouri*, 451 U.S. 430 (1981), the petitioner was assessed a life sentence at his first trial for capital murder. Thereafter, his conviction was reversed and he was scheduled to be tried again for capital murder. The state announced its intention to seek the death penalty at the subsequent trial but this action was barred by the trial court. Appeal was taken to the Supreme Court, which agreed with the trial court and the

petitioner. "Having received 'one fair opportunity to offer whatever proof it could assemble,' . . . the State is not entitled to another. * * * Because the sentencing proceeding at petitioner's first trial was like the trial on the question of guilt or innocence, the protection afforded by the Double Jeopardy Clause to one acquitted by a jury also is available to him, with respect to the death penalty, at his retrial." *Id*. at 446; *accord Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)(Court declines invitation to overrule *Bullington*); *see also Sanne v. State*, 609 S.W. 2d 762, 767 (Tex. Crim. App. 1980).

2. The defendant in *Ex parte Sorola*, 769 S.W. 2d 920 (Tex. Crim. App. 1989), had been tried for capital murder once before and sentenced to life imprisonment. On appeal his case was reversed because the trial court erred in discharging the jury and assessing a life sentence. Prior to his retrial, defendant claimed that double jeopardy barred the state from seeking the death penalty because the previous imposition of a life sentence, even though erroneous, was an implied finding of acquittal regarding the special issues. The court disagreed. There was no evidence that the trial court expressly or impliedly made favorable findings on the special issues when it gave defendant his first life sentence. *Id*. at 926-28.

3. In *Padgett v. State*, 717 S.W. 2d 55 (Tex. Crim. App. 1986), the defendant robbed and killed three persons in the same transaction. In 1983 he was tried and convicted of the capital murder of one of the victims, McClaflin. The jury answered the first and third issues affirmatively, but could not answer the second issue; accordingly, defendant was sentenced to life imprisonment. The state then attempted to try defendant for the capital murder of Thompson, one of the other victims, and defendant filed a pre-trial writ of habeas corpus, contending that the McClaflin jury's failure to answer the second issue constituted an express negative finding that collaterally estopped the state from relitigating the same issue in the Thompson trial. *Id*. at 56. The court of criminal appeals disagreed. Presuming, without deciding, that the doctrine of collateral estoppel applies to the punishment phases of different capital trial, the court went on to find that the McClaflin jury's inability to answer the second issue "was not an actual determination of that issue. Without such a determination, the State is not collaterally estopped from relitigating that issue by trying appellant for the capital murder of Shirley Thompson [and] seeking the death penalty in that cause." *Id*. at 58. The court expressly decided this issue on federal constitutional grounds. *Id*. at 56 n.2.

4. In *State ex rel. Curry v. Gray*, 726 S.W. 2d 125 (Tex. Crim. App. 1987), defendant Battie was separately indicted for the capital murders of Hester and Robinson during the robbery of Hester. The evidence showed that Hester and Robinson were killed seconds apart by separate bullets during the same robbery. Battie was first tried and sentenced to death for the capital murder of Hester. After this conviction, he entered a plea bargain with the state, and pled guilty to the murder of Robinson, in exchange for a sentence of 30 years imprisonment. Thereafter, his conviction for the capital murder of Hester was reversed in federal court. On remand, the state proposed to retry Battie for the capital murder of Hester, and again seek the death penalty. The defendant filed a plea of collateral estoppel, asserting that retrial for the capital murder of Hester was barred by the state's dismissal of the capital murder indictment and decision to prosecute for murder in the Robinson killing. The trial court agreed with the defendant and granted the motion for collateral estoppel. *Id*. at 125-26. The state filed a petition for writ of mandamus. On original submission, the court of criminal appeals reversed, holding that collateral estoppel did not apply because the subsequent dismissal of the Robinson capital murder indictment did not constitute the litigation of any ultimate issue of fact. *Id*. at 127. The court then granted a motion for rehearing, and, withdrew its original decision. Without addressing the merits of the defendant's collateral estoppel claim, the court held that the state had no right to the extraordinary remedy of mandamus. "The question is not whether [the trial court] made an incorrect decision regarding the motion. The question is did [the trial court] have the *authority* to rule in any way he believed proper. In the case before us, [the trial court] had the jurisdiction and the complete authority to consider and rule upon the motion presented by Battie regarding collateral estoppel, regardless of the propriety of the actual ruling made." *Id*. at 128-29.

5. That the defendant received a life sentence pursuant to a plea bargain in one county does not collaterally estop the state from obtaining the death penalty against him in another county for an unrelated capital murder. *Boggess v. State*, 855 S.W. 2d 656, 664 (Tex. Crim. App. 1989).

6. In *Ex parte Mathes*, 830 S.W.2d 596 (Tex. Crim. App. 1992), defendant had been separately indicted for killing two different persons in the course of a robbery. He was first tried for the murder/robbery of Davis, and he was sentenced to life imprisonment after the jury answered the second special issue "no." The state then sought to try him and to impose the death sentence for the second robbery/killing. The court held that this was forbidden by collateral estoppel. The first jury

"acquitted" defendant on an essential ultimate fact determinative of the death penalty, and this barred the state from relitigating this issue in another trial. *Id*. The court indicated that its holding might be different if additional facts on the question of future dangerousness *"have not occurred* or have not been discovered despite the exercise of due diligence." *Id*. at 599 n.4. Here, though, the state stipulated it would offer "exactly the same evidence" at the second trial. *Id*. at 597 n.2.

B. No Collateral Estoppel Without Final Judgment

1. In *Garcia v. State*, 768 S.W. 2d 726 (Tex. Crim. App. 1987), the defendant fired a single shotgun blast which killed officer Serna and did not hit officer Ayala. He was initially indicted and tried for the capital murder of Serna, but was convicted of the lesser included offense of voluntary manslaughter. He was then indicted for the attempted capital murder of Ayala. Prior to trial on the second indictment, he filed a writ of habeas corpus, contending that the first verdict for the lesser included offense collaterally estopped the state from proceeding in the second trial. According to the defendant, the first jury determined that he had acted out of sudden passion arising from an adequate cause, and that in light of this final decision, the issue could not be litigated again in a second trial for attempted capital murder. The court of appeals agreed, and ordered the second indictment dismissed. The court of criminal appeals disagreed, and reversed. The court noted that, prior to its decision, the defendant had appealed and reversed his first conviction for voluntary manslaughter, and that case had been remanded for a new trial. Accordingly, the first conviction did not constitute a final conviction. "A claim of collateral estoppel cannot flow from an invalid judgment of conviction which is not final." *Id*. at 729.

C. Multiple Trials Following Acquittal

1. In *Herrera v. State*, 754 S.W.2d 795 (Tex. App.--El Paso, 1988, no pet.), the defendant was indicted for deadly assault upon a peace officer. Later, the officer died and defendant was indicted for capital murder. The trial court gave the prosecutor the option of which indictment to try first, and he chose the deadly assault case. Defendant was acquitted, after which the state sought trial for capital murder. The trial court and the court of appeals held that the second trial was barred by double jeopardy and collateral estoppel. *Id*. at 795-97.

D. Sufficiency Review Of The First Trial

1. In *Thompson v. State*, 691 S.W. 2d 627 (Tex. Crim. App. 1984), defendant's first conviction for capital murder had been reversed for *Smith* error, after which he was retried, and again convicted and sentenced to death. In his second appeal, he contended that the evidence at his first trial had been insufficient, and that therefore, jeopardy barred both a conviction and an affirmative answer to the special issues at his second trial. The court pointed out that the defendant had not challenged the sufficiency of the special issue evidence in his first appeal and that the court had rejected his argument that the evidence of guilt was insufficient. The court also noted that defendant had not filed a plea of former jeopardy before the second trial, and had not included the record of his first trial. Nevertheless, the court addressed the jeopardy contention in the second trial, and rejected it on its merits. *Id*. at 632-33.

E. Retrial Following Acquittal Of Greater Offense

1. Appellant may be retried for the lesser included offense of murder after his conviction for capital murder was reversed for insufficiency of the evidence, since the jury was instructed on the lesser at the first trial. *Granger v. State*, 850 S.W. 2d 513, 520 (Tex. Crim. App. 1993); *State v. Rice*, 862 S.W. 2d 619, 621 (Tex. App. --Tyler 1993, pet. ref'd).

F. Bail

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

G. Mistrial Before Jury Sworn

1. In *Jones v. State*, 843 S.W. 2d 487 (Tex. Crim. App. 1992), after having been selected, juror Godfrey came forward and told the judge she could not answer the special issues. The state's challenge for cause was granted, and then, appellant's motion for mistrial was granted. Jeopardy did not bar the subsequent trial, because jeopardy does not attach until the jury is impaneled and sworn. "Because only eight of the jurors at appellant's first trial were selected before the mistrial was declared the jury was not impaneled." *Id*. at 494-95.

H. Unadjudicated Offenses At Punishment

1. The use of an unadjudicated extraneous offense as evidence in the punishment phase of a capital murder trial, where the death penalty was assessed, does not bar the subsequent prosecution of that offense under either the federal or state double jeopardy clauses. *Broxton v.*

State, 888 S.W. 2d 23, 25-28 (Tex. Crim. App. 1994); *accord McDuff v. State*, 939 S.W. 2d 607, 621 (Tex. Crim. App. 1997); *see Smith v. State*, 842 S.W. 2d 401, 404 (Tex. App. -- Fort Worth 1992, pet. ref'd).

I. Retrial Following Hung Jury

1. In *Ex parte Zavala*, 900 S.W. 2d 867 (Tex. App.--Corpus Christi 1995), appellant argued that she could not be retried for capital murder because her previous jury had acquitted her of capital murder, but had hung on the lesser included offense of murder. The court of appeals held that retrial was not barred. First, the record showed that at least two jurors never intended to unconditionally vote "not guilty." *Id*. at 870. Second, the court believed that the jury had not decided the issue submitted to it until it declared the accused guilty of one of the offenses or not guilty of them all. *Id*.

XXXI. DIRECT APPEAL

A. Who Has Jurisdiction

1. "The appeal of all cases in which the death penalty *has been assessed* shall be to the Court of Criminal Appeals." TEX. CONST. art.V, § 5(emphasis supplied); *see also* TEX. CODE CRIM. PROC. ANN. art. 4.04, §

2. The direct appeal only goes to the court of criminal appeals if the death penalty has actually been assessed. All other criminal cases are appealed to the courts of appeals. TEX. CODE CRIM. PROC. ANN. art. 4.03. Thus, capital cases where the state elects not to seek the death penalty are appealable to the courts of appeals.

a. Where the appellant in a capital case complains prior to trial that bail is excessive, or has been denied altogether, appeal is to the court of appeals. *Beck v. State*, 648 S.W.2d 7, 10 (Tex. Crim. App. 1983). Since the death penalty has not actually been assessed, the court of criminal appeals lacks jurisdiction. *See Primrose v. State*, 725 S.W.2d 254, 256 (Tex. Crim. App. 1987).

b. A pre-trial appeal based on double jeopardy is to the court of appeals. *See generally Ex parte Lane*, 806 S.W.2d 336, 337 (Tex. App.--Fort Worth 1991, no pet.).

c. In *Callins v. State*, 726 S.W. 2d 555 (Tex. Crim. App. 1986), appellant was simultaneously tried and convicted of one count of capital murder and two counts of aggravated robbery. Appellant appealed the aggravated robbery convictions to the court of appeals, which dismissed, holding that these should have been appealed to the court of criminal appeals, since they were tried with a capital murder case. The court of criminal appeals disagreed. The death penalty conviction was properly appealed to the court of criminal appeals. The aggravated robbery cases were properly appealed to the court of appeals, since the death penalty was not assessed in these cases. *Id*. at 558. *Accord McDuff v. State*, 943 S.W. 2d 517, 519 (Tex. App.--Austin 1997, pet. ref'd).

3. The appellant in *Chamberlain v. State*, 998 S.W. 2d 230 (Tex. Crim. App. 1999), had a novel idea, arguing that the appeal process in death penalty cases, which bypasses the courts of appeals, denied him due process and due course of law, because the court of criminal appeals is not compelled to review the factual sufficiency of the evidence supporting the special issues. The court rejected this argument. "It is not a lack of power or jurisdiction that prevents this Court from conducting a factual sufficiency review of the special issues. [citations omitted] It is the nature of the special issues, which are mixed questions of fact and moral responses to the evidence, which makes factual sufficiency reviews impossible." *Id*. at 234.

B. Appeal Is Automatic

1. "The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals." TEX. CODE CRIM. PROC. ANN. art. 37.071(h).

C. Even Handed, But Not Proportional

1. Unlike virtually every other capital punishment state, Texas does not conduct a proportionality review on appeal. *See Pulley v. Harris*, 465 U.S. 37, 51 (1984); *King v. State*, 953 S.W. 2d 266, 273 (Tex. Crim. App. 1997); *Pondexter v. State*, 942 S.W. 2d 577, 588 (Tex. Crim. App. 1996); *McKay v. State*, 707 S.W. 2d 23, 39 (Tex. Crim. App. 1985).

2. In *Hughes v. State*, 897 S.W. 2d 285, 294 (Tex. Crim. App. 1994), the court refused to decide whether a proportionality review is required *under the Texas Constitution*, because, even if such a review were employed, the mitigating evidence did not over-

whelmingly outweigh the state's evidence in support of the special issues.

3. The court of criminal appeals does recognize a duty, however, to assure "the evenhanded application of the ultimate punishment . . . ." *Vigneault v. State*, 600 S.W.2d 318, 330 (Tex. Crim. App. 1980). Accordingly, the court will review the record on its own motion for sufficiency of the evidence to support the special issues. *Id*. Again, however, this is a sufficiency, not a proportionality, review. Reversals for insufficient punishment evidence are exceedingly rare.

D. Relaxation of Procedural Rules

1. Do the courts grant any special treatment to appellants or their lawyers in death penalty appeals? Occasionally the United States Supreme Court has generously construed the Eighth Amendment, and then justified this construction by noting that death is different. *E.g*., *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985)("'the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination'"); *Coker v. Georgia*, 433 U.S. 584, 598 (1977)(death penalty "'unique in its severity and irrevocability'"). Certiorari was granted in *Kyles v. Whitley*, 514 U.S. 419 (1995), to examine a *Brady* claim, "[b]ecause '[o]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case . . . .'" *Id*. at 422.

2. The court of criminal appeals has also, on occasion, relaxed its usually strict procedural rules in death cases. *E.g*., *Hicks v. State*, 860 S.W. 2d 419, 422 (Tex. Crim. App. 1993)(hybrid representation); *Draughon v. State*, 831 S.W. 2d 331, 337 (Tex. Crim. App. 1992)(permitting both appellant and his attorney to file supplemental briefs); *Modden v. State*, 721 S.W.2d 859, 861 n.2 (Tex. Crim. App. 1986) (review of multifarious grounds of error and issues raised *pro se*); *Moore v. State*, 700 S.W.2d 193, 207 (Tex. Crim. App. 1985)(hybrid representation); *Lackey v. State*, 638 S.W.2d 439, 4471 (Tex. Crim. App. 1982); *see also Hernandez v. State*, 819 S.W.2d 806, 820 (Tex. Crim. App. 1991); *Boyd v. State*, 811 S.W.2d 105, 109 (Tex. Crim. App. 19991); *but see Patrick v. State*, 906 S.W. 2d 481, 498 (Tex. Crim. App. 1995); *Lockhart v. State*, 847 S.W. 2d 568, 569 n.1 (Tex. Crim. App. 1992); *Black v. State*, 816 S.W.2d 350, 356 n.11 (Tex. Crim. App. 1991); *Farris v. State*, 819 S.W.2d 490, 493 n.1 (Tex. Crim. App. 1990); *Rosales v. State*, 841 S.W.2d 368, 383 (Tex. Crim. App. 1992).

3. In *Cuevas v. State*, 742 S.W. 2d 331, 335 n.4 (Tex. Crim. App. 1987), the court warned that appellant risked rejection for multifariousness by complaining of 14 cause challenge denials in a single point of error. Calling it a "close question," the court nevertheless addressed the point of error.

4. The court has refused to review matters presented to it in a *pro se* brief, because appellant is not entitled to hybrid representation. *Turner v. State*, 805 S.W.2d 423, 425 n.1 (Tex. Crim. App. 1991); *accord Miniel v. State*, 831 S.W.2d 310, 313 n.1 (Tex. Crim. App. 1992).

5. "Given the nature of applicant's claim and the heightened need for due process standards to meet in death penalty cases, we hold that appellant's claim is cognizable via an application for writ of habeas corpus." *Ex parte McKay*, 819 S.W.2d 478, 485 (Tex. Crim. App. 1990).

6. The relaxation of standards of review, however, is largely illusory. *Harris v. State*, 784 S.W.2d 5 (Tex. Crim. App. 1989), is a good illustration. In one place in the opinion the court notes an arguable procedural default, but reviews the point of error anyway "given the severity of the penalty assessed." *Id*. at 21 n.21. The court rejected the point on its merits. In other places in the opinion the court makes no mention of its earlier relaxed standard of review, and rules against appellant purely on the basis of a procedural default. *See id*. at 24, 24 n.24, 26-27, 27 n.29. Could it be that court only relaxes when it is able to find from the merits that no reversible error was committed? Despite those isolated death-is-different cases, prudent counsel should not expect any special treatment from present-day appellate courts. In fact, a better rule to live by might be, "bad cases make bad law."

7. "[R]equiring appellants, even capital appellants, to abide by our published briefing rules and to make reasonable arguments in their own behalf does not offend traditional notions of fair play and substantial justice." *Ladd v. State*, 3 S.W. 3d 547, 575 (Tex. Crim. App. 1999).

E. Reformation

1. The court of criminal appeals shall reform a death sentence to life imprisonment if it finds the evidence insufficient to support an affirmative answer to an issue submitted under article 37.071 § 2(b), or article 37.0711 § 3(b), or a negative answer to an issue submitted under article 37.071 § 2(e), or article 37.0711, § 3(e). TEX. CODE CRIM. PROC. ANN. art. 44.251(a).

2. For reversible error occurring at the punishment phase, but *not* involving insufficiency of the punishment evidence, the court of criminal appeals shall reform the sentence of death to one of life imprisonment if: "within 30 days after the date on which the opinion is handed down, the date the court disposes of a timely request for rehearing, or the date that the United States Supreme Court disposes of a timely filed petition for writ of certiorari, whichever date is later, the prosecuting attorney files a motion requesting that the sentence be reformed to confinement for life." TEX. CODE CRIM. PROC. ANN. art. 44.251(b).

3. If the court of criminal appeals finds reversible error affecting only the punishment stage, which does not involve insufficiency of the punishment evidence, and the state does not file a motion for reformation of sentence in the 30 day time period described above, a new trial shall be granted as detailed in article 44.29(c) of the Texas Code of Criminal Procedure. TEX. CODE CRIM. PROC. ANN. art. 44.251(c).

4. Tex. Code Crim. Proc. Ann. art. 44.29(c) provides as follows:

> If any court sets aside or invalidates the sentence of a defendant convicted of an offense under Section 19.03, Penal Code, and sentenced to death on the basis of any error affecting punishment only, the court shall not set the conviction aside but rather shall commence a new punishment hearing under Article 37.071 or Article 37.0711 of this code, as appropriate, as if a finding of guilt had been returned. The court shall empanel a jury for the sentencing stage of the trial in the same manner as a jury is to be empaneled by the court in other trials before the court for offenses under Section 19.03, Penal Code. At the new punishment hearing, the court shall permit both the state and the defendant to introduce evidence as permitted by Article 37.071 or Article 37.0711 of this code.

5. Article 44.29(c) is applicable to offenses, regardless of whether they were committed before, on, or after its effective date. *Clark v. State*, 994 S.W. 2d 166, 168 (Tex. Crim. App. 1999).

6. 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).

7. Where habeas relief is granted due to the improper admission of a psychiatrist's testimony at the punishment phase of the trial, appellant is not entitled to a full retrial, but only to a new punishment hearing. *Purtell v. State*, 910 S.W. 2d 145, 146-47 (Tex. App.--Eastland 1995, pet. ref'd).

8. The court of criminal appeals does not have authority to reform the judgment of conviction to reflect a conviction for the lesser offense of murder based on insufficiency. *Urbano v. State*, 837 S.W. 2d 114, 117 (Tex. Crim. App. 1992); *cf. Bigley v. State*, 865 S.W. 2d 26, 27-28 (Tex. Crim. App. 1993)(the *intermediate* courts of appeals, however, do have such authority); *see Watkins v. State*, 880 S.W. 2d 16, 18 (Tex. App. -- Tyler 1993, no pet)(because the evidence was insufficient to prove remuneration, and therefore capital murder, the court reformed the judgment to reflect a conviction for murder, and remanded the case for a punishment determination only).

F. Life Sentence Moots Punishment Complaints

1. Where the punishment is assessed at life, any appellate complaints about the sentencing portion of the trial are moot. *E.g.*, *Phelps v. State*, 594 S.W.2d 434, 437 (Tex. Crim. App. 1980); *Marini v. State*, 593 S.W.2d 709, 716 (Tex. Crim. App. 1980); *White v. State*, 591 S.W.2d 851,858 (Tex. Crim. App. 1979).

G. Waiver

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

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

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

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

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

4. Error that occurs at punishment is *not* waived. Also, the court must carefully examine the elements of the offense to ensure that a judicial confession was, in fact, given. *McGlothlin v. State*, 896 S.W. 2d at 188.

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

H. Inaccurate Records

1. The court of criminal appeals may abate the appeal and remand to the trial court to correct an inaccurate record. *See James v. State*, 745 S.W. 2d 28, 28 (Tex. Crim. App. 1988); *Black v. State*, 745 S.W. 2d 27, 27 (Tex. Crim. App. 1988).

2. To preserve error that the trial court errs in not requiring that all bench conferences be recorded by the court reporter, "the record must reflect that trial counsel either (1) attempted to stipulate with opposing counsel and the trial court the substance of unrecorded bench conferences, (2) requested that the trial court reflect the substance of the unrecorded bench conferences in the statement of facts, or (3) made a formal bill of exception regarding the substance of the unrecorded bench conference." *Moore v. State*, 999 S.W. 2d 385, 398 (Tex. Crim. App. 1999). Merely filing a motion to record bench conferences and objecting to the failure to do so is insufficient. *Id*.

I. Standing

1. A fellow inmate may lack standing to challenge the validity of a death sentence of a capital defendant who himself has elected to forego his right to direct appeal. *Whitmore v. Arkansas*, 495 U.S. 149, 151 (1990).

J. Special Rules Of Appellate Procedure In Capital Cases

1. In most cases, there are no special procedural rules for death penalty appeals. Listed below are the exceptions:

a. In non-death penalty cases, appeal is perfected by a timely, written notice of appeal. "In a death-penalty case, however, it is unnecessary to file a notice of appeal." TEX. R. APP. PROC. 25.2(a).

b. Rule 38 governs the preparation and filing of briefs, except no appendix is necessary, and "the brief in a case in which the death penalty has been assessed may not exceed 125 pages." TEX. R. APP. PROC. 71.3.

K. Arguing The State Constitution

1. In *Heitman v. State*, 815 S.W. 2d 681 (Tex. Crim. App. 1991), the court recognized that Texas courts are empowered to interpret the State Constitution more protectively than the United States Supreme Court has interpreted the Federal Constitution. Lawyers seeking a

more protective interpretation, however, must proffer argument and authority as to how State protection differs from Federal protection. "State and federal constitutional claims should be argued in separate grounds, with separate substantive analysis or argument provided for each ground." *Muniz v. State*, 851 S.W. 2d 238, 251 (Tex. Crim. App. 1993). Otherwise, the court will not address the Texas constitutional claims. *Id*; *accord Rayford v. State*, 125 S.W. 3d 521, 534 (Tex. Crim. App. 2003)*; Narvaiz v. State*, 840 S.W. 2d 415, 432 (Tex. Crim. App. 1992). Where appellant claims both state and federal constitutional violations, but fails to distinguish his rights under the state and federal constitutions, the court will address only whether federal constitutional rights have been violated. *Dewberry v. State*, 4 S.W. 3d 735, 746 (Tex. Crim. App. 1999); *but see Arnold v. State*, 873 S.W. 2d 27, 29 n.2; 33 n.4 (Tex. Crim. App. 1993)(early on in the opinion, the court addresses the merits of appellant's various state and federal constitutional claims, despite the fact of their "incomplete and multifarious nature," contrary to the dictates of *Heitman*; later, in the same opinion, the court cites *Heitman* as justification for not addressing insufficiently briefed points).

2. In *Lawton v. State*, 913 S.W. 2d 542 (Tex. Crim. App. 1995), appellant believed it "particularly noteworthy" that the state constitution prohibits "cruel *or* unusual punishment" while the federal constitution refers to cruel *and* unusual punishment. "The noteworthiness of the distinction is not self-evident to us. Appellant offers no arguments or authority explaining why the difference is noteworthy; his briefing regarding this point is inadequate. To adequately brief a state constitutional issue appellant must proffer specific arguments and authorities supporting his contentions under the state constitution. Otherwise his contentions are inadequately briefed." *Id*. at 558; *accord Cannady v. State*, 11 S.W. 3d 205, 214 (Tex. Crim. App. 2000); *Brooks v. State*, 990 S.W. 2d 278, 288 (Tex. Crim. App. 1999)*; Moore v. State*, 935 S.W. 2d 124, 128 (Tex. Crim. App. 1996); *see Shannon v. State*, 942 S.W. 2d 591, 600 (Tex. Crim. App. 1996)*; Morris v. State*, 940 S.W. 2d 610, 616 (Tex. Crim. App. 1996)*; Williams v. State*, 937 S.W. 2d 479, 492 (Tex. Crim. App. 1996)*; Cantu v. State*, 939 S.W. 2d 627, 645 (Tex. Crim. App. 1997); *see also McFarland v. State*, 928 S.W. 2d 482, 521 (Tex. Crim. App.1996)(a mere claim that the Texas Constitution provides broader protection, without "substantive citation or authority" will be rejected). *Cf. Henderson v. State*, 962 S.W. 2d 544, 563 n. 17 (Tex. Crim. App. 1997).

3. In *Anderson v. State*, 932 S.W. 2d 502 (Tex. Crim. App. 1996), the court explicitly did not decide whether the state constitution was broader than the federal constitution. "Assuming that the word 'or' requires a disjunctive reading of the words 'cruel' and 'unusual,' we find that the death penalty is neither." *Id*. at 509.

L. Prosecutorial Vindictiveness

1. In this case the court of appeals found prosecutorial vindictiveness when the state retried appellant on a charge of capital murder after the court had reversed his conviction for murder. The court reformed the conviction from capital murder to murder and reversed the judgment imposing punishment and remanded the case for another punishment hearing. *Doherty v. State*, 892 S.W. 2d 13, 17 (Tex. App.--Houston [1st Dist.] 1994, pet. ref'd).

M. Law Of The Case

1. "Under the doctrine of the law of the case, when a court of last resort has determined questions of law on a prior appeal, those determinations will generally govern a case throughout all of its subsequent stages." *Bell v. State*, 938 S.W. 2d 35, 47 (Tex. Crim. App. 1996).

2. The law of the case doctrine does not apply to a challenge to the sufficiency of the evidence. *Bell v. State*, 938 S.W. 2d 35, 42-34 (Tex. Crim. App. 1996).

N. Cumulative Errors

1. "It is conceivable that a number of errors may be found harmful in their cumulative effect. But, we are aware of no authority holding that non-errors may in their cumulative effect cause error." *Chamberlain v. State*, 998 S.W. 2d 230, 238 (Tex. Crim. App. 1999). "Non-errors," though, may not cause error in cumulative effect. *Rayford v. State*, 125 S.W. 3d 521, 534 (Tex. Crim. App. 2003).

O. DNA

1. The court of criminal appeals has constitutional and statutory jurisdiction to hear and decide chapter 64 DNA appeals. *Kutzner v. State*, 75 S.W. 3d 427, 432-35 (Tex. Crim. App. 2002). On the merits, the court refused to hold that the trial court "erroneously determined that appellant failed to establish the Article 64.03(a)(2)(A) requirements by a preponderance of the evidence. No reasonable probability exists that exculpatory DNA tests on the evidence for which appellant seeks DNA testing would prove appellant's innocence. At most, exculpatory DNA tests on this evidence would 'merely muddy the waters.'" *Id*. at 439. *Accord Rivera v. State*, 89 S.W. 3d

55, 59-61 (Tex. Crim. App. 2002); *see also Skinner v. State*, 122 S.W. 3d 808, 811 (Tex. Crim. App. 2003)(presence of a third party's DNA would not constitute "affirmative evidence of innocence"). For DNA appeals filed after September 1, 2003, the convicted person must show by a preponderance of the evidence that he would not have been convicted if exculpatory results had been obtained through DNA testing. *Hood v. State*, 158 S.W. 3d 480, 482 (Tex. Crim. App. 2005).

2. In *State v. Patrick*, 86 S.W. 3d 592 (Tex. Crim. App. 2002), the trial court found that appellant had not shown himself entitled to testing under chapter 64, but, because appellant agreed to pay for it, the court ordered the testing anyway. The court first held that the state had no authority to appeal, since the trial court's order was not pursuant to chapter 64. *Id*. at 594. Mandamus, however, was appropriate, since the trial court had no authority to order testing unless pursuant to chapter 64 or a writ of habeas corpus. *Id*. at 597.

3. The trial court need not grant a convicted person's request for DNA testing unless he establishes by a preponderance of the evidence a reasonable probability that he would not have been prosecuted or convicted if exculpatory results had been obtained through the testing. *Dinkins v. State*, 84 S.W. 3d 639, 643 (Tex. Crim. App. 2002).

4. General constitutional challenges, unsupported by specific legal arguments, will be unsuccessful. *See Bell v. State*, 90 S.W. 3d 301, 304-307 (Tex. Crim. App. 2002).

5. A defendant is not entitled to a pre-test hearing with live witnesses under article 64.03. *Rivera v. State*, 89 S.W. 3d 55, 59-60 (Tex. Crim. App. 2002).

6. In *Shannon v. State*, 116 S.W. 3d 52 (Tex. Crim. App. 2003), appellant filed a motion requesting DNA testing of all physical evidence pertaining to an extraneous aggravated sexual assault which was used by the state at the punishment phase of his capital murder trial. Apparently, the trial court denied the motion for several reasons, including that chapter 64 is inapplicable to evidence gathered in connection with an extraneous offense, and that no physical evidence still existed. The court of criminal appeals found that, on this record, the trial court could reasonably have concluded that no physical evidence pertaining to the extraneous offense presently existed. *Id*.at 55.

7. The trial court erred in finding that appellant's DNA request was for delay. He did not have an execution date set, and he did have a federal habeas appeal pending. The DNA testing could be done before the execution date were set and the appeal determined. *Skinner v. State*, 122 S.W. 3d 808, 811 (Tex. Crim. App. 2003).

8. For motions for DNA testing made before September 1, 2003, the statute does not authorize an appeal of findings under any articles other than articles 64.03 and 64.04. "The convicting court's decision to deny appointment of a post-conviction DNA expert does not fall within the purviews of Article 64.03 or 64.04 and is therefore not reviewable on appeal under Article 64.05." *Wolfe v. State*, 120 S.W. 3d 368, 371 (Tex. Crim. App. 2003). For DNA motions made after September 1, 2003, the legislature has broadened the scope of appeals under Chapter 64 to include issues pertaining to all articles of that chapter. *Id*. at 372 n. 5.

9. For persons who file their motion for DNA testing on or after September 1, 2003, article 64.05 clearly specifies that the appeal is to the court of appeals, unless the convicted person was sentenced to death. An earlier version of this statute, applicable to persons who filed their motions before that date, was less clear, and seemed to give the court of criminal appeals original appellate jurisdiction in all capital cases, whether or not the death penalty had been assessed. In any event, the court of criminal appeals has clarified the matter, holding that "the term 'a capital case' in former Article 64.05 means a case in which a convicted person was sentenced to death." *Sisk v. State*, 131 S.W. 3d 492, 497 (Tex. Crim. App. 2004); *but see Whitaker v. State*, 160 S.W. 3d 5, 8 (Tex. Crim. App. 2004)(where appellant was sentenced to life imprisonment for capital murder and filed his DNA motion before September 1, 2003, "the appeal is properly to this Court"); *Smith v. State*, 2003 WL 22303995 *1 (Tex. Crim. App. 2003)(not designated for publication)("appeal . . . correctly filed in this Court").

10. In *Smith v. State*, 165 S.W. 3d 361 (Tex. Crim. App. June 15, 2005), applicant alleged in his affidavit that he was actually innocent, and the trial court overruled his request for DNA testing because the affidavit failed to allege specific facts. The court of criminal appeals held that the trial court judged the affidavit too strictly. Although it could arguably have been more specific, applicant's plea of actual innocence was equivalent to an assertion that there was at least a 51% chance he would not have been convicted if the DNA testing had been done. The trial record, which the trial court had taken judicial notice of, contained sufficient facts to allow the trial court to determine, by a preponderance of the evidence, that applicant would not

have been convicted had the DNA results been favorable. *Id*. at 365.

11. Despite the fact that he gave an inculpatory statement that was admitted at trial, appellant was able to show a reasonable probability that DNA testing would have been exculpatory. Accordingly, the trial court erred when it denied post-trial testing under chapter 64. There was no showing that the request for testing was made for the purpose of delay. *Raby v. State*, No. 74,930 (Tex. Crim. App. June 29, 2005)(not designated for publication). Judge Cochran dissented, believing that appellant was not entitled to relief under Chapter 64, but also noted that there was reason to question the wisdom of the state's position, considering that testing would not delay anything or impair the right of either side to do more retesting, that appellant was willing to pay for the testing, and that recent problems with the Houston Crime Lab are well known. "I continue to believe that Chapter 64 was intended to increase, not limit or decrease, a trial court's authority to permit post-conviction DNA testing. (1) Those who insist upon balancing atop the sharp point of the letter of Chapter 64 law may one day find themselves hoist on their own forensic petard. Sometimes discretion is the better part of valor." *Raby v. State*, No. 74,930 (Tex. Crim. App. June 29, 2005)(not designated for publication)(Cochran, J., dissenting).

12. The post-conviction writ of habeas corpus pursuant to article 11.07 of the Texas Code of Criminal Procedure is not available to raise claims that counsel was ineffective during DNA testing proceedings brought under Chapter 64. In some cases, though a person whose counsel is ineffective may receive relief on direct appeal under Chapter 64. Also, Chapter 64 does not prohibit second, successive petitions for DNA testing. *Ex parte Baker*, 185 S.W. 3d 894, 897 (Tex. Crim. App. 2006); *accord Ex parte Ex parte Suhre*, 185 S.W. 3d 898, 899 (Tex. Crim. App. 2006).

13. To be timely, the notice of appeals must be given no later than 30 days after the trial court denies the motion for DNA testing. *Swearingen v. State*, 189 S.W. 3d 779, 781 (Tex. Crim. App. 2006). A defendant who does not give timely notice of appeal because his lawyer fails to properly advise him is not entitled to habeas relief. He may, however, get relief in a second Chapter 64 proceeding. *Ex parte Estrada*, 2007 WL 1264039 *1 (Tex. Crim. App. 2007)(not designated for publication).

14. The majority in *Wilson v. State*, 185 S.W. 3d 481 (Tex. Crim. App. 2006), found that appellant was not entitled to DNA testing because identity was not in issue: appellant has never claimed the state was prosecuting the wrong man. It is irrelevant that additional testing might have shown that another person was involved, since this would have no effect whatever on appellant's conviction and sentence. Judge Johnson concurred in the result, but wrote an interesting opinion discussing the difficulty many lawyers have any time anything scientific is involved. "Numbers flummox many of us, and as a result, numerical evidence can become confusing and misleading." *Wilson v. State*, at 486 (Johnson, concurring).

15. The trial court and the court of criminal appeals found that appellant's DNA motion, filed a month before his execution, was made to unreasonably delay the execution. Nothing prevents the filing of a motion for DNA testing during the pendency of federal habeas corpus. *Thacker v. State*, 177 S.W. 3d 926, 927 (Tex. Crim. App. 2005).

16. Chapter 64's requirement that identity be in issue does not violate due process and the right to present a meaningful defense, as established in *Holmes v. South Carolina*, 547 U.S. 319 (2006). *Holmes* concerned the right to present a defense at trial, unlike Chapter 64, which governs procedures long after trial is concluded. "There is no constitutional right to post-conviction DNA testing in order to determine the presence of a third-party's DNA." *Prible v. State*, 2008 WL 375977 (Tex. Crim. App. 2008).

17. That the victim knew the appellant and identified him as the person who robbed and sexually assaulted her does not prevent appellant from being able to show that "identity was or is an issue in the case," as provided by Chapter 64. A person requesting DNA testing "can make identity an issue by showing that exculpatory DNA tests would prove his innocence." *Blacklock v. State*, 235 S.W. 3d 231, 232 (Tex. Crim. App. 2007).

18. Although the Supreme Court has not yet decided the issue, the Court of Criminal Appeals holds that warrantless searches of prisoners to obtain samples for DNA databases does not violate the Fourth Amendment. Nor is it a problem that the samples are retained even after the person's parole has expired. *Segundo v. State*, 270 S.W.3d 79, 99-100 (Tex. Crim. App. 2008).

19. Applicant met the *Elizondo* standard by showing that no reasonable jury would have convicted him considering the post-conviction DNA results along with the inculpatory evidence in the record. "The relief applicant seeks is therefore granted: The judgment of guilt and sentence of death are set aside, and applicant shall answer the indictment against him." *Ex parte Blair*, 2008 WL 2514174 (Tex. Crim. App. 2008)(not designated for publication).