Chapter 1 - PRE-INDICTMENT AND PRE-TRIAL MANAGEMENT

Section 1. Setting Bail

1. Setting Bail

A. Factors to Consider in Setting Bail

* It is important that the magistrate make a sufficient record so that any court hearing a pre-indictment writ of habeas corpus can understand the factors which weigh on the exercise of judicial discretion in setting bail. Consider:

1. The rules for fixing amount of bail include the following five factors:
    a. Assurance of the defendant's appearance at trial
    b. An amount which is not oppressive
    c. The nature of offense
    d. The ability to make bail
    e. The future safety of the victim and of the community. Tex. Code Crim. Proc. Ann. art. 17.15 (Vernon 2005). *Ex Parte Wood*, 952 S.W.2d 41, 42 (Tex. App.—San Antonio 1977).
2. Bail should be set sufficiently high to give reasonable assurance that the defendant will appear at trial, but it should not be used as an instrument of oppression. *Ex parte Prelow,* 929 S.W.2d 54, 55 (Tex. App.—San Antonio 1996, no pet.). In seeking to reduce bail, the burden is on the defendant to show that the amount is excessive. *Id.* at 55.
3. The nature of the offense charged and circumstances of commission, the punishment permitted under the law, and ability of defendant to make bail are all important factors in evaluating the appropriate bail amount in a capital case. *Ex parte Cash*, 476 S.W.2d 294, 295 (Tex. Crim. App. 1972); *Ex parte Tanner*, 458 S.W.2d 815, 816 (Tex. Crim. App. 1970); E*x parte Miller*, 631 S.W.2d 825, (Tex. App.—Fort Worth 1982, pet. ref'd). Prior to an appeal seeking reduction, the accused must show that he has made a reasonable effort to furnish bail in the amount set at a habeas hearing. *Miller* at 827.
4. The following factors may be considered by the magistrate in setting the amount of bail, but are not statutory and may be considered at the magistrate's discretion:
    a. the defendant's work record
    b. the defendant's family and community ties
    c. the defendant's length of residency
    d. the defendant's prior criminal record
    e. the defendant's conformity with conditions of any previous bond
    f. the existence of outstanding bond, if any
    g. any alleged aggravating circumstances involved in the offense *Nguyen v. State,* 881 S.W.2d 141, 143 (Tex. App.—Houston [1st Dist.] 1994, no pet.).
5. The safety of the victim's family is a factor which the Victim's Rights Constitutional Amendment and enacting legislation has designated as a factor to be considered in setting bail. Tex. Code Crim. Proc. art. 56.02(a)(2).
6. "Victim" includes only persons who are complainants to the charged offense. *Ludwig v. State*, 812 S.W.2d 323, 325 (Tex. Crim. App. 1991).
7. The defendant has no constitutional right for bail to be set at an amount that at least one bondsman in the county is approved for making. *Wright v. State*, 976 S.W.2d 815, 820 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

B. Amount of Bail

* The amount of bail in capital cases varies throughout Texas. It is not unusual for bail to be set in an amount over $1 million. The courts have upheld bail of $500,000 on a capital murder case on appeal from a pretrial application for Writ of Habeas Corpus. *Ex parte Brown*, 959 S.W.2d 369, 373 (Tex. App.—Fort Worth 1998, no pet.).

* However, see *Ludwig v. State*, 812 S.W.2d 323 (Tex. Crim. App. 1991). The Court of

Appeals reduced defendants bond from $2 million to $1 million, which was further lowered it to $50,000 by the Court of Criminal Appeals.

C. Conditions of Bail

* Conditions of bail which relate to the safety of the alleged victim and the community are provided by law. Tex. Code Crim. Proc. art. 17.40(a).

* Special conditions such as home confinement, electronic monitoring, and weekly drug testing have statutory authority. Tex. Code Crim. Proc. art. 17.44(a).

* Special conditions which govern the defendant's possession of and contact with her children. Burson v. State, 202 S.W.3d 423 (Tex. App.—Tyler 2006, no pet.).

* The installation of an interlocking device on the defendant's vehicle. Tex. Code Crim. Proc. art. 17.441.

* The submission of a specimen to a local law enforcement agency for the purposes of creating a DNA record to be kept on file. Tex. Code Crim. Proc. art. 17.47.

D. Hearing to Lower Amount of Bond

Practice Notes:

* *A defendant may request a hearing to lower the amount of bail. This is normally accomplished pre-indictment by filing a written motion to reduce bail with the magistrate or by filing a pre-indictment application for Writ of Habeas Corpus. The judge should give proper notice to all parties and set an evidentiary hearing.*

* The burden of proof rests upon defendant when defendant claims that amount of bail set is excessive. *Nguyen v. State,* 881 S.W.2d 141, 143 (Tex. App.—Houston [1st Dist.] 1994, no pet.). The standard for review on appeal from a bond ruling is abuse of discretion. *Ex parte Rubac*, 611 S.W.2d 848, 850 (Tex. Crim. App. 1980).

* Although the magistrate maintains jurisdiction of a case until indictment, the filing of an application for Writ of Habeas Corpus vests the district court with jurisdiction, even if that court did not perform the magistration. *See Ex parte Mapula*, 538 S.W.2d 794, 795 (Tex. Crim. App. 1976).

Practice Notes:

* *The district judge typically understands what the appropriate court of appeals will uphold as appropriate under the facts of the bond or writ hearing. Generally, if the original bond is lowered to another amount (for example from $1,000,000 to $800,000) the defendant must file a second motion or writ because relief has been granted in some form.*

E. Denial of Bail

* Capital murder defendants can be denied bail where the state presents "proof evident" to the court. "All prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident." Tex. Const. art. 1 § 11.

* "Proof evident" means evidence that is "clear and strong, leading a well-guarded and dispassionate judgment to the conclusions that 1) the offense of capital murder has been committed; 2) that the accused is the guilty party; and 3) the jury will both convict the accused and will return findings requiring a death sentence." *Angleton v. State* 955 S.W.2d 655, 657 (Tex. App.—Houston [14th Dist.] 1997), *rev'd on other grounds,* 971 S.W.2d 65 (Tex. Crim. App. 1998).

* The State has the burden of substantially showing that proof is evident, which standard is far less than the trial burden of beyond a reasonable doubt. The general rule favors the allowance of bail. *Lee v. State*, 683 S.W.2d 8, 9 (Tex. Crim. App. 1985).

* An indictment alone is not proof evident. *See* e*x parte Cevallos*, 537 S.W.2d 744, 745 (Tex. Crim. App. 1976).

* The uncorroborated accomplice testimony is not proof evident. *Ex parte Mitchell*, 601 S.W.2d 376, 377 (Tex. Crim. App. 1980).

* Insufficient evidence that the murder was committed in the course of a burglary may defeat the claim of proof evident. *Ex parte Woodward*, 601 S.W.2d 378 (Tex. Crim. App. 1980).

* A judge is required to return findings which would require a sentence of death to establish proof evident. *See ex parte Maxwell*, 556 S.W.2d 810, 811 (Tex. Crim. App. 1977). 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 id* at 811.

* The denial of bail for "proof evident" is subject to statutory provisions requiring the release of the defendant when the State is not ready to go to trial on felony charge within 90 days of defendant's arrest and to the exception that when the State seeks more than one continuance, and defendant does not seek continuance, defendant will be entitled to bail. Tex. Code Crim. Proc. art. 17.151; *Beckcom v. State*, 938 S.W.2d 780, 781 (Tex. App.—Corpus Christi 1997, no pet.).

* The standard of appellate review for denial of bail is abuse of discretion. *Ex parte Spaulding*, 612 S.W.2d 509, 511 (Tex. Crim. App. 1981).

F. Victim Notification Issues

* A close relative of a deceased victim has the right to be present at all public court proceedings related to the offense, subject to the approval of the judge in the case. Tex. Code Crim. Proc. art. 56.02(b).

* A judge is not liable for failure or inability to provide these rights to the close relative of the deceased victim. Tex. Code Crim. Proc. art. 56.02(d).

Practice Notes:

* *The trial judge should ask, on the record and before any proceedings, if there has been victim notification for that hearing. The district attorney may have the record reflect that the judicial system has complied with the constitutional and statutory rights of alleged victims.*

Section 2. Appointment of Counsel

2. Appointment of Counsel

A. Timing of Appointment

* The presiding judge of the district court in which a capital felony case is filed *shall* appoint two attorneys . . . to represent an indigent defendant as soon as practicable after charges are filed, unless the state gives notice in writing that the state will not seek the death penalty." Tex. Code Crim. Proc. art. 26.052(e); Texas Death Penalty Representation Guideline 3.1 (emphasis added).

* Defendant must show that the delay in appointment of counsel was such that it "pervaded the entire proceeding." *Sterling v. State*, 830 S.W.2d 114, 121 (Tex. Crim. App. 1992) (citing *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988)).

Practice Notes:

* *The trial judge should consider appointment of counsel in a capital case at the earliest point. If defense counsel is appointed early in the case, they will have an opportunity to better protect the rights of the defendant and preserve evidence favorable to the defense that might not be readily available later in the discovery process. This is especially true with the preparation of any defensive issues which rely on evaluations close to the time of the date of alleged offense, such as insanity.*

B. Qualifications of Capital Counsel

* Public defender's office

1. "If a county is served by a public defender's office, trial counsel ... may be appointed as provided by the guidelines established by the public defender's office." Tex. Code Crim. Proc. art.

26.052(b).
2. The 7th and 9th Judicial Administrative regions are served by the West Texas Regional Public Defender's office for capital cases.

* Appointed counsel-

1. A local selection committee in each administrative judicial region is created where there is no public defender's office. Tex. Code Crim. Proc. art. 26.052(c).
2. The regional administrative judge shall appoint the members of the committee, which shall have not less than four members, including:
    a. The administrative judge of the judicial region
    b. At least one district judge,
    c. A representative from the local bar association, and
    d. At least one practitioner who is board certified by the State Bar of Texas in criminal law.
3. "The committee shall adopt standards for the qualification of attorneys to be appointed to represent indigent defendants in capital cases in which the death penalty is sought." Tex. Code Crim. Proc. art. 26.052(d)(1).

* Texas statutory qualification requirements. Tex. Code Crim. Proc. art. 26.052(d)(2). The standards in each administrative region must require that the attorney appointed to a death penalty case:

1. Be a member of the State Bar of Texas,
2. Exhibit proficiency and commitment to providing quality representation to defendants in death penalty cases,
3. Have at least five years of experience in criminal litigation, and
4. Have tried to verdict as lead defense counsel a significant number of felony cases, including homicide trials and other trials for offenses punishable as second or first degree felonies or capital felonies.
5. Have participated in continuing legal education courses or other training relating to criminal defense in death penalty cases.
6. Have trial experience in
    a. The use of and challenges to mental health or forensic expert witness and
    b. Investigating and presenting mitigating evidence at the penalty phase of a death penalty trial.
7. Have participated in continuing legal education courses or other training relating to criminal defense in death penalty cases.

* Regional standards must be posted in each district clerk's office in the region with a list of attorneys qualified for appointment. Tex. Code Crim. Proc. art. 26.052(d)(3).

* It is harmless error to violate article 26.052 of the Texas Code of Criminal Procedure if the record shows counsel was fully qualified and capable. *See Hughes v. State*, 24 S.W.3d 833, 837-38 (Tex. Crim. App. 2000).* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 5.1 (2003); State Bar of Texas Guidelines and Standards for Texas Capital Counsel 4.1 (2006).

1. Every attorney representing a capital defendant has:
    a. Obtained a license or permission to practice in the jurisdiction,
    b. Demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases, and
    c. Satisfied training requirements.
2. The pool of defense attorneys as a whole should be such that each capital defendant within the jurisdiction receives high quality legal representation. Accordingly, the qualification standards should insure that the pool includes sufficient numbers of attorneys who have demonstrated:
    a. Substantial knowledge and understanding of the relevant state, federal, and international law, both procedural and substantive, governing capital cases;
    b. Skill in the management and conduct of complex negotiations and litigation;
    c. Skill in legal research, analysis, and the drafting of litigation documents;
    d. Skill in oral advocacy;
    e. Skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;
    f. Skill in the investigation, preparation, and presentation of evidence bearing upon mental status,
    g. Skill in the investigation, preparation, and presentation of mitigating evidence; and
    h. Skill in the elements of trial advocacy, such as jury selection, cross-examination of

witnesses, and opening and closing statements.

C. Number of Counsel to be Appointed

* Texas law provides that in a capital case the trial court *shall* appoint two capital counsel for an indigent defendant, at least one must be qualified under Tex. Code Crim. Proc. art. 26.052(e). Note that each county may have local orders regarding appointment of counsel and qualifications for both lead counsel and second chair counsel.

D. Compensation of Capital Counsel

* There is no mandatory fee set by statute, except that it must be reasonable considering many factors that require skill and time investment in the preparation for and trial of a capital case. The general rule is that the court should pay reasonable attorney's fees using a local schedule adopted by county judiciary, taking into account the time and labor, complexity of the case, and experience and ability of counsel. Tex. Code Crim. Proc. art. 26.05.

* A reasonable guideline is what the county is paying civil firms for representation. Flat fees, caps on compensation, and lump sum fees are improper in capital cases. State Bar of Texas Guidelines and Standards for Texas Capital Counsel 8.1 (2006).

* Appointed attorneys are entitled to recoup expenses from the court only after they have been incurred. The reimbursement is at the court's discretion, however. Refusal of the court to pay expenses prior to incursion is not an abuse of discretion. *Wallace v. State*, 618 S.W.2d 67, 70 (Tex. Crim. App. 1981).

* There are special compensation provisions for those counties with institutional divisions contained in Tex. Code Crim. Proc. art. 26.05(c).

* Additional information on the checklist for appointment of counsel can be found in the Bench Book for the Texas Judiciary.

E. Retained Counsel

Practice Notes:

* *Although the trial judge does not control who a capital defendant retains for representation, the trial judge should make a record as to whether or not that counsel is on the court appointed capital counsel list or possesses the training, experience, background, and skills to handle a capital case. If counsel is not qualified, the trial judge should carefully monitor effective assistance of counsel issues and have the record reflect those judicial actions taken in an attempt to oversee the effective assistance of counsel. There is no right to have a retained attorney as well as a court appointed attorney; however, the trial judge should carefully consider what action is appropriate if retained counsel is incompetent to represent the defendant.*

* Upon a finding of indigency, the trial judge may provide funds to retained counsel for investigations, mitigation specialists, and other experts. *See Ex Parte Briggs*, 187 S.W.3d 458, 468-69 (Tex. Crim. App. 2005).

Section 3. Appointment of the Core Defense Team Under Guidelines and Standards for Texas Capital Counsel 10.1

3. Appointment of the Core Defense Team Under Guidelines and Standards for Texas Capital Counsel 10.1

A. Timing of Appointment

Practice Notes:

* *A skilled investigator and mitigation specialist are critical to the trial preparation of a capital case. If counsel does not have an investigator or mitigation specialist, the court should inquire about that decision. The trial court has discretion to appoint an investigator and mitigation specialist even prior to indictment. Such pre-indictment appointment may assist the defense in finding and preserving important evidence in the case.*

B. Qualifications of Investigators

* Must be licensed under the Occupations Code. Tex. Occ. Code Ann. § 1702.113.* Licensing requirements. Tex. Occ. Code Ann. § 1702.113

1. Must be at least 18 years of age,
2. No conviction of two or more felonies,
3. No conviction of a single felony which occurred less than twenty years ago without pardon,
4. No conviction of a Class A misdemeanor which occurred less than ten years ago without pardon,
5. Not incompetent by reason of mental defect or disease,
6. No discharge other than honorable from armed services,
7. Be required to register anywhere as a sex offender.

* *See also* Guidelines and Standards for Texas Capital Counsel 10.1, State Bar of Texas (2006).

C. Number of Investigators and Mitigation Specialists

* The number of investigators and mitigation specialists to be appointed is discretionary with the court, usually one or two. The court should consider the difficulty of the case and the request of defense counsel. *See ex parte Gonzales*, 204 S.W.3d 391 (Tex. Crim. App. 2006).

D. Court Order on Defense Motion

* The court should require defense counsel to prepare the appropriate order granting a request for an investigator and mitigation specialist. The order should include the information listed below:

1. Name and license number of investigator
2. Initial financial limit on fees (can be later raised by second motion and order)
3. This order should be *ex parte* and confidential. Tex. Code Crim. Proc. art. 26.052(f).
4. The Court may seal on own motion if *ex parte* is not requested by the defense.
5. If the request is *ex parte*, order the Court Clerk to seal the request and only note on paper and the electronic docket that an *ex parte* request was filed, but not what the request was for.

E. Compensation of Investigators

* The Court may order that the investigator be paid either directly or through the defense attorney, Tex. Code Crim. Proc. art. 26.052 (f)-(h).

F. Advance Payment of Expenses

* If the defense requests advance payment of expenses, the request must posit the type of investigation to be conducted, state the specific facts that suggest the investigation will result in admissible evidence, and present an itemized list of anticipated expenses for each investigation. Tex. Code Crim. Proc. art. 26.052(f).

* The Court shall grant reasonable requests in whole or in part. Tex. Code Crim. Proc. art. 26.052(g). If the Court denies the request in whole or in part, the denial must be in writing and shall state the reasons for the denial; furthermore, the denial shall be attached to the confidential request as both are submitted as a sealed exhibit to the record. Tex. Code Crim. Proc. art. 26.052(g).

* In requesting additional funds beyond the statutory minimum for reasonable investigation, the defendant must show a specific need for a particular expert, witness, or other assistance. Additionally, the defendant should explain how he would be harmed if the additional funds were withheld. *Castillo v. State*, 739 S.W.2d 280, 294 (Tex. Crim. App. 1987).

G. Expenses Incurred Without Prior Court Approval

* The law additionally provides that if expenses are incurred without prior court approval, the court must pay those expenses if they are reasonably necessary and reasonably incurred. Tex. Code Crim. Proc. Ann. art. 26.052(h).

Section 4. Appointment Of Experts

4. Appointment of Experts

A. Generally

* Policy issues and fundamental fairness require that indigent defendants have an adequate opportunity to present their claims fairly within the adversarial system. The court finds that denying an indigent defendant basic critical expert assistance, while the state may utilize virtually any expert of its choosing, renders a criminal trial fundamentally unfair. *See Ex Parte Briggs*, 187 S.W.3d 458, 469-70 (Tex. Crim. App. 2005).

* Upon a finding of indigency, the trial court should appoint experts even for retained counsel upon proper

request. *Ex Parte Briggs*, 187 S.W.3d 458, 468-69 (Tex. Crim. App. 2005).

Practice Notes:

* *The appointment of experts has become an important area for judicial oversight in a capital case. Where a defendant has made a preliminary showing that his sanity is likely to be a significant factor at trial, the United States Constitution requires the state to provide access to a psychiatric expert if the defendant is indigent or cannot afford one. Ake v. Oklahoma, 470 U.S. 68, 82-83. (1985). If defense counsel is not requesting appointment of an expert in a capital case, the proactive trial court judge may make an ex parte inquiry, on a sealed record, as to why there is not a request for assistance. The court should also be open to appointment of reasonably needed experts in areas of specialized training and knowledge in both the guilt/innocence phase of trial and the punishment phase of trial.*

B. Timing of Appointment

* Although most expert appointments will occur after indictment, there may be a need for appointment of an expert pre-indictment. The general provisions of law are set out below; however, a capital case may call on a more expansive consideration of request for appointments of experts.

1. Requests may be filed and granted at pretrial hearing.
2. *Ex parte* request is allowed. An indigent defendant is entitled to make his request for expert *ex parte*. *Williams v. State*, 958 S.W.2d 186, 193-94 (Tex. Crim. App. 1997). Trial court commits error that is subject to a harm analysis by not allowing *ex parte* request. *See id.* at 194-95. *Williams* was reversed for a new punishment hearing because the state had premature disclosure of the expert's area of testimony. *Id.* at 195.

C. Defense Motion

* The defense is responsible for preparing an appropriate and specific motion for appointment of experts. The defense must make an *ex parte* threshold showing to the trial judge that the area of inquiry needing an expert will be a significant factor at trial. In order to meet the required *Ake* threshold showing for the appointment of experts, the indigent defendant must support his claim with more "than undeveloped assertions that the requested assistance would be beneficial." *Caldwell v. Mississippi, 472 U.S. 320, 323-324 n. 1 (1985). Insufficient defense requests include:*

1. Defendant's failure to support his motion with affidavits or other evidence in support of his defensive theory,
2. Defendant's failure to provide an explanation as to what his defensive theory was and why expert assistance would aid in building this defense,
3. Defendant's failure to show that there was reason to question the State's expert and proof. *Rey v. State*, 897 S.W.2d 333, 341 (Tex. Crim. App. 1995).

* This request should be *ex parte* and confidential. Tex. Code Crim. Proc. art. 26.052(f). The court can seal on own motion if not requested *ex parte* by the defense.

* A defendant may retain private counsel and still be found to be indigent for the purposes of procuring expert assistance under *Ake*. To obtain court appointed and state funded investigatory and expert witness fees, the defendant's attorney must present evidence of his client's indigence. Retained defense counsel has a duty to seek court-appointed expert witnesses and investigative services if the defendant is unable to afford them. *Ex parte Briggs*, 187 S.W.3d 458, 468 (Tex. Crim. App. 2005).

Practice Notes:

* *Get firm estimation of cost of expert by tasks performed, testing, testifying, travel time, etc.*

D. Types of Experts

* The holding in *Ake* has been interpreted in Texas so as to require the appointment of any expert so long as "the defendant has made a sufficient threshold showing of need for the expertise" of the specialist. *Rey v. State*, 897 S.W.2d 333, 339 (Tex. Crim. App. 1995). While *Ake* and *Rey* dealt with the appointment of psychologists and pathologists, respectively, case law requires the appointment of experts irrespective of their field of specialization or expertise if their knowledge is "integral to the building of an effective defense." *Griffith v. State*, 983 S.W.2d 282, 286 (Tex. Crim. App. 1998).

E. Compensation of Experts

* Much like the law on payment to investigators, expert compensation may be paid directly to the expert. Tex. Code Crim. Proc. art. 26.052. Additionally, the court may order that the compensation be paid

through defense attorney.

F. Advance Payment of Expenses

* The court may approve advance payment of expenses if the defense makes an *ex parte* threshold showing to the trial judge that the area of inquiry needing an expert will be a significant factor at trial and gives an itemized list of anticipated expenses. Tex. Code Crim. Proc. art. 26.052(f). The court shall grant reasonable requests in whole or in part. Tex. Code Crim. Proc. art. 26.052(g). If the Court denies the request in whole or in part, the denial must be in writing and shall state the reasons for the denial; furthermore, the denial shall be attached to the confidential request as both are submitted as a sealed exhibit to the record.

G. Expenses Incurred Without Prior Court Approval

* The court must pay expenses incurred without prior court approval if the expense was reasonably necessary and reasonably incurred. Tex. Code Crim. Proc. art. 26.052(h).

Section 5. State's Notice of Seeking the Death Penalty

5.State's Notice of Seeking the Death Penalty

* The State's notice of seeking the death penalty is normally an issue reserved until the pre-trial hearings, following indictment. The decision on whether or not to seek the death penalty is a critical issue in many determinations by the trial judge on the appointment of counsel, investigators, experts, and generally scheduling of the capital case. *See* Tex. Penal Code § 12.31(b) (Vernon 2005); Tex. Code Crim. Proc. art. 26.052(e).

* However, appointment of the core defense team (two counsel, investigator, and mitigation specialist) should be made as soon as possible in order to allow the team to pursue critical evidence for the guilt-innocence and punishment phase of trial.

Practice Notes:

* *Since most appointed counsel are busy practitioners, it is often their nature to postpone much of their trial preparation until just before trial. A good practice might be to set monthly status conferences with both counsel present to monitor the status of the case. If nothing else, the monthly conference will keep this important case on the minds of both sides and keep preparation of the case moving forward.*

Section 6. Arraignment

6. Arraignment

Practice Notes:

* *In many felony cases, arraignment is a formality and often waived. It is a good practice in a capital case, unless counsel insists on waiving arraignment, that there be a formal arraignment process. This will allow the court to handle initial pre-trial matters and check that the defense is competently preparing the case. The formal reading of the indictment will also assist in identifying any errors in the indictment at a very early stage of the proceedings.*

* *The court can utilize the arraignment time to work on a schedule for the pre-trial hearings jury selection, and trial of the case. Also issues of appointment of co-counsel, investigators, and experts can be discussed and ruled upon by the trial.*

Section 7. Planning Costs of Trial

7. Planning Costs of Trial

* The law does provide for financial assistance to counties who have extraordinary costs of prosecution in capital murder or "hate crime" cases. Tex. Code Crim. Proc. art. 104.004. Counties are entitled to be reimbursed from the criminal justice division of the Governor's office. This is a resource which should not be overlooked when scheduling a capital case and its expenses.

* Suggesting to defense counsel that all their expert needs be submitted in an omnibus motion is a good way to predict the budgetary needs of the case.

Practice Notes:

* *Since a capital case, where the death penalty is sought, may cost the county well over $100,000.00,*

and sometimes over $300,000, the trial judge might consider a conference with the auditor, county judge, or some of the county commissioners, especially when the capital case will require county funding that is unanticipated in the budget. When the financial arm of the county has fair notice of unexpected demands on the general fund, the county can better plan for payment of those expenses.

Section 8. Scheduling

8. Scheduling

Practice Notes:

* *The judge may discuss with counsel on the record* ***or may prepare an order*** *scheduling discovery* ***motions and hearings****, the decision to seek the death penalty, and other trial management issues as early as possible. This will focus the attorneys on preparation and evaluation of the case.*

Section 9. Order on Conduct of Counsel

9. Order on Conduct of Counsel

* An orderly disposition of every case, but in particular a capital case, is important for the due and proper administration of justice. Disruptions in the court, attorney's making speaking objections, **and** lack of the orderly presentation of evidence can detract from the dignity and decorum in the courtroom. An Order on Conduct of Counsel can certainly assist the trial court in maintaining the calm, focused, and dignified presentation of evidence in the case.

Section 10. Pre-Trial and Trial Management Orders

10. Pre-Trial and Trial Management Orders

A. Generally

* The trial judge has the inherent power to control the orderly proceedings in the courtroom. This necessarily includes entry of Orders on Conduct of Counsel which are designed to assure an orderly presentation of the case and decorum in the courtroom. *See In Re Bennett*, 960 S.W.2d 35 (Tex. 1997). The ability of the court to issue such orders is derived from its inherent power "which it may call upon to aid in the exercise of its jurisdiction, in the administration of justice, and in the preservation of its independence and integrity." *Eichelberger v. Eichelberger,* 582 S.W.2d 395, 398 (Tex. 1979).

* Entry of a carefully drafted pre-trial and trial management order can assist the court in its oversight responsibilities as to effective assistance of counsel, help expedite discovery compliance and production of any *Brady* material, provide documented notice of hearings and court deadlines, and document notice of court rules for counsel and witnesses. See *infra* at 8(F) for a discussion on *Brady* material.

B. Timing and Entry of Order

Practice Notes:

* *The trial court should enter the Pre-trial and Trial Management Order soon after the indictment is returned. Normally, the court may find it beneficial to have an informal scheduling conference with counsel for the State and counsel for the defense in chambers immediately after the indictment is returned. The Court can then discuss the general ideas on time table for case disposition. If you can have the attorneys agree in concept to the time schedule, this will assist the Court in drafting a meaningful scheduling order. There may be matters which cause extensions, delays, and continuances, but you may have a fairly workable order after that conference.*

* *The Pre-trial and Management Order should be served on counsel and the defendant to give notice of the Court's expectations and the deadlines for certain actions. Having counsel sign and return an acknowledgement of the order will help document that notice has been properly provided.*

C. Scheduling of Pre-Trial Matters and Hearings

* If the trial court can carry certain motions until trial, such as motions to suppress, this will limit pre-trial publicity on what may be extremely prejudicial information.

* If the trial judge has a jury selected, instructed, and perhaps sequestered, the judge can hear the suppression motion with less concern about the impact upon the potential jury pool.

* Carrying a motion to suppress has the added benefit of encouraging the State of Texas to carefully consider their case and the need to try and introduce this evidence, since they will not have a pre-trial

right to appeal from a decision made during the trial on the motion.

Practice Notes:

* *Carrying the motion will also encourage the defense to carefully review their case status without knowing the court's ultimate ruling on the case.*

* *The court may consider setting hearings on days and times where there will be the least dissemination of the events which might jeopardize selection of a fair and unbiased jury. A common tactic to limit publicity in high profile cases is to schedule pre-trial hearings on Friday. The idea behind this is that the general public has busier schedules on Friday nights and weekends and that this will result in more limited media exposure and publicity than would be experienced during the work week.*

Section 11. Pre-Trial Hearings and Discovery Issues

11. Pre-Trial Hearings and Discovery Issues

A. Pre-Trial Hearings

* When and whether to set a pretrial hearing is a discretionary decision with the trial court and not a mandatory provision of law. *See Davis v. State*, 150 S.W.3d 196, 208 (Tex. App.—Corpus Christi 2004). Therefore, the Court is entitled to determine when to set the pre-trial hearings and whether to hear a motion to suppress at that time or later during the trial.

* When a trial court chooses to convene any pretrial proceeding, the presence of the defendant is required. Tex. Code Crim. Proc. art. 28.01 § 1.

* The defendant's right to have counsel present at the pretrial proceeding also attaches. *Riggall v. State*, 590 S.W.2d 460, 462 (Tex. Crim. App. 1979).

* To determine whether something falls under the definition of a "proceeding" within Article 28.01, ask whether there will be any findings of fact or law, an adversarial hearing, or the entry of an order by the court. If these factors can be found, then the meeting likely constitutes a proceeding and the presence of the defendant or at least his counsel is required. *Lawton v. State*, 913 S.W.2d 542, 549 (Tex. Crim App. 1995), *cert. denied* 519 U.S. 826 (1996).

* The trial judge has the discretion to "set any criminal case for a pre-trial hearing before it is set for trial upon its merits." Tex. Code Crim. Proc. art. 28.01 § 1. The Court can set the time and place for such a conference and hearing. Under the statute, the pre-trial hearing shall determine the following issues:

1. Arraignment of the defendant if not previously arraigned and appointment of counsel, if necessary;
2. Pleadings of the defendant;
3. Special pleas, if any;
4. Exceptions to the form or substance of the indictment or information;
5. Motion for continuance;
6. Motion to suppress;
7. Motion for change of venue;
8. Discovery;
9. Entrapment; and
10. Motion for appointment of interpreter.

* Notice of the hearing is sufficient if the trial court gives the required minimum notice of ten days in one of three ways:

1. Oral pronouncement in open court and in the presence of the defendant or his counsel;
2. Personal service upon the defendant or his counsel;
3. Mailed notice to the defendant or his counsel is *sufficient* if mailed six days prior to the date set for the hearing. Tex. Code Crim. Proc. art. 28.01 Sec. (3). The court may mail notice to the defendant at the address on his bond. If the defendant failed to place an address on the bond, mailing to the one of the sureties on the bond is sufficient. There is no requirement of proof that notice was received if the notice was properly addressed, stamped and mailed.

* Pre-trial matters must be filed by the defendant seven days before the pre-trial hearing. The defendant must be given ten days notice in which to raise and file pre-trial matters. Consequently, the trial court must give the defendant a total of 17 days notice prior to a pre-trial hearing. Tex. Code Crim. Proc. art 28.01 Sec. 2. In the seven days prior to the hearing, no further motions may be filed. This allows the

judge an uninterrupted week in which to review all pre-trial motions that have been filed.

* The purpose of the provisions of Article 28.01 in leaving to the sound discretion of the trial judge the setting of pre-trial hearings "is to enable the judge to dispose of certain matters prior to trial and thus avoid delays during the trial." *Johnson v. State*, 803 S.W.2d 272, 284 (Tex. Crim. App. 1990), aff'd 68 F.3d 106 (5th Cir. 1995).

* The law does not mandate that the trial judge hear suppression matters pretrial. *Lozada-Mendoza v. State*, 951 S.W.2d 39, 42 (Tex. App.—Corpus Christi 1997).

* The Court may, in its discretion, carry such hearings and ruling until during the trial. *Moore v. State*, 700 S.W.2d 193, 205 (Tex. Crim. App. 1985). It is preferred in capital cases where the death penalty is being sought that motions to suppress be heard pretrial, however. *Id.* at 205.

* There are some matters which the trial court must determine before trial, including a Motion to Challenge the Array.

B. Presence of Defendant at Pre-Trial Hearing

* The defendant must be present at the pre-trial hearing and the trial court can require his attendance. In *Warren v. State*, 804 S.W.2d 597 (Tex. App.—Houston [1st Dist] 1991), the Court held that Article 28.01 imposes an unwaiveable requirement on the defendant to be present at the pre-trial hearings, not a right to be present or not at such hearings. The Court clarified that the law provides "a right to be present at one's trial, but not a right to be absent." *Warren*, 804 S.W.2d at 598.

* In *Sanchez v. State*, 122 S.W.3d 347, 351 (Tex. App.—Texarkana 2003), the court found error when the trial court failed to require a capital murder defendant to be present at a pretrial hearing to determine whether to appoint a second interpreter in the case.

* The best method of protecting the record and the rights of all parties is to make sure everyone has proper notice, everyone is present, and a full record is made of the proceedings. The absence of a defendant during a hearing may be cured by going on the record, with the defendant and his counsel present, stating what occurred in the hearing held outside the presence of the defendant and allowing the defendant and his counsel to argue the issue, present evidence, or confront and cross any witnesses in the on the record hearing. *See Lawton v. State*, 913 S.W.2d 542 (Tex. Crim. App. 1995), *cert. denied* 519 U.S. 826 (1996).

Section 12. Motions to Quash the Indictment and Motions Challenging the Constitutionality of the Statutes

12. Motions To Quash the Indictment and Motions Challenging the Constitutionality of the Statues

A. Generally

* 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. Challenge to Constitutionality of the Statute

* "Questions involving the constitutionality of a statute upon which a defendant's conviction is based should be addressed by appellate courts even when such issues are raised for the first time on appeal." Rabb v. State, 730 S.W.2d 751, 752 (Tex. Crim. App. 1987).

* If the capital murder statute is challenged as being unconstitutional for its vagueness, the defendant must show that it is unconstitutional as applied to him. A showing of the statute being unconstitutional as applied to others is not sufficient. Such constitutional challenges to the multiple murder statute, Texas Penal Code § 19.03(a)(6)(A), have been consistently rejected. *Vuong v. State*, 830 S.W.2d 929, 941 (Tex. Crim. App. 1992); S*ee also Johnson v. State*, 853 S.W.2d 527, 534 (Tex. Crim. App. 1992) (statute not vague and over broad for failure to define "deliberately," "probability," "criminal acts of violence" and "continuing threat" to society).

* Texas Code of Criminal Procedure Article 37.071 is not unconstitutional for failure to provide a carefully detailed instruction on consideration of mitigating evidence, or because the 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 found in Article 37.071(b)(2) are vague. *Lackey v. State*, 819 S.W.2d 111, 135 (Tex. Crim. App. 1989).

* Article 37.071(b)(1) is not unconstitutional even though it does not permit the defendant to introduce mitigating evidence when the state relies on the theory of parties. This is due to the fact that the defendant has the "utmost latitude in presenting to the jury any evidence that may mitigate his punishment." *Ransom v. State*, 789 S.W.2d 572, 589 (Tex. Crim. App. 1989).

* Prosecutorial discretion on whether to charge a defendant for capital murder is broad, but limited by some constitutional restraints including basing a decision to prosecute on race, religion, or another arbitrary classification. If a defendant seeks to quash an indictment based on an equal protection claim, the defendant has the burden of proving purposeful discrimination. To succeed, the defendant must provide "exceptionally clear evidence" that the prosecution acted for improper reasons. *County v. State*, 812 S.W.2d 303, 308 (Tex. Crim. App. 1989); *See also Gregg v. Georgia*, 428 U.S. 153, 199 (1976).

* Prosecutorial discretion on whether to indict a defendant on capital murder charges is not equivalent to the legislature's power to define the range of penalties for crimes and thus does not violate the separation of powers doctrine. Tex. Const. art. II, sec. 1; *Patrick v. State*, 906 S.W.2d 481, 495 (Tex. Crim. App. 1995), *cert. denied*, 517 U.S. 1106 (1996).

* Article 37.071(b)(1) is not unconstitutional for imposing on the jury the standard of "probability" based on the theory that this is less stringent than proof beyond a reasonable doubt. The use of the word "probability" in the statute's special issues for juries in capital cases does not lessen the state's burden below that of beyond a reasonable doubt. *Sosa v. State*, 769 S.W.2d 909, 916-917 (Tex. Crim. App. 1989).

* A defendant is not denied 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) (allowing juries to consider unadjudicated, extraneous offenses at the punishment phase of trial).

* Article 37.071 is not unconstitutional because it is not based on a uniform national standard. States are permitted "to set their own standards within the limits imposed by the United States Constitution." *Johnson v. State*, 691 S.W.2d 619, 624 (Tex. Crim. App. 1984). Nor is it unconstitutional because it does not allow a proportionality review to determine whether the penalty is proportionate to other similar crimes. *Johnson*, 691 S.W.2d at 624.

* Article 37.071(d)(2) is not unconstitutional because it requires ten votes to answer "no" to a special issue resulting in life imprisonment rather than death for a defendant where in any other noncapital case, a single "no" would result in a mistrial. *Johnson*, 691 S.W.2d at 624.

* A defendant's claim that the death penalty is arbitrarily applied in Texas based on the size of the prosecuting counties' tax base and violates equal protection is without foundation absent a showing of empirical data, case law, or other factual data. *Bell v. State*, 938 S.W.2d 35, 55 (Tex. Crim. App. 1996).

* Execution by lethal injection is not cruel and unusual punishment, or otherwise unconstitutional. *Ex parte Granviel*, 561 S.W.2d 503, 508-16 (Tex. Crim. App. 1978).

* The risk that the execution procedures will not be properly followed and will result in pain to the condemned does not establish the objectively intolerable risk of harm that is necessary for a method of execution to be deemed cruel and unusual. *Baze v. Rees*, 128 S. Ct. 1520, 1531 (2008). Deciding if an alternative method of execution carries a smaller risk of harm is not a determination to be made by the judiciary. *Id.*

* Article 37.07(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).

* Article 37.071 is not unconstitutional for failing "to provide any mechanism by which the jurors could give recognition to the balance between the aggravating and mitigating factors involved" in the punishment phase of capital cases. *Soria v. State*, 933 S.W.2d 46, 67 (Tex. Crim. App. 1996).

* In *Satterwhite v. State*, 858 S.W.2d 412, 425 (Tex. Crim. App. 1993), defendant contended Article 37.071 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).

* The special issues found in Article 37.071 are constitutional despite not providing a mechanism for the jury to give mitigating effect to defendant's non-triggerman status. The special issues given to a jury

during the punishment phase focus “the jury's attention on a defendant's individual conduct, and does not allow a defendant to be put to death for merely being a party to a murder.” *Robinson v. State*, 851 S.W.2d 216, 235-36 (Tex. Crim. App. 1991).

* The multiple murder statute found in the Texas Penal Code § 19.03(a)(6) is constitutional because it requires a jury to find that a defendant commits all killings he is charged with under this statute either intentionally or knowingly. *Dinkins v. State*, 894 S.W.2d 330, 340 (Tex. Crim. App. 1995). The statute is constitutional to the extent that it requires a finding of deliberateness only as to one victim in a multiple murder prosecution in order to make the defendant eligible for the death penalty. *Norris v. State*, 902 S.W.2d 428, 448 (Tex. Crim. App. 1995).

* 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).

* Article 37.071 is constitutional because it does not deny jurors the opportunity to hear any relevant evidence during the punishment phase, including whatever the defense may deem to be mitigating evidence. *McFarland v. State*, 928 S.W.2d 482, 496 (Tex. Crim. App. 1996). * Article 37.071 § 2(e) is constitutional and requires the jury to consider all evidence, not exclusively mitigating or aggravating. “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).

* Death penalty schemes are not unconstitutional even though “statistical studies show 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.” *Cantu*, 939 S.W.2d at 649. Such statistical evidence is insufficient to create an inference that a decision maker acted with a discriminatory purpose. *McCleskey v. Kemp*, 481 U.S. 279, 297* Defendant 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).* Defendants are not entitled to evidentiary hearings “on whether the death penalty is administered in Texas in a racially discriminatory way.” *Raby v. State*, 970 S.W.2d 1, 4 (Tex. Crim. App. 1998).* The voir dire process is constitutional regardless of the fact that it may produce a jury that is more likely to convict the defendant and levy the death penalty. “We are disinclined to hold that jury selection conducted in accordance with state law violates state or federal constitutional law.” *Canales v. State*, 98 S.W.3d 690, 700 (Tex. Crim. App. 2003).

C. Motion to Quash Indictment for Lack of Notice

* 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). Such an indictment is a correct statement of the statutes governing capital murder. Texas Penal Code § 19.03(a)(2).*

* A capital murder indictment cannot be quashed for alleging that the defendant acted “intentionally and knowingly,” even though the statute requires only intentional conduct. The inclusion of the word “knowingly” does not render the indictment invalid. *Wyle v. State*, 777 S.W.2d 709, 717 (Tex. Crim. App. 1989). * Since there is no “double intent” requirement in the capital murder statute, an indictment need not be quashed 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).

* 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).

* An indictment for capital murder is not fundamentally defective for alleging murder in the course of *aggravated robbery,* even though the statue specifies *robbery*. This is due to the fact that “technically speaking, if one commits the offense of aggravated robbery, he is also guilty of committing the offense of robbery.” *Bonham v. State*, 680 S.W.2d 815, 820 (Tex. Crim. App. 1984).

* An indictment may allege a single count of murder in the course of burglary and murder in the course of robbery, where these allegations allege multiple ways of committing the offense of capital murder and not

multiple crimes. *Jernigan v. State*, 661 S.W.2d 936, 942 (Tex. Crim. App. 1983).

* An indictment may allege that the defendant intentionally caused the death of the victim rather than alleging that he intentionally murdered her. *Williams v. State*, 937 S.W.2d 479, 484 (Tex. Crim. App. 1996).

* 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).

D. State Constitutional Considerations

* Motion for Change of Venue

1. "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) (en banc). In other words, the defendant must show "the existence of such prejudice in the community that the likelihood of obtaining a fair and impartial jury is doubtful" which is a heavy burden. *DeBlanc v. State,* 799 S.W.2d 701, 704 (Tex. Crim. App. 1990).
2. The test to be applied in determining whether a venue motion should be granted is "where outside influences affecting the community's climate of opinion as to a defendant are inherently suspect the resulting probability of unfairness requires suitable procedural safeguards, such as a change of venue, to assure a fair and impartial trial." *Bridges v. State*, 471 S.W.2d 827, 828 (Tex. Crim. App. 1971). 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.
3. 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.
4. 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. "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, 743 (Tex. Crim. App. 1988).
5. The trial court may also change venue on its own motion and does not have to provide evidence in support of its motion, but must state its grounds for doing so and provide the parties a chance to be heard on the matter. *Brimage v. State*, 918 S.W.2d 466, 508 (Tex. Crim. App. 1996).
6. 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).
7. It is a deprivation of due process and an error for a trial court 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).
8. 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) appeal after remand 620 S.W.2d 134 (Tex. Crim. App. 1981).
9. Failure to comply with the time limits for filing other pretrial motions, set out in Tex. Code Crim. Proc. 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 impaneled, and before the defendant enters his plea to the indictment. *Foster v. State*, 779 S.W.2d 845, 854 (Tex. Crim. App. 1989 (en banc).
10. 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. 1988).

* Experts

1. *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).
2. A defendant does not have the right to have counsel present during a psychiatric examination either under the Fifth or Sixth Amendment. *Gardner v. State*, 733 S.W.2d 195, 201-02 (Tex. Crim. App. 1987)("informal discussions" were adequate notice).
3. 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).

4. In *Wright v. State*, 28 S.W. 3d 526, 532-33 (Tex. Crim. App. 2000), defendant 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.
5. For motions for DNA testing made before September 1, 2003, the statute does not authorize an appeal of findings under any articles other than Texas Code of Criminal Procedure 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.

Section 13. Addendum

13. Addendum

1. Scheduling Order
2. Attorney checklist on motion and rulings
3. Conditions of Bond
4. Standards for Appointment of Counsel in Death Penalty Cases:

   1st Administrative Region

   2nd Administrative Region

   3rd Administrative Region

   4th Administrative Region

   5th Administrative Region

   6th Administrative Region

   7th Administrative Region

   8th Administrative Region

   9th Administrative Region
5. Fee structures for capital cases

   1. Cherokee County
   2. Dallas County
   3. Harris County
   4. Lubbock County
   5. Smith County
   6. Tarrant County

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Chapter 2 - MENTAL HEALTH ISSUES

Section 1. Appointment Of Experts

1. Appointment of Experts

A. Appointment in General

* The trial court should appoint mental health experts to assist the defendant in investigating and presenting evidence of mental health status in a capital case.

* The court is not required to appoint all the experts requested by a defendant in a capital murder case but should appoint a psychiatrist and psychologist if properly requested.

B. Appointment Under Seal

* In a capital case the defendant may request that the appointment be made under seal. This can be done in two ways:

1. The defendant can make a motion and justification for experts under seal. The judge's order will appoint the expert and also order the clerk to seal the motion and the order.
2. Alternatively, the defendant can make a regular motion for appointment of an expert and then make a separate motion to seal the motion and the order. *See also*, Tex. R. Civ. Pro., Rule 76a.

C. *AKE* Motions

* The Due Process Clause of the 14th Amendment requires an expert witness to be appointed to an indigent defendant if the appointment of the expert is necessary "to provide [the defendant] with the basic tools to present his defense within our adversarial system." *Ake v. Oklahoma, 470 U.S. 68, 85 (1985); Busby v. State, 990 S.W.2d 263, 271 (Tex. Crim. App. 1999).*

* The "key question" the court must answer in an *Ake* Motion is whether there is a "high risk of an inaccurate verdict absent the appointment of the requested expert." *Busby v. State*, 990 S.W.2d 263, 271 (Tex. Crim. App. 1999).

* Often in capital cases, either during the trial on the merits or later in a writ of habeas corpus, the defendant's counsel will request an ex parte *Ake* hearing.

* The court should have the court reporter record the ex parte *Ake* hearing.

* At the ex parte *Ake* hearing the defendant may file his request for a specific expert and request funding to pay the expert.

* The court should require that the expert's qualifications and experience be set out in detail before funding is ordered. Additionally, the court should require that the expert prepare a budget setting out expenses and costs to be incurred.

Section 2. Compulsory Examinations

2. Compulsory Examinations

* The court may order any defendant to submit to an examination to determine competency to stand trial or insanity. If the defendant refuses to be examined, the defendant may be institutionalized for up to 21 days. If after the 21 days the defendant continues to refuse, the defendant is placed in the custody of the county sheriff. Tex. Code Crim. Proc. art. 46C.104.

Section 3. Compentency to Stand Trial

3. Competency to Stand Trial

A. Incompetency to Stand Trial, Defined

* A person is incompetent to stand trial if the person does not have:

1. Sufficient present ability to consult with a lawyer with a reasonable degree of rational understanding,

or

2. A rational and factual understanding of the proceedings against the person. Tex. Code Crim. Proc. art. 46B.003(a).

B. Incompetency to Stand Trial in a Capital Case

* The procedures concerning incompetency to stand trial in a capital case are identical to the procedures used in a non-capital case.

C. Presumption of Competency

* A defendant is presumed competent to stand trial unless incompetence is proven by a preponderance of the evidence. Tex. Code Crim. Proc. art. 46B.003(b).

* A defendant's disruptive and unruly courtroom behavior is not necessarily sufficient evidence of incompetence to stand trial, unless there is enough evidence to create genuine doubt in the judge's mind as to whether the defendant meets the test of legal competence. *Moore v. State*, 999 S.W.2d 385, 393-95 (Tex. Crim. App. 1999).

Section 4. Compentency to be Executed

4. **Competency to be Executed**

A. Incompetency to be Executed, Generally

* A person who is incompetent to be executed may not be executed. Tex. Code Crim. Proc. art. 46.05(a).

* "The Eighth Amendment prohibits a state from carrying out a sentence of death upon a prisoner who is insane." *Ford v. Wainwright*, 477 U.S. 399, 410 (1986).

B. Incompetent to be Executed, Defined

* The defendant is incompetent to be executed if the defendant does not understand:

1. That he or she is to be executed, and
2. The reason for the execution. Tex. Code Crim. Proc. art. 46.05.

C. Raising the Issue of Incompetence to be Executed

* A motion of incompetency to be executed must include the following:

1. Identify the proceeding in which the defendant was convicted,
2. Give the date of the final judgment,
3. Set forth the fact that the date of execution has been set, if the date has been set,
4. clearly set forth alleged facts in support of the assertion that the defendant is presently incompetent,
5. affidavits, records, or other evidence supporting the defendant's allegations or the defendant shall state why those items are not attached
6. the defendant shall identify any previous proceedings in which the defendant challenged the defendant's competency in relation to the conviction and sentence in question. Tex. Code Crim. Proc. art. 46.05(c).

* The motion must be verified by the oath of some person on the defendant's behalf. Tex. Code Crim. Proc. art. 46.05(c).

D. Jurisdiction

* The trial court which sentenced the defendant to death retains jurisdiction over motions of incompetence to be executed. Tex. Code Crim. Proc. art. 46.05(b).

E. Basis for Determination of Substantial Doubt of Competency to Executed

* Upon receipt of a motion of incompetency to be executed, the court must determine whether the defendant has raised a substantial doubt of the defendant's competency to be executed on the basis of:

1. The motion, any attached documents, and any responsive pleadings, and
2. The presumption of competency, if applicable. Tex. Code Crim. Proc. art. 46.05(d).

* Presumption of Competency

1. If a defendant has previously been determined to be competent to be executed, this previous adjudication creates a presumption of competency to be executed. Tex. Code Crim. Proc. art. 46.05(e).
2. If there is a presumption of competency the defendant is not entitled to a hearing unless the efendant makes a prima facie showing of substantial change in circumstances sufficient to raise a significant question as to the defendant's competency to be executed as the time of the filing of the subsequent motion. Tex. Code Crim. Proc. art. 46.05(e).

F. Denial of the Motion

* If the court determines that the defendant has not made a substantial showing of incompetency the court shall deny the motion and set an execution date. Tex. Code Crim. Proc. art. 46.05(g).

G. Examination of the Defendant

* If the court determines that the defendant has made a substantial showing of incompetency the court shall order an examination by at least two mental health experts. Tex. Code Crim. Proc. art. 46.05(f).

* The determination of whether to appoint experts and conduct a hearing is within the discretion of the trial court. *Ex parte Caldwell, 58 S.W.3d 127, 130 (Tex. Crim. App. 2000).*

* By filing a motion of incompetency to be executed the defendant waives any claim of privilege with respect to, and consents to the release of all mental health and medical records relevant to whether the defendant is incompetent to be executed. Tex. Code Crim. Proc. art. 46.05(j).

* The experts shall provide copies of their reports to the attorneys of both parties and to the court within a time ordered by the trial court. Tex. Code Crim. Proc. art. 46.05(i).

H. Determination of Incompetency to be Executed

* The trial court shall determine whether the defendant has established by a preponderance of the evidence that the defendant is incompetent to be executed on the basis of the following:

1. the reports provided by the mental health experts,
2. the motion and any attached documents,
3. responsive pleadings, and
4. evidence introduced in the competency hearing. Tex. Code Crim. Proc. art. 46.05(k).

* If the court makes a finding that the defendant is not incompetent to be executed the court may set an execution date. Tex. Code Crim. Proc. art. 46.05(k).

* The Court of Criminal Appeals cannot review a finding by the trial court that the defendant is competent to be executed after a hearing takes place. *Ex parte Caldwell, 58 S.W.3d 127, 130 (Tex. Crim. App. 2000).*

I. Review of the Trial Court's Decision by the Court of Criminal Appeals

* Following the trial court's determination of the motion of incompetency to be executed and on the motion of either party the clerk shall send immediately to the Court of Criminal Appeals the appropriate documents for review and entry of judgment of whether to adopt the trial court's findings. Tex. Code Crim. Proc. art. 46.05(l).

* The Court of Criminal Appeals shall also determine whether any existing execution date should be withdrawn and a stay of execution issued while that court is conducting its review or after entry of its judgment. Tex. Code Crim. Proc. art. 46.05(l).

* Barriers to Review by the Court of Criminal Appeals

1. The Court of Criminal Appeals may not review any finding of the defendant's competency made by the trial court as a result of a motion filed on or after the 20th day before the defendant's scheduled execution date. Tex. Code Crim. Proc. art. 46.05(l-1).
2. Under Article 46.05, the Court of Criminal Appeals only has authority to review the trial court's finding that a defendant is incompetent, not a finding that the defendant is competent. *Ex parte Caldwell, 58 S.W.3d 127, 130 (Tex. Crim. App. 2000).*

* If the Court of Criminal Appeals enters a judgment that a defendant is not incompetent to be executed the court may withdraw any stay of execution and the trial court may set an execution date. Tex. Code

Crim. Proc. art. 46.05(n).

J. Re-examination of Incompetent Inmate

* If a stay of execution is ordered by the Court of Criminal Appeals, the trial court shall periodically order an examination of the defendant to determine if the defendant has regained competency. Tex. Code Crim. Proc. art. 46.05(m).

K. Compulsory Medication to Restore Competency to be Executed

* An order compelling an inmate to take medication to regain competency to be executed is not an "appealable order" under Texas Rules of Appellate Procedure, Article 25.2(a)(2). *Staley v. State*, 233 S.W.3d 337, 337 (Tex. Crim. App. 2007) (Defendant's appeal was dismissed because the trial court's order requiring an incompetent-to-be-executed death-row inmate to voluntarily take his psychotropic medications to treat his schizophrenia, and requiring him to be compelled to do so if he refused, was interlocutory in nature and did not constitute an appealable order).

* A state may constitutionally restore a death-row inmate's competency through forced medication and then execute him in part because the best medical interests of the prisoner must be determined without regard to whether there is a pending date of execution. *Singleton v. Norris*, 319 F.3d 1018, 1027 (8th Cir. 2003), *cert. denied*, 540 U.S. 832 (2003).

* A State does not violate the 8th Amendment when it executes a prisoner who became incompetent during his stay on death row but who subsequently regained competency through appropriate compulsory medical care. *Singleton v. Norris*, 319 F.3d 1018, 1026-27 (8th Cir. 2003), *cert. denied*, 540 U.S. 832 (2003).

Section 5. Insanity Defense

5. The Insanity Defense

A. Legal Insanity Defined

* "Legal Insanity" exists when at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his or her conduct was wrong. Texas Penal Code § 8.01(a).

* The term "mental disease or defect" does not include an abnormality manifested only be repeated criminal or otherwise antisocial conduct. Tex. Penal Code § 8.01(b).

* "Legal insanity" is not a clinical term. Instead, legal insanity is a legal determination made by a fact finder that at the time the crime was committed the mental disease or defect prevented the defendant from understanding that the criminal conduct engaged in was wrong.

* Even if a defendant's evidence indisputably establishes medical insanity, it would not necessarily establish legal insanity. *Dashield v. State*, 110 S.W.3d 111, 118 (Tex. App.— Houston [1st Dist.] 2003).

* The term "wrong" is not defined in the penal code and so the jury is free to interpret the word according to common meaning. *Aschbacker v. State*, 61 S.W.3d 532, 539 (Tex. App.—San Antonio 2001).

B. Insanity as an Affirmative Defense

* The defendant has an affirmative defense to prosecution if the defendant was insane at the time of the conduct charged. Tex. Penal Code § 8.01(a).

C. Insanity Defense in a Capital Case

* The procedures governing the use of the insanity defense in a capital case are identical to those used in a non-capital case.

D. Burden of Proof

* The defendant has the burden to prove by a preponderance of the evidence that the defendant was insane at the time of the offense. *Bigby v. State*, 892 S.W.2d 864, 870 (Tex. Crim. App. 1994).

* The State has no burden to negate the existence of the affirmative defense of insanity. *Bigby v. State*, 892 S.W.2d 864, 870 (Tex. Crim. App. 1994).

* If the defendant has previously been adjudicated insane in another proceeding and has raised the affirmative defense of insanity, then the burden of proof shifts to the State to prove beyond a reasonable doubt that the defendant was sane at the time of the offense. *Martinez v. State*, 867 S.W.2d 30, 33 (Tex. Crim. App. 1993).

Section 6. Diminished Capacity

6. Diminished Capacity

* Texas does not recognize diminished capacity as an affirmative defense. Jackson v. State, 160 S.W.3d 568, 572 (Tex. Crim. App. 2005).

Section 7. Mental Retardation

7. Mental Retardation

A. Mental Retardation, Generally

* Mental Retardation is applicable in a capital case in two situations:
    1. As a mitigating factor during the sentencing phase
    2. As a bar to execution after the trial has concluded

B. U.S. Supreme Court Standards for Mental Retardation

* The United States Supreme Court banned the execution of the mentally retarded, but left the job of defining “mentally retarded” to the states. *Atkins v. Virginia*, 536 U.S. 304, 317 (2002); *Ex parte Briseno*, 135 S.W.3d 1, 5 (Tex. Crim. App. 2004).

* The United States Supreme Court looked to the American Association on Mental Retardation (AAMR) and the American Psychiatric Association (APA) for definitions of mental retardation. *Atkins v. Virginia*, 536 U.S. 304, 309 n.3 (2002).

1. The American Association on Mental Retardation (AAMR) definition is as follows:
    a. “Mental retardation refers to substantial limitation in present functioning. It is characterized by significantly sub average intellectual functioning, existing concurrently with related limitations in two or more of the following adaptive skill areas:
        i. Communication,
        ii. Self-care,
        iii. Home living,
        iv. Social skills,
        v. Community use,
        vi. Self-direction,
        vii. Health and safety,
        viii. Functional academics,
        ix. Leisure and
        x. Work.
    b. Mental retardation manifests before age 18.” *Atkins v. Virginia*, 536 U.S. 304, 309 n.3 (2002); Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed. 1992).
2. American Psychiatric Association (APA) definition is as follows:
    a. The essential feature of mental retardation is significantly sub average general intellectual function that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas:
        i. Communication,
        ii. Self-care,

iii. Home living,
iv. Social skills,
v. Community use,
vi. Self-direction,
vii. Health and safety,
viii. Functional academics,
ix. Leisure and
x. Work.

b. The onset must occur before age 18 years.
c. Mental retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system. *Atkins v. Virginia*, 536 U.S. 304, 309 n.3 (2002); American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000).

C. Diagnostic and Statistical Manual – IV (Revised) Definition of Mental Retardation

* "The essential feature of Mental Retardation is significantly below average general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C)." Disorders Usually First Diagnosed in Infancy, Childhood or Adolescence. DSM-IV (rev'd 4th ed. 2000).

* Problems with the DSM-IV Definition of Mental Retardation

1. The DSM-IV divides mental retardation into five categories: Mild, Moderate, Severe, and Profound Mental Retardation and Mental Retardation, Severity Unspecified (see chart below).
2. Although these categories are necessary for the medical and field and for social services, there is not a national or Texas consensus that all of those persons whom the mental health profession might diagnose as meeting the criteria for mental retardation are automatically less morally culpable than those who just barely miss meeting those criteria. *Ex parte Briseno*, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004).

Diagnostic and Statistical Manual – IV (Revised) **Categories of Mental Retardation**				
Mild Mental Retardation	**Moderate Mental Retardation**	**Severe Mental Retardation**	**Profound Mental Retardation**	**Mental Retardation, Severity Unspecified**

Mild Mental Retardation constitutes the largest segment (about 85%) of those with the disorder. People with this level of Mental Retardation typically are not distinguishable from children without Mental Retardation until a later age. They can acquire academic skills up to approximately the sixth-grade level.	This group constitutes about 10% of the entire population of people with Mental Retardation. They can also benefit from training in social and occupational skills but are unlikely to progress beyond the second-grade level in academic subjects.	Severe Mental Retardation constitutes 3%-4% of individuals with Mental Retardation. During the early childhood years, they acquire little or no communicative speech. They profit to only a limited extent from instruction in pre-academic subjects, such as familiarity with the alphabet and simple counting.	Profound Mental Retardation constitutes approximately 1%-2% of people with Mental Retardation. During the early childhood years, they display considerable impairments in sensory motor functioning.	The diagnosis of Mental Retardation, Severity Unspecified, should be used when there is a strong presumption of Mental Retardation but the person cannot be successfully tested by standardized intelligence tests.

D. Texas Standards for Mental Retardation

* The only statutory definition of “mental retardation” in Texas is found at Tex. Health & Safety Code §591.003(13):

1. “Mental Retardation means significantly sub average general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period.”

* Texas House Bill 236, 77th Leg., R.S. (2001).

1. Note: This bill was proposed prior to the U.S. Supreme Court decision in *Atkins,* which made the execution of the mentally retarded illegal.
2. Texas House Bill 236 would have made it illegal to execute the mentally retarded in Texas. Secondly, it called for the adoption of the definition of mental retardation found in Tex. Health & Safety Code § 591.003(13) for use by the criminal justice system. Lastly, it allowed judges to use this definition to determine if a defendant was mentally retarded. Tex. H.B. 236, 77th Leg., R.S. (2001).
3. This bill was vetoed by Governor Perry in 2001 because it shifted the power of choosing who should be executed from a jury to a judge. Megan K. Stack, “Governor vetoes ban on executing mentally disabled” Los Angeles Times, June 18, 2001 available at http://www2.ljworld.com/news/2001/jun/18/governor_vetoes_ban/ ("This legislation is not about whether to execute mentally retarded murderers. We do not execute mentally retarded murderers. It's about who makes the determination.")

* Texas Common Law Measurements of Mental Retardation

1. The Texas Court of Criminal Appeals follows two definitions of mental retardation (*Ex parte Briseno*, 135 S.W.3d 1, 7 (Tex. Crim. App. 2004)):
    a. American Association on Mental Retardation (AAMR)
        i. Mental retardation is a disability characterized by: (1) "significantly sub average" general intellectual functioning; (2) accompanied by "related" limitations in adaptive functioning; (3) the onset of which occurs prior to the age of

18.

ii. “Significantly sub average intellectual functioning” is an IQ of about 70 or below (approximately 2 standard deviations below the mean).

b. Tex. Health & Safety Code § 591.003(13).

i. “Mental retardation means significantly sub average general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period."

2. Impairments in adaptive behavior should be considered. *Ex parte Briseno*, 135 S.W.3d 1, 7 (Tex. Crim. App. 2004).
    a. “Impairments in adaptive behavior” are significant limitations in an individual’s effectiveness in meeting the standards of maturation, learning, personal independence, and/or social responsibility that are expected for his or her age level and cultural group, as determined by clinical assessment, and usually standardized scales. *Ex parte Briseno*, 135 S.W.3d 1, 7 (Tex. Crim. App. 2004).
    b. In this context, "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." *Ex parte Briseno*, 135 S.W.3d 1, 7 (Tex. Crim. App. 2004).
3. The fact finder in a criminal trial may also consider the following:
    a. Did those who knew the person best during the developmental stage - his family, friends, teachers, employers, and 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. Did the commission of that offense require forethought, planning, and complex execution of purpose? *Ex parte Briseno,* 135 S.W.3d 1, 8-9 (Tex. Crim. App. 2004).
4. The court should also measure the IQ of the defendant.
    a. The Wechsler Adult Intelligence Scales test (WAIS-III) is the standard instrument in the United State for assessing intellectual functioning. *Atkins v. Virginia, 536 U.S. 304, 309 n. 5 (2002).*
    b. The WAIS-III is scored by adding together the number of points earned on different subtests and using a mathematical formula to convert this raw score into a scaled score. *Atkins v. Virginia, 536 U.S. 304, 309 n. 5 (2002).*
    c. The test measures an intelligence range from 45 to 155. The mean score of the test is 100, which indicates that a person receiving a score of 100 is considered to have an average level of cognitive functioning. *Atkins v. Virginia, 536 U.S. 304, 309 n. 5 (2002).*
    d. A score of 75 or lower is an indication of mental retardation. Between 1 and 3% of the US population falls into this range. *Atkins v. Virginia, 536 U.S. 304, 309 n. 5 (2002).*

E. Burden of Proof

* The defendant must prove mental retardation by a preponderance of the evidence. *Ex parte Briseno*, 135 S.W.3d 1, 12 (Tex. Crim. App. 2004).

* The State does not have a duty to affirmatively show that a capital murder defendant

is not mentally retarded. *Escamilla v. State*, 143 S.W.3d 814, 828 (Tex. Crim. App. 2004).

F. Execution of the Mentally Retarded Prohibited

* Mentally retarded defendants cannot be executed. *Atkins v. Virginia, 536 U.S. 304, 321 (2002).*

* The execution of mentally retarded criminals will not measurably advance the deterrent or retributive purpose of the death penalty. *Atkins v. Virginia, 536 U.S. 304, 321 (2002).* * The execution of the mentally retarded is excessive punishment under the 8th Amendment. *Atkins v. Virginia, 536 U.S. 304, 321 (2002).* * The task of creating of guidelines for determination of whether a person is mentally retarded has been left to the states. *Ex parte Briseno*, 135 S.W.3d 1, 5 (Tex. Crim. App. 2004).

G. Writ Hearings on Mental Retardation

* If a defendant has been sentence to death, mental retardation can be raised as a bar to execution.

* In an Art. 11.071 writ of habeas corpus hearing there is no mechanism that provides for a jury trial on an issue first raised in a post-conviction habeas corpus proceeding.

* The court should hold an evidentiary hearing to determine mental-retardation claims raised for the first time in post-*Ake* habeas applications. *Ex parte Simpson*, 136 S.W.3d 660, 663 (Tex. Crim. App. 2004).

* An evidentiary hearing is not necessary if:

1. The habeas applicant relies primarily on trial testimony, and
2. Both sides had an opportunity to fully develop the pertinent facts at trial, and
3. The habeas judge had an opportunity to assess the credibility and demeanor of the witness when he presided over the trial. *Ex parte Simpson*, 136 S.W.3d 660, 663 (Tex. Crim. App. 2004).

Section 8. Mental Health Issues as Mitigating Evidence

8. Mental Health Issues as Mitigating Evidence

* In any capital case, a defendant has wide latitude to raise as a mitigating factor "any aspect of [his or her] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Roper v. Simmons*, 543 U.S. 551, 568 (2005).

* Even if the issues of competence, sanity, and mental retardation were determined against a defendant, these issues still should be available for the jury to consider in the sentencing phase of trial.

* A defendant's impairment need not rise to the level of incompetency or insanity to be relevant to the issue of sentencing.

* Mental impairment of a defendant should be presented to a jury in the sentencing phase.

1. Evidence of paranoid schizophrenia is relevant mitigating evidence. *Bigby v. Dretke*, 402 F.3d 551, 567 (5th Cir. 2005).
2. Evidence of a low IQ can be admitted as mitigating evidence. *Ramirez v. State*, 815 S.W.2d 636, 656 (Tex. Crim. App. 1991).
3. Testimony that a defendant's mental and emotional development is at a level several years below his chronological age should be admitted as mitigating evidence. *Burger v. Kemp*, 483 U.S. 776, 790 n.7 (1987).
4. Mental retardation can be admitted as mitigating evidence. *Ex parte Modden v. State*, 147 S.W.3d 293, 298 (Tex. Crim. App. 2004).

* No Nexus Requirement

1. A mentally retarded or otherwise mentally disabled individual does not have to establish a nexus between his or her mental capacity the crime in order for evidence of mental capacity to be admissible as a mitigating factor. *Tennard v. Dretke*, 542 U.S. 274, 287 (2004).
2. *See also Bigby v. Dretke*, 402 F.3d 551, 565 (5th Cir. 2005) (the petitioner's chronic paranoid schizophrenia was relevant mitigating evidence without regard to any link between his mental illness and his conduct at the time of the murders.)

* Note: The fact that a jury answered the mitigation special issue “no” is not the equivalent of a jury finding that the applicant is not mentally retarded. *Ex parte Modden*, 147 S.W.3d 293, 298 (Tex. Crim. App. 2004).

Section 9. Addendum

9. ADDENDUM

1. **Forced Medication of Incompetent Prisoners**

Section 10. Author Credits

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Chapter 3 - JURY SELECTION

Section 1. Determine Method of Jury Selection

1. Determine Method of Jury Selection

A. **General Venire**

- Article 34.01 of the Texas Code of Criminal Procedure provides that where more than 100 individuals are summoned for jury service during a particular week of a capital trial, the trial judge may draw a panel from the central jury pool in lieu of summoning a special venire. *See Barnes v. State*, 876 S.W.2d 316, 323-24 (Tex. Crim. App. 1994).
- Where as many as 100 jurors have been summoned in such county for regular service for the week in which such capital case is set for trial, the judge of the court having jurisdiction of a capital case in which a motion for a special venire has been made, shall grant or refuse such motion for a special venire, and upon such refusal require the case to be tried by regular jurors summoned for service in such county for the week in which such capital case is set for trial and such additional talisman as may be summoned by the sheriff upon order of the court as provided in Article 34.02 of this Code, but the clerk of such court shall furnish the defendant or his counsel a list of the persons summoned as provided in Article 34.04. Tex. Code Crim. Proc. Art. 34.01.
- Benefit: A change in the trial schedule will not necessitate a separate jury summons because the venire can be drawn on any week a jury panel reports for service.
- Where more than 100 jurors are summoned for regular service the week of trial, the decision to grant a special venire is at the trial court's discretion. If a trial court grants a motion for a special venire in one county and venue is then changed to a county where more than 100 jurors are called for service during a particular week, the trial court has discretion to deny the request for special venire in the county to which venue has been changed. *See Barnes*, 876 S.W.2d at 323-24.

B. **Special Venire**

- A "special venire" is a writ issued in a capital case by order of the district court, commanding the sheriff to summon either verbally or by mail such a number of persons, not less than 50, as the court may order, to appear before the court on a day named in the writ from whom the jury for the trial of such case is to be selected. Tex. Code Crim. Proc. Art. 34.01.
- A writ to summon a special venire should be served to the district clerk. The writ should include a return to be completed by the sheriff to show evidence of compliance with the court's order. The return should be properly filed with the trial court. Tex. Code Crim. Proc. Art. 34.01.
- Either the state or defense may request a special venire. *Hatton v. State*, 109 Tex. Crim. 121, 123, 3 S.W.2d 87, 88 (1928).
- In determining how many potential jurors to summon for a special venire, the trial judge should carefully determine how many potential jurors are needed to assure that a jury of 12, plus any alternates, can be qualified and sworn to serve.

Section 2. Additional Summons for Supplemental Special Venire Persons

2. Additional Summons for Supplemental Special Venire Persons

A. **Generally**

- In any criminal case in which the court deems that the veniremen theretofore drawn will be insufficient for the trial of the case, or in any criminal case in which the venire has been exhausted by challenge or otherwise, the court shall order additional veniremen in such numbers as the court may deem advisable. Tex. Code Crim. Proc. Art. 34.02.
- The court is not required to order additional venire persons until all those members of the original special venire have been exhausted. *Williams v. State*, 778 S.W.2d 155, 155-56 (Tex. App.—Texarkana 1989, no writ).

B. **The Process**

- Article 34.02 of the Texas Code of Criminal Procedure provides that additional venire persons shall be summoned as follows:
    1. In a jury wheel county, the names of those to be summoned shall be drawn from the jury wheel.

2. In counties not using the jury wheel, the veniremen shall be summoned by the sheriff.

Section 3. Instructions to the Sheriff

3. Instructions to the Sheriff

- When the sheriff is ordered by the court to summon persons upon a special venire whose names have not been selected under the Jury Wheel Law, the court shall, in every case, caution and direct the sheriff to summon such persons as have legal qualifications to serve on juries, informing him of what those qualifications are, and shall direct him, as far as he may be able to summon persons of good character who can read and write, and such as are not prejudiced against the defendant or biased in his favor, if he knows of such bias or prejudice. Tex. Code Crim. Proc. Art. 34.03./li>

Section 4. Notice of List

4. Notice of List

A. **Two Day Requirement**

- No defendant in a capital case in which the state seeks the death penalty shall be brought to trial until he shall have had at least two days (including holidays) a copy of the names of the persons summoned as veniremen for the week for which his case is set for trial except when he waives the right or is on bail. Tex. Code Crim. Proc. Art. 34.04; *Brown v. State*, 496 S.W.2d 640, 640 (Tex. Crim. App. 1973).
- When such defendant is on bail, the clerk of the court shall furnish the list to the defendant or his counsel at least two days prior to the trial (including holidays) upon timely motion by the defendant or his counsel at the office of the clerk, and the defendant shall not be brought to trial until such list has been furnished to the defendant or his counsel for at least two days (including holidays). Tex. Code Crim. Proc. Art. 34.04.
- There is no requirement that additional time be granted to review said list. Denial of additional time is not error. *See Ramirez v. State*, 815 S.W.2d 636, 654 (Tex. Crim. App. 1991).
- The list of names of a second or supplemental special venire does not need to be served to the defendant two days before jury selection. However, the clerk should compile a list of additional names promptly after they are drawn. *Wyle v. State*, 777 S.W.2d 709, 713-14 (Tex. Crim. App. 1989).

B. **Service**

- Delivery to counsel for the defendant is sufficient. There is no requirement for the capital defendant to be personally served with the list of special venire persons. *See Wyle v. State*, 777 S.W.2d 709, 713-14 (Tex. Crim. App. 1989).
- The defendant may waive being served a copy of the list. Tex. Code Crim. Proc. Art 34.04.
- Where there is no objection to the venire or motion to quash for failure of the court to supply the defendant with the list, and there is no request for a continuance or postponement in order to obtain the list, service is waived. *Burns v. State*, 470 S.W.2d 867, 868 (Tex. Crim. App. 1971).

Practice Notes: *The number of special venire persons to be summoned for trial is at the court's discretion. Input from counsel and the District Clerk can assist the court is determining how many special venire persons are needed to provide an adequate pool of qualified venire persons from which to select the jury. The Court should consider many factors including:*

1. *Notoriety of the case in the community;*
2. *Extent and nature of pre-trial publicity in case;*
3. *Historical data from the District Clerk as to the numbers of jurors summoned on past capital cases;*
4. *Historical data from the District Clerk as to percent of individuals who respond to their jury summons;*
5. *Physical plant limitations of the central jury room or the courtroom;*
6. *Effect of the trial of other cases of high publicity in community on this trial;*
7. *Whether the defendant is probation eligible for any lesser-included offenses; and*
8. *Whether there have been trials of any co-defendants connected with this case.*

Section 5. Formation of the Jury

5. Formation of the Jury

A. **Presence of Summoned Jurors**

- Texas Code of Criminal Procedure Article 35.01 provides:
    1. When a case is called for trial and the parties have announced ready for trial, the names of those summoned as jurors in the case shall be called. Those not present may be fined not exceeding fifty dollars.
    2. An attachment may issue on request of either party for any absent summoned juror, to have him brought forthwith before the court.
    3. A person who is summoned but not present, may upon appearance, before the jury is qualified, be tried as to his qualifications and empanelled as a juror unless challenged, but no cause shall be unreasonably delayed on account of his absence.
- If an attachment is issued, the record should clearly reflect the order issuing the writ and the efforts made to obtain the presence of the individual(s) who failed to appear.
- The failure of the trial court to grant attachments does not constitute reversible error unless there is a showing of injury. *Dowthitt v. State*, 931 S.W.2d 244, 251 (Tex. Crim. App. 1996).

B. **Evaluation of Potential Jurors' Excuses**

- Article 35.03, Sec. 1, of the Code of Criminal Procedure provides that except for Sections 2 and 3 of 35.03, the court shall then hear and determine excuses for not serving as a juror, including any claim of an exemption or a lack of qualification, and if the court considers the excuse sufficient, the court shall discharge the prospective juror's service to a date specified by the court as appropriate. Tex. Code Crim. Proc. Art 35.03 §1.
- Article 35.03, Sec. 2 provides that under a plan approved by the commissioners court of the county in the same manner as a plan is approved for jury selection under Section 62.011, Government Code, in a case **other than a capital felony case**, the court's designee may hear and determine an excuse offered for not serving as a juror, including any claim of an exemption or a lack of qualification. The court's designee may discharge the prospective juror or postpone the prospective juror's service to a date specified by the court's designee, as appropriate, if:
    1. the court's designee considers the excuse sufficient; and
    2. the juror submits to the court's designee a statement of the ground of the exemption or lack of qualification or other excuse. Tex. Code Crim Proc. Art. 35.03.
- In the case of a special venire in a capital case, the trial judge cannot designate others to make decisions with respect to excuses. Tex. Code Crim. Proc. Ann. art. 35.03 (Vernon 2006); *Chambers v. State*, 903 S.W.2d 21, 30 (Tex. Crim. App. 1995).
- However, under subsection (2) of Article 35.05 of the Code of Criminal Procedure, a court's designee may make decisions on excuses in cases other than capital felony cases. In the case of a general assembly (a general venire situation) prospective jurors who are summoned have not been assigned to any particular case. Therefore, a judge assigned to the general assembly or a court designee under 35.03(2) may hear potential juror excuses. *Chambers v. State* , 903 S.W.2d 21, 30 (Tex. Crim. App. 1995).

Section 6. Challenge to the Array

6. Challenge to the Array

A. **Grounds**

- Each party may challenge the array only on the ground that the officer summoning the jury has willfully summoned jurors with a view to securing a conviction or an acquittal. All such challenges must be in writing setting forth distinctly the grounds of such challenge. When made by the defendant, it must be supported by his affidavit or the affidavit of any credible person. When such challenge is made, the judge shall hear evidence and decide without delay whether or not the challenge shall be sustained. Tex. Code Crim. Proc. Art. 35.07

B. **Timing**

- The Court shall hear and determine a challenge to the array before interrogating those summoned as to their qualifications. Tex. Code Crim. Proc. Art. 35.06.

C. **When Challenge is Sustained**

- The array of jurors summoned shall be discharged if the challenge be sustained, and the court shall order other jurors to be summoned in their stead, and direct that the officer who summoned those so discharged, and on account of whose misconduct the challenge has been sustained shall not summon any other jurors in the case. Tex. Code Crim. Proc. Art. 35.08.

Section 7. Preparation of List - Motion to Shuffle

7. Preparation of List – Motion to Shuffle

A. **The Process**

- The trial judge, on the demand of the defendant or his attorney, or of the State's counsel, shall cause a sufficient number of jurors from which a jury may be selected to try the case to be randomly selected from the members of the general panel drawn or assigned as jurors in the case. The clerk shall randomly select the jurors by a computer or other process of random selection and shall write or print the names, in the order selected, on the jury list from which the jury is to be selected to try the case. The clerk shall deliver a copy of the list to the State's counsel and to the defendant or his attorney. Tex. Code Crim. Proc. Art. 35.11.
- Compliance with the statute is had when counsel for either the State or the defendant is allowed the opportunity to view the venire seated in the courtroom in proper sequence and is thereafter allowed an opportunity to exercise his or her option to have the names shuffled. *Chappell v. State*, 850 S.W.2d 508, 511 (Tex. Crim. App. 1993) *quoting Davis v. State*, 782 S.W.2d 211, 214 (Tex. Crim. App. 1989).

B. **Number Allowed**

- While upon timely demand, a defendant or the State is entitled to have the jury panel for the case shuffled, *Williams v. State*, 719 S.W.2d 573, 575 (Tex. Crim. App. 1986), only one shuffle of the jury venire is authorized. *Chappell v. State*, 850 S.W.2d 508, 511 (Tex. Crim. App. 1993).
    1. Therefore, if the court has granted the State's motion to shuffle, the defense is not entitled to a reshuffle. *Chappell v. State*, 850 S.W.2d 508, 511 (Tex. Crim. App. 1993).
    2. Any shuffle prior to allowing the parties to see the jury panel seated in the courtroom is premature and will entitle the parties to another shuffle. *Scott v. State*, 805 S.W. 2d 612, 614 (Tex. App.—Austin 1991, no writ).
- Because the right to a jury shuffle is statutory in nature, any error in connection therewith must be evaluated for harm under the standard for non-constitutional errors. Therefore, jury shuffle error is subject to a harm analysis. *Ford v. State*, 73 S.W.3d 923, 924-25 (Tex. Crim. App. 2002); *see also* Tex. R. App. Proc. 44.2(b).

C. **Timely Motion**

- In a capital case, where the venire has been seated in the order they will be examined and the defendant has been afforded an opportunity to request a shuffle, the voir dire commences when the trial judge begins his examination of the panel. *Davis v. State*, 782 S.W.2d 211, 214 (Tex. Crim. App. 1989).
    1. A motion to shuffle made after the voir dire examination has begun is untimely and may be summarily overruled by the trial court. *Williams,* 719 S.W.2d 573, 575 (Tex. Crim. App. 1986).
    2. A jury shuffle request is timely if the request is made before start of the voir dire examination. *Latham v. State*, 656 S.W.2d 478, 479 (Tex. Crim. App. 1983).
    3. A trial court is neither required to allow nor prohibited from allowing a party to review written questionnaires before deciding whether to request a shuffle. Voir dire does not commence simply because a party has read the answers to written jury questionnaires. *Garza v. State*, 7 S.W.3d 164, 166 (Tex. Crim. App. 1999).

Section 8. Oath to Special Venire

8. Oath to Special Venire

A. **The Oath or Affirmation**

- The Texas Code Criminal Procedure Article 35.02 provides that the court shall administer the following oath to prospective jurors present in the court:
"You, and each of you, solemnly swear that you will make true answers to such questions as may be propounded to you by the court, or under its directions, touching your service and qualified as a juror, so help you God."
- The trial court should allow a prospective juror to "affirm" instead of "swear" to the oath. *Craig v. State*, 480 S.W.2d 680, 684 (Tex. Crim. App. 1972).

B. **When to Administer**

- The court should administer the oath to the entire panel before any statements or answers by the prospective jurors so that the complete voir dire is conducted while the venire persons are under oath or affirmation. *Duffy v. State*, 567 S.W.2d 197, 200 (Tex. Crim. App. 1978).

Section 9. Conduct of Voir Dire by Trial Judge

A. Questions Submitted to the Panel

- Article 35.17, sec. 2, of the Texas Code of Criminal Procedure, provides that in a capital case in which the State seeks the death penalty, the court shall propound to the entire panel of prospective jurors questions concerning the principles, as applicable to the case on trial, of:

1. beyond a reasonable doubt,
2. burden of proof,
3. return of indictment by grand jury,
4. presumption of innocence, and
5. opinion

B. Examination of the Panel

- Then, on demand of the State or defendant, either is entitled to examine each juror on voir dire individually and apart from the entire panel, and may further question the juror on the principles propounded by the court. Tex. Code Crim. Proc. Art 35.17(2).
- The court may employ different methods to manage the voir dire.

1. For example, the court has the right to question the jury panel as a group, and in so doing, the court does not deny the defendant the right to voir dire prospective jurors separately. *See Esquivel v. State*, 595 S.W.2d 516, 521-22 (Tex. Crim. App. 1980).
2. The trial court may set reasonable limits on the time for individual voir dire.
    a. When the court has set a 30 minute limit per side and has allowed some additional time, the court may deny a request for additional time where the venire person has already stated that he can follow the law in the area which the defense counsel now wishes to voir dire. *See Cantu v. State.* 842 S.W.2d 667, 686–87 (Tex. Crim. App. 1992).
    b. However, the trial court's decision to limit voir dire is reviewed under an abuse of discretion standard. *Cantu v. State.* 842 S.W.2d 667, 687 (Tex. Crim. App. 1992).

Practice Notes:

Schedule of Individual Voir Dire

- *Many different methods exist for the scheduling of individual venire persons for voir dire. The following methods have been used around the state:*

1. ***Individual Appointment***
    - *Prospective jurors are recessed to return on a specific date and at a specific time for their individual voir dire.*
    - *Benefit: Specific scheduling which allows a prospective juror to make plans for their appointment date and time.*
    - *Detriment: If the voir dire of some prospective jurors takes longer than planned, then this will impact the timing for the remaining schedule for that day.*
2. ***Block Appointments***
    - *Some courts schedule a certain number of prospective jurors in the morning of each day and a certain number of prospective jurors in the afternoon of each day.*
    - *The court conducts individual voir dire until the morning session is complete and then recesses until the afternoon session. The court then conducts individual voir dire until the afternoon session is complete.*
    - *Benefit: The court has a readily available number of prospective jurors available during the morning and afternoon sessions.*
    - *Detriment: If the voir dire of a prospective juror takes longer than planned, the morning session may run into the afternoon and disrupt scheduling. Additionally, jurors may have to wait a long period of time before they are actually needed in court.*
3. ***On Call Appointment***
    - *Some courts merely require that the prospective jurors leave a number and be*

available by phone when needed at the courtroom for voir dire.
- *Benefit: The flexibility of the court each day in scheduling its voir dire.*
- *Detriment: The court will need to make a large number of phone calls. Prospective jurors may be unavailable when called or the court may not be able to reach the prospective jurors by phone. Even if reached by phone, there may be a delay in the prospective juror arriving at the courthouse, which might delay the proceedings.*

4. ***Work Until a Juror is Seated***
   - *Several courts continue voir dire each day and into the evening, if necessary, until a juror is seated.*
   - *Benefit: Jury selection will take only twelve working days, plus one day for each alternate.*
   - *Detriment: This method may lead to some extremely short days and some extremely long days. Also, the calling and scheduling of jurors may be a problem.*

Section 10. Procedure for Passing a Juror or Challenge

10. Procedure For Passing A Juror or Challenge

A. The Process

- A juror in a capital case in which the state has made it known it will seek the death penalty, held to be qualified, shall be passed for acceptance or challenge first to the state and then to the defendant. Challenges to jurors are either peremptory or for cause. Tex. Code Crim. Proc. Art. 35.13.
- This procedure, in which the State and then the defendant are required to exercise peremptory challenges following the examination of each individual prospective juror, is proper and does not violate the equal protection or due process rights of the defendant. *Janecka v. State*, 739 S.W.2d 813, 833-34 (Tex. Crim. App. 1987).
- 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. Both sides should explicitly agree on the method of “accepting or challenging prospective jurors” before voir dire begins. *Hughes v. State*, 24 S.W.3d 833, 841 (Tex. Crim. App. 2000).
- A court has the discretion to choose which method to use and does not abuse its discretion in requiring both sides [to] issue challenges for cause prior to the State’s use of a peremptory challenges. *Wood v. State*, 18 S.W.3d 642, 649 (Tex. Crim. App. 2000).

B. Defendant Cannot Create Reversible Error

- If the defense has requested to use peremptory challenges following the examination of the entire panel and the court has granted the defense’s request, then the defense may not complain on appeal of this method. *Campbell v State*, 742 S.W.2d 759, 761 (Tex. App.—San Antonio 1987, writ ref’d). (“Generally, a defendant may not create reversible error by his own manipulation”).
- The order and timing of the exercise of peremptory challenges is not an absolute requirement. A defendant who requests and receives the retroactive exercise of peremptory strikes waives any error. *Busby v. State*, 990 S.W.2d 263, 268 (Tex. Crim. App. 1999).

C. Retroactive Exercise of Peremptory Challenges

- A trial court’s refusal to allow retroactive exercise of peremptory challenges under Article 35.13 does not violate a defendant’s due process rights to fair and impartial jury. *Rocha v. State*, 16 S.W.3d 1, 5-6 (Tex. Crim. App. 2000).

Section 11. Number of Preemptory Challenges

11. Number of Peremptory Challenges

A. Number for One Defendant Tried

- In a capital case in which the State seeks the death penalty, both the State and defendant shall be entitled to fifteen peremptory challenges. Tex. Code Crim. Proc. Art. 35.15(a).

B. Number for Two or More Defendants Tried

- In a capital case in which the State seeks the death penalty and two or more defendants are tried together, the State shall be entitled to eight peremptory challenges for each defendant; and

each defendant shall be entitled to eight peremptory challenges. Tex. Code Crim. Proc. Art. 35.15(a).

C. **Number for Alternate Jurors**

- In addition to those otherwise allowed by law, the State and the defendant shall each be entitled to:

    1. One peremptory challenge if one or two alternate jurors are to be empanelled.
    2. Two peremptory challenges if three or four alternate jurors are to be impaneled.

- These additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by law may not be used against an alternate juror. Tex. Code Crim. Proc. Art. 35.15(d).

Section 12. Request for Additional Preemptory Challenges

12. Request for Additional Peremptory Challenges

- Trial court has discretion to grant additional peremptory challenges to the defense upon exhaustion of the statutory number of strikes. *Cooks v. State*, 844 S.W.2d 697, 717 (Tex. Crim. App. 1992).
- In the absence of wrongdoing on the court's part, no abuse of discretion will be found when the court overrules a defendant's request for additional peremptory strikes after the defendant has exhausted those accorded him by statute. The "wrongdoing" may occur when the court deprives a defendant of a peremptory challenge by improperly overruling a defendant's challenge for cause and forcing him to use a strike on a juror who is subject to challenge for cause. If the trial court has improperly denied a challenge for cause, the defendant may establish harm by showing that an "objectionable" juror was placed on the jury. *Thomas v. State,* 701 S.W.2d 653, 658 (Tex. Crim. App. 1985).
- When a trial court errs in denying a challenge for cause, the defendant is harmed only if he uses a peremptory strike and, thereafter, suffers a detriment from the loss of that strike. In order to preserve error, appellant must: (1) use all of his peremptory strikes; (2) ask for and be refused additional peremptory strikes; and (3) be forced to take an identified objectionable juror whom the appellant would not otherwise have accepted had the trial court granted his challenge for cause or granted him additional peremptory strikes. *Colella v. State,* 915 S.W.2d 834, 843 (Tex. Crim. App. 1995).
- No harm was found for a trial court's denial of a challenge for cause when the court granted the defense an additional peremptory strike, but the defense did not use it. See *Halprin v. State*, 170 S.W.3d 111, 117-18 (Tex. Crim. App. 2005).

Section 13. Challenges for Cause by the State or Defendant

13. Challenges For Cause By the State or Defendant

- Many challenges for cause in a capital case are the same as challenges in a non-capital case. However, there are challenges particular to capital cases.

    A. **Conscientious Scruples as to the Death Penalty**

    - One of the main areas of contention between the State and the defendant is whether a prospective juror is qualified to serve on a capital case.
    - A prospective juror is "not subject to a challenge for cause merely because he is opposed to or has 'conscientious scruples' regarding the death penalty." *Granados v. State*, 85 S.W.3d 217, 230-31 (Tex. Crim. App. 2002).
    - Strong personal feelings or convictions about the death penalty do not necessarily mean a person is biased and could not follow the law. *Granados v. State*, 85 S.W.3d 217, 235 (Tex. Crim. App. 2002).
    - If a person can set aside personal beliefs about capital punishment and honestly answer the special issues, hat juror cannot be challenged for cause. *Blue v. State*, 125 S.W.3d 491, 496 (Tex. Crim. App. 2003).
    - Cause exists where beliefs against the death penalty would:
        1. prevent
        2. or substantially impair the jury person's ability to follow the court's instructions, the juror's oath or the juror's duties. *Id.*
    - Potential jurors may "believe what they want regarding the death penalty, including the

quantum of evidence they will require to impose a death sentence," but they cannot substitute their own legal categories for the law. *Rachal v. State*, 917 S.W.2d 799, 812 (Tex. Crim. App. 1996).

- The appellate court will defer to the trial court's ruling on a challenge for cause: especially if the "juror's answers are vacillating, unclear or contradictory." *Russeau v. State*, 171 S.W.3d 871, 879 (Tex. Crim. App. 2005).
- ***Note: Use of Peremptory Strikes***--If a venireman vacillates or expresses bias regarding his ability to impose the death penalty; it is a "valid and neutral reason to strike that person." *Jasper v. State*, 61 S.W.3d 413, 422 (Tex. Crim. App. 2001).
- On appeal, the court will review the record in its entirety to see if there was a rational basis for the challenge for cause. *Granados v. State*, 85 S.W.3d 217, 230-31 (Tex. Crim. App. 2002).
- It is the burden of the challenging party to show that the venireman is incapable of or substantially impaired from following the law. *Castillo v. State*, 913 S.W.2d 529, 534 (Tex. Crim. App. 1995).
- A trial court ruling on a challenge for cause based on bias against the death penalty is reversible only if it is clearly an abuse of discretion. *Crane v. State*, 786 S.W.2d 338, 344 (Tex. Crim. App. 1990).
- If a party requests to individually question a venireman about his views on the death penalty—even after the other party has challenged that juror for cause—the requesting party must be allowed to question the venireman. *Simpson v. State*, 119 S.W.3d 262, 266 (Tex. Crim. App. 2003); Tex. Code Crim. Proc. Art. 35.17 §2. If the court refuses the request, the trial court has erred. The court's refusal is analyzed under harmless error analysis. *Simpson v. State*, 119 S.W.3d 262, 266 (Tex. Crim. App. 2003); Tex. Code Crim. Proc. Art. 35.17 §2.
- The following are examples of cases where prospective jurors were properly challenged for cause in a capital murder case:
    1. Jurors who indicated that they could not vote for the death penalty. *Kinnamon v. State,* 791 S.W.2d 84, 98-100 (Tex. Crim. App. 1990).
    2. Jurors who have severe reservations about their involvement in the sentencing of death because of prior military armed service. *Moody v. State*, 827 S.W.2d 875, 886-89 (Tex. Crim. App. 1992).
    3. A juror firmly maintains that he could never return a verdict which assessed the death penalty. *Barnes v. State*, 876 S.W.2d 316, 324-25 (Tex. Crim. App. 1994).
    4. A juror would require a greater burden of proof than beyond a reasonable doubt because the case was a capital case. See *Chambers v. State,* 866 S.W.2d 9, 22 (Tex. Crim. App. 1993).

B. **The Special Issues**

- Article 37.071, section 2(c) requires the State to prove the future dangerousness and "anti-parties" special issues beyond a reasonable doubt. Therefore, any venireman who would automatically answer those special issues in the affirmative, or who would place the burden of proof on the defense, is challengeable for cause under Article 35.16(c)(2) for having a bias or prejudice against a law applicable to the case upon which the defense is entitled to rely. *Ladd v. State*, 3 S.W.3d 547, 558-559 (Tex. Crim. App. 1999), *citing Banda v. State,* 890 S.W. 2d 42, 57 (Tex. Crim. App. 1994), *cert. denied,* 515 U.S. 1105, 115 S.Ct. 2253, 132 L.Ed.2d 260 (1995).
- 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 evidence mitigating evidence and the jury be provided a vehicle to give mitigating effect to that evidence if the jury finds it to be mitigating. A trial court does not abuse its discretion by refusing to allow a defendant to ask veniremen questions based on facts peculiar to the case on trial (e.g. questions about particular mitigating evidence). *Raby v. State*, 970 S.W.2d 1, 3-4 (Tex. Crim. App. 1998) citing *Coleman v. State*, 881 S.W.2d 344 (Tex. Crim. App. 1994), cert denied, U.S., 513 U.S. 1096, 115 S.Ct. 763, 130 L.E.d.2d 660 (1995).
- The Court of Criminal Appeals has held it is not error for a trial court to overrule a challenge for cause where it is shown that a venireman will not or may not give a particular variety of "mitigating evidence" any consideration. *See Cuevas v. State*, 742

S.W.2d 331 (Tex. Crim. App. 1987), *cert. denied* (1988); *see also Cordova v. State,* 733 S.W.2d 175 (Tex.Cr.App.1988), *cert. denied* (1988).

- *Note*: Under 37.071, section 2, of the Code of Criminal Procedure, the court, the attorney representing the State, 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). (These are the punishment special issues in a capital death case). Therefore, jurors or prospective jurors cannot be informed that if they are unable to answer the special issues, that the court shall sentence the defendant to life in prison.

Section 14. Calls of Names of Jurors to be Seated and Sworn

14. Call of Names of Jurors to be Seated and Sworn

- In a capital case in which the State seeks the death penalty, the court may direct that the two alternate jurors be selected and that the clerk call off the first fourteen names not stricken. Tex. Code Crim. Proc. Art. 35.26(b).
- The last two names to be called are the alternate jurors. Tex. Code Crim. Proc. Art. 35.26(b).

Section 15. Attachment of Jeopardy

15. Attachment of Jeopardy

- Jeopardy in a capital case does not attach until a jury is empanelled and sworn as a whole—meaning that jeopardy does not attach until all twelve jurors are empanelled and sworn. Even if the judge swears in each juror as he or she is selected during individual voir dire, jeopardy does not attach until the entire jury is empanelled. There is not a jury until the jury as a whole is sworn. *See Sanne v. State*, 609 S.W.2d 762, 769 (Tex. Crim App. 1980).

Section 16. Confidentiality of Jurors Personal Information

16. Confidentiality of Juror Personal Information

A. **Sealing Information**

- Upon completion of jury selection, the trial court should assure that any juror information sheets and/or questionnaires are sealed and not disclosed, except by proper court order.

B. **Nondisclosure**

- Information collected by the court or by a prosecuting attorney during the jury selection process about a person who serves as a juror, including the juror's:
    1. home address,
    2. home telephone number,
    3. social security number,
    4. driver's license number,
    5. and other personal information is confidential and may not be disclosed by the court, the prosecuting attorney, the defense counsel, or any court personnel, except on application by a party in the trial or on application by a bona fide member of the news media acting in such capacity to the court in which the person is serving or did serve as a juror. On a showing of good cause, the court shall permit disclosure of the information sought. Tex. Code Crim. Proc. Art. 35.29.
- Good Cause is not shown when:
    - defense counsel argues that he would "be unable to effectively assist his client without" juror information sheets. *Saur v. State*, 918 S.W.2d 64, 67 (Tex. App.—San Antonio 1996, no pet.).
    - defense counsel posits that there "is a mere possibility that jury misconduct might have occurred" because the request is too general and it shows only a "desire to probe for possible, but unspecific, issues that might rise to allegations of jury misconduct." *Esparza v. State*, 31 S.W.3d 338, 340 (Tex. App.—San Antonio 2000, no pet.).
    - counsel asks for the "information to determine whether he should file a motion for a new trial." *Valle v. State*, 109 S.W.3d 500, 509 (Tex. Crim. App. 2003).
    - counsel has a "couple of thoughts" about the trial that he would like to ask the jurors. *Hooker v. State*, 932 S.W.2d 712, 716 (Tex. App.—Beaumont 1996, no pet.).

Section 17. Addendum

17. Addendum

1. Order Requiring Case to be Tried to Regular Jurors from Central Jury Panel
2. Order Withdrawing Grant of Special Venire
3. Writ to Summon Special Venire
4. Writ to Serve Defendant Jury List – Special Venire
5. Letter to Attorneys on Copy of Names of Special Venire
6. Letter to Sheriff Smith
7. Letter to Attorneys on Jury Questionnaire
8. Jury Questionnaire
9. Protective Order
10. Instructions to Special Venire
11. Schedule of Voir Dire Summary
12. Checklist
13. Judge's Voir Dire and Outline
14. Notice to Jury Panel
15. Individual Voir Dire
16. Selection Jury Instrument
17. Reporter's Record
18. CWilliams, Volume 11, Court's Voir Dire
19. Venire Person Excerpt, CWilliams, Volume 11, Court's Voir Dire

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Chapter 4 - GUILT/INNOCENCE PHASE

Section 1. Defendant's Plea

1. Defendant's Plea

A. **Jury Waiver**

- A defendant cannot waive a jury in a case where the state seeks the death penalty. Texas Code of Criminal Procedure arts. 1.13 and 1.14.
- The defendant is permitted to waive a jury trial if the state waives its right to seek the death penalty and consents to the waiver of jury trial. Tex. Code Crim. Proc. art. 1.13(b).

Section 2. Plea of Guilty

2. Plea of Guilty

A. **General**

- The defendant may enter a plea of guilty as long as a jury is impaneled to decide the punishment. *Holland v. State*, 761 S.W.2d 307, 313 (Tex. Crim. App. 1988).
    1. The defendant has not waived his right to trial by jury since the jury is responsible for determining whether the defendant receives life imprisonment or the death penalty.

Practice Notes:

- *In a capital case the trial judge should ensure that the record reflects the mental capacity of the defendant to enter a guilty plea, the specific time of actual consultation with the defendant's counsel regarding the entry of such a plea, and careful inquiry as to the lack of any pressure, threat, duress, or improper influence affecting the defendant's decision to enter a plea of guilty.*
- *The trial judge must assure that the plea is being made freely, intelligently, knowingly, and voluntarily.*

B. **Admonishments**

- If the court is unaware that a defendant will enter a plea of guilty before the jury, the court should immediately excuse the jury back to the jury room and administer a thorough admonition. *Palacios v. State*, 556 S.W.2d 349 (Tex. Crim. App. 1977).
    1. If the jury has not been empanelled, the proper time for admonishment is at arraignment. *Palacios v. State,* 556 S.W.2d 349, 351 (Tex. Crim. App. 1977).
    2. If the jury has been empanelled, then the admonishment should be done in the absence of the jury and prior to the acceptance of the court of the guilty plea or plea of nolo contender." *Id.* at 352.
    3. f the court is aware that a plea of guilty will be entered, the defendant may enter the plea before the formal reading of the indictment outside of the jury's presence.
- According to Tex. Code Crim. Proc. article 26.13(a), before the court accepts a plea of guilty or a plea of nolo contendere, it should admonish the defendant of:
    1. The range of the punishment attached to the offense;
    2. Practice Note:

       Specifically inform the defendant that the State will be seeking the death penalty, notwithstanding that the defendant has entered his plea of guilty.

    3. The fact that the recommendation of the prosecuting attorney as to punishment is not binding on the court. Provided that the court shall inquire as to the existence of any plea bargaining agreements between the state and the defendant and, in the event that such an agreement exists, the court shall inform the defendant whether it will follow or reject such agreement in open court and before any finding on the plea. Should the court reject any such agreement, the defendant shall be permitted to withdraw his plea of guilty or nolo contendere;
    4. The fact that if the punishment assessed does not exceed the punishment recommended by the prosecutor and agreed to by the defendant and his attorney, the trial court must give its permission to the defendant before he may prosecute an appeal

on any matter in the case except for those matters raised by written motions filed prior to trial;

a. However, if the defendant receives a death penalty, the defendant has an automatic direct appeal to the Court of Criminal Appeals. Tex. Code Crim. Proc. art. 37.071(h).

5. The fact that if the defendant is not a citizen of the United States of America, a plea of guilty or nolo contendere for the offense charged may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law;

C. **Verdict**

- If a defendant pleads guilty to a jury, the jury does not need to return any verdict of guilty. *Fuller v. State*, No. AP-74,980, 2008 Tex. Crim. App. LEXIS 567, at *10 (Tex. Crim. App. Apr. 30, 2008).

D. **Jury Instructions**

- After the defendant has entered his plea of guilty before the jury and been properly admonished, the court may utilize either:

1. Bifurcated Method

a. Inform the jury that the defendant has entered his plea freely, intelligently, and voluntarily, is competent, has persisted in maintaining his plea, and that the court has accepted his plea, *Morin v. State*, 682 S.W.2d 265, 268 (Tex. Crim. App. 1983).
b. Instruct the jury to return a verdict of guilty of capital murder as charged in the indictment.
c. The court should then proceed with the presentation of testimony, including all evidence normally offered in the punishment phase; or

2. Unitary Trial

a. Once the defendant has entered his plea of guilty before the jury and has been properly admonished, the court should proceed with the opening statements and presentation of evidence as one unitary proceeding, to include punishment evidence.
b. Thereafter, the Court's charge will include the above instructions and order the jury to find the defendant guilty, as well as instruct the jury pursuant to Tex. Code Crim. Proc. article 37.071 regarding the special issues.

E. **Citations of Guilty Pleas in Capital Murder Cases**

- *Morin v. State*, 682 S.W.2d 265, 269 (Tex. Crim. App. 1983).
  1. A directed verdict is permissible in a capital case when the defendant pleads guilty and the plea is accepted by the court.
  2. The defendant is not deprived of trial by jury with a directed verdict since the jury must determine whether the defendant should receive life imprisonment or the death penalty.
- *Williams v. State*, 674 S.W.2d 315, 318 (Tex. Crim. App. 1984).
  1. The plea of guilty before a jury becomes a trial "on punishment since entry of a plea of guilty before a jury establishes a defendant's guilt except where evidence demonstrates his innocence."
- *Holland v. State*, 761 S.W.2d 307, 313 (Tex. Crim. App. 1988).
  1. "A plea of guilty before a jury in a capital case constitutes trial by jury whether such a proceeding be denominated 'bifurcated' or 'unitary' in nature."
- *Matchett v. State*, 941 S.W.2d 922, 930-31 (Tex. Crim. App. 1996).
  1. "The important factor in determining whether appellant has had a jury trial in a capital murder case is that the jury returned a verdict regarding the special issues under Article 37.071."

Section 3. Court's Jury Charge

3. Court's Jury Charge

A. **Lesser Included Offenses**

- To determine whether the defendant is entitled to a lesser included offense instruction, the court should apply a two prong test (Royster Test):
    1. The lesser included offense must be included within the proof necessary to establish the offense charged; and
    2. Some evidence must exist in the record that would permit a jury to rationally find that if the defendant is guilty, he is guilty only of the lesser included offense. *Wesbrook v. State*, 29 S.W.3d 103, 113 (Tex. Crim. App. 2000).
- The following offenses can be lesser included offenses of capital murder (non-exclusive list):
    1. Murder. *Threadgill v. State*, 146 S.W.3d 654, 655-56 (Tex. Crim. App. 2004).
        a. Defendant was convicted of capital murder for a murder that occurred in the course of a robbery and sentenced to death. Defendant appealed and contended that the trial court erred by not instructing the jury on the lesser-included offense of murder.
        b. The court determined that murder is a lesser-included offense of capital murder.
        c. The court held that the record did not contain evidence that would permit a rational jury to find the defendant guilty of only murder.
    2. Felony Murder. *Id.*
        a. Defendant was convicted of capital murder for a murder that occurred in the course of a robbery and sentenced to death. Defendant appealed and contended that the trial court erred by not instructing the jury on the lesser-included offense of felony murder.
        b. The court determined that felony murder is a lesser-included offense of capital murder.
        c. The court held that the record did not contain evidence that would permit a rational jury to find the defendant guilty of only the lesser offense because the defendant had intent to murder.
    3. Manslaughter/Criminally Negligent Homicide/ Aggravated Assault. *Cardenas v. State*, 30 S.W.3d 384, 392-93 (Tex. Crim. App. 2000).
        a. Defendant was convicted of capital murder for kidnapping, committing aggravated sexual assault, and murder. Defendant was sentenced to death and contended on appeal that the evidence was legally insufficient to establish elements the underlying offenses.
        b. The court determined that manslaughter, criminally negligent homicide, and aggravated assault are lesser-included offenses of murder.
        c. The court held that there was evidence showing intent to kill which would lead a rational jury to not convict of only the lesser included offenses.

B. **Parties Instructions**

- To determine if parties charge is appropriate, the trial court should examine the involvement of the various actors. If evidence shows the active participation in the offense by two or more persons, the trial court should remove from consideration the acts and conduct of the non-defendant actor, and
    1. If the evidence of the conduct of the defendant on trial would be sufficient to sustain the conviction, no submission of the law of parties is required.
    2. However, if the evidence introduced raises an issue that the conduct of the defendant on trial is not sufficient to sustain a conviction, the State's case rests upon the law of parties and is dependent, in part, upon the conduct of another. In such a case, the law of parties must be submitted and made applicable to the facts of the case. *Goff v. State*, 931 S.W.2d 537, 544 (Tex. Crim. App. 1996).
- A defendant may be found guilty of capital murder and a party to the crime even when the indictment does not specifically plead the party or parties issue. *Crank v. State,* 761 S.W.2d 328, 352 (Tex. Crim. App. 1988).
    1. The court must apply the law of parties to the facts of the case in the application paragraphs of the indictment. Merely outlining the law of parties in the abstract is insufficient. *Campbell v. State*, 910 S.W.2d 475, 477 (Tex. Crim. App. 1995)
    2. A defendant who objects to a general reference to the law of parties in the application paragraph is entitled to increased specificity and to have the law of parties applied to the facts of the case. *Id.*
    3. A defendant charged with conspiracy liability under Texas Penal Code 7.02(b) is not entitled to an independent impulse instruction if the appropriate part of the jury charge

tracks the language of section 7.02(b). Such instruction would only serve to negate elements of the State's case. *Solomon v. State*, 49 S.W.3d 356, 368 (Tex. Crim. App. 2001).

Section 4. Receipt of Verdict

4. Receipt of Verdict

- Practice Note:

1. *To maintain security and decorum in the courtroom, the trial judge should strongly caution those in attendance to refrain from any gesture or comment reflecting an opinion of the jury's verdict. These remarks should be given outside the presence of the jury and immediately before the receipt of the verdict.*
2. *The bailiffs should also be instructed to maintain order and decorum in the courtroom, especially at the time of the receipt of the verdict. Extra security in the courtroom during the receipt of the verdict is often a prudent measure.*

Section 5. Polling the Jury

5. Polling the Jury

- The State and the defendant have a right to request a jury poll. Tex. Code Crim. Proc. art. 37.05.
- The poll is conducted by calling the name of each juror separately and asking him if the verdict is his.
    1. If all jurors answer in the affirmative, the verdict shall be entered upon the minutes.
    2. If any juror answers in the negative, the jury shall retire again to consider its verdict. *Id.*

Section 6. Addendum

6. Addendum

1. Sample Guilt/Innocence Charge
2. Disjunctive Charging
3. Lesser Included Offense Charges
4. Parties Charges
5. Reporter's Record

Section 7. Author Credits

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Chapter 5 - PUNISHMENT PHASE

Section 1. Future Dangerousness Special Issue

1. Future Dangerousness Special Issue

A. Generally

- The first special issue asks 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. art. 37.071 § 2(b)(1).
- The state must prove the defendant's future dangerousness beyond a reasonable doubt. Tex. Code Crim. Proc. art. 37.071 § 2(c).
- Evidence of race/ethnicity may not be used as evidence of future dangerousness. Tex. Code Crim. Proc. art. 37.071 § 2(a)(2).

B. Factors To Be Considered By The Jury

- The jury determining future dangerousness is entitled to consider a variety of factors at punishment, including, but not limited to the following:
    1. "The circumstances of the offense, including the defendant's state of mind and whether he was acting alone or with other parties;
    2. The calculated nature of the defendant's acts;
    3. The forethought and deliberateness exhibited by the crime's execution;
    4. The existence of a prior criminal record, and the severity of that record;
    5. The defendant's age and personal circumstances at the time of the offense;
    6. Whether the defendant was acting under duress or the domination of another at the time of the commission of the offense;
    7. Psychiatric evidence; and
    8. Character evidence." *Keeton v. State*, 724 S.W.2d 58, 61 (Tex. Crim. App. 1987).
- Evidence of future dangerousness may include, but is not limited to:
    1. 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).
    2. That defendant 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).
    3. 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).
    4. 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 defendant's future dangerousness. *Bell v. State*, 938 S.W.2d 35, 49 (Tex. Crim. App. 1996).
    5. The trial court did not abuse its discretion in admitting a letter written while in jail in which defendant described himself as a "trigga happy nigga," since this evidence was probative of his future dangerousness. *Green v. State*, 934 S.W.2d 92, 103-104 (Tex. Crim. App. 1996).

Section 2. Anti-Parties Special Issue

2. Anti-Parties Special Issue

1. Generally

- The second special issue is required when the jury was permitted at the guilt/innocence phase of the trial to find the defendant guilty as a party under Tex. Penal Code §§ 7.01-7.02.
- It charges the jury to answer "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. art. 37.071 § 2(b)(2).
- The state must prove the answer is yes beyond a reasonable doubt. Tex. Code Crim. Proc. art. 37.071 § 2(c).

- Claims that the special issue is "unconstitutional because it fails to provide individualized assessment as to [defendant's] deathworthiness by failing to require a finding beyond that already found at the guilt stage". *Valle v. State*, 109 S.W.3d 500, 503-04 (Tex. Crim. App. 2003).
- A defendant can be convicted of capital murder and still lack the intent or anticipation of taking a human life that is required to affirmatively answer the anti-parties special issue. *Valle v. State*, 109 S.W.3d 500, 503-04 (Tex. Crim. App. 2003).
- Also, the issue is open to factual and legal sufficiency review and provides an assessment of deathworthiness. *Valle v. State*, 109 S.W.3d 500, 504 (Tex. Crim. App. 2003).

Section 3. Mitigation Special Issue

3. Mitigation Special Issue

A. Generally

- Tex. Code Crim. Proc. art. 37.071 § 2(e)(1) states that if the jury answers the first two special issues affirmatively, it must then determine "[w]hether, 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."

B. Jury Instructions

- The jury "may not answer the [mitigation special] issue "no" unless it agrees unanimously and may not answer it "yes" unless 10 or more jurors agree." Art. 37.071 § 2(f)(2).
- The jury "need not agree on what particular evidence supports an affirmative finding on the issue." Art. 37.071 § 2(f) (3).
- The jury "shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness." Art. 37.071 § 2(f) (4).

C. Burden of Proof

- Article 37.071 § 2(e)(1) is not facially unconstitutional for failing to expressly assign a burden of proof as to mitigating evidence nor is it unconstitutional for implicitly assigning the burden of proof to the defendant. The court has rejected the challenge that the statute is unconstitutional. *Ladd v. State*, 3 S.W.3d 547, 573-74 (Tex. Crim. App. 1999).
- 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. Art. 37.071 § 2(a).
- When charged with the special issues, the jury must be able to "respond to [the mitigating evidence] in a reasoned, moral manner and to weigh such evidence in its calculus of deciding whether a defendant is truly deserving of death." *Brewer v. Quarterman*, 127 S. Ct. 1706, 1714 (2007).

D. Mitigating Evidence

- 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. *Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986).*
- Examples of mitigating evidence include, but is not limited to, the following:
    1. Mental retardation and child abuse. *Penry v. Lynaugh*, 492, U.S. 302, 320 (1989). (See Chapter 2 - Mental Health Issues)
        a. Evidence that defendant's IQ is below 70, standing alone, does not prove that he is retarded. *Ex Parte Tennard*, 960 S.W.2d 57, 61 (Tex. Crim. App. 1997); but may be mitigating evidence *Wiggins v. Smith*, 539 U.S. 510, 535 (2003). (an IQ of 79 is relevant mitigating evidence.)
    2. Good behavior in prison or jail. *Franklin v. Lynaugh*, 487 U.S. 164, 177 (1988).
    3. An "exceptionally unhappy and unstable childhood." *Burger v. Kemp*, 483 U.S. 776, 789 (1987); *but see Goss v. State,* 826 S.W.2d 162, 166-67 (Tex. Crim. App. 1992) (evidence of a troubled childhood with no shown connection to defendant's moral culpability is irrelevant).
    4. Childhood drug abuse and economic deprivation. *Hitchcock v. Dugger*, 481 U.S. 393, 397 (1987).
    5. Youth. *Eddings v. Oklahoma, 455 U.S. 104, 115-116 (1982); Ellason v. State, 815*

S.W.2d 656, 663 (Tex. Crim. App. 1991).

a. 21 must be considered youthful, though "it is at least on the cusp of mature adulthood." *Ex parte Davis, 866 S.W.2d 234, 240 (Tex. Crim. App. 1993).*
b. 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).

6. Evidence of voluntary intoxication if the intoxication caused temporary insanity. *Cordova v. State*, 733 S.W.2d 175, 189 (Tex. Crim. App. 1987).
7. Lay witness opinion testimony that defendant will not be dangerous in the future. *Cass v. State*, 676 S.W. 2d 589, 592 (Tex. Crim. App. 1984).
8. Psychological opinion testimony that defendant will not be dangerous in the future. *Robinson v. State*, 548 S.W.2d 63, 65-66 (Tex. Crim. App. 1977).
9. Psychiatric testimony concerning defendant's future behavior may be admitted for whatever value it may have to a jury. *McBride v. State*, 862 S.W.2d 600, 610 (Tex. Crim. App. 1993).
10. Expert testimony that a person is less likely to commit crimes the older he gets. Excluding such testimony is an abuse of discretion. *Matson v. State*, 819 S.W.2d 839, 850-854 (Tex. Crim. App. 1991).
11. Drug dependency. *Burns v. State*, 761 S.W.2d 353, 355 n.3 (Tex. Crim. App. 1988).
12. Illiteracy. *Cannon v. State*, 691 S.W.2d 664, 678 (Tex. Crim. App. 1985).
13. That defendant had once worked in a hospital and a church. *Burns v. State*, 761 S.W.2d 353, 358 (Tex. Crim. App. 1988).
14. Provocation by the victim. *Evans v. State*, 601 S.W.2d 943, 946-47 (Tex. Crim. App. 1980).
15. Gender may or may not be mitigating. *Fuentes v. State*, 991 S.W.2d 267, 275 (Tex. Crim. App. 1999) (the court was careful to emphasize that gender was just an example of what may or may not be a mitigating factor).
16. 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).

E. **Non-Mitigating Evidence**

- Examples of evidence that is not mitigating include:

1. "Residual doubt" about the defendant's guilt. *Franklin v. Lynaugh*, 487 U.S. 164, 174 (1988).
2. A co-party's criminal record. *Cook v. State*, 858 S.W.2d 467, 476 (Tex. Crim. App. 1993).
3. A co-defendant's conviction and sentence. *Evans v. State*, 656 S.W.2d 65, 67 (Tex. Crim. App. 1983).
4. Evidence that the state chose not to seek the death penalty against any co-defendants. *Morris v. State*, 940 S.W.2d 610, 613-14 (Tex. Crim. App. 1996).
5. Evidence that the death penalty is not an effective deterrent. *Granviel v. State*, 723 S.W.2d 141, 156 (Tex. Crim. App. 1986).
6. Evidence that the defendant received a life sentence for another, different murder by another jury. *Evans v. State*, 656 S.W.2d 65, 67 (Tex. Crim. App. 1983).
7. Opinion testimony by the defendant's psychologist that a life sentence was appropriate. *Sattiewhite v. State*, 786 S.W.2d 271, 291 (Tex. Crim. App. 1989).
8. Evidence discussing defendant's mother's hospitalization for post-partum psychosis, which did not discuss actual or potential abuse of defendant. *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).
9. Evidence that the state offered defendant a life sentence. *Prystash v. State*, 3 S.W.3d 522, 527-28 (Tex. Crim. App. 1999).
10. Photographs of defendant which depict a cheerful early childhood are irrelevant to defendant's moral blameworthiness for the commission of a violent double-murder because such evidence has no relationship to defendant's conduct in those murders. *Jackson v. State,* 992 S.W.2d 469, 480 (Tex. Crim. App. 1999).

Section 4. Evidence Admissible at the Punishment Phase

4. Evidence Admissible at the Punishment Phase

A. **Generally**

- 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."

B. **Unadjudicated Offenses**

- Unadjudicated Offenses: Generally
    1. Unadjudicated extraneous offenses are admissible at the punishment phase of a capital trial, in the absence of surprise. *Gentry v. State*, 770 S.W.2d 780, 793 (Tex. Crim. App. 1988). To be admissible, it must be proven beyond a reasonable doubt that defendant committed the offense. Tex. Code Crim. Proc. art. 37.07 § 3(a)(1).
    2. "[M]isconduct left unadjudicated because the evidence may possibly be insufficient to formally indict is like any extraneous offense, evidence introduced during the sentencing stage of a capital murder trial; if it is clearly proven, relevant, and more probative than prejudicial, it is admissible." *Rachal v. State*, 917 S.W.2d 799, 807 (Tex. Crim. App. 1996).
    3. The admission of unadjudicated offenses in capital cases has been held constitutional. Such evidence does not violate equal protection rights. There is a strong interest in ensuring that all relevant evidence be admitted to appropriately assist the jury in determining whether the defendant is likely to be a continued threat to society. *Williams v. Lynaugh*, 814 F.2d 205, 207-08 (5th Cir. 1987), *cert. denied*, 484 U.S. 935 (1988).
    4. Details of extraneous offenses are admissible as well. *Green v. State*, 587 S.W.2d 167, 169 (Tex. Crim. App. 1979).
    5. The jury need not be instructed that it cannot consider unadjudicated extraneous offenses unless it believes they occurred beyond a reasonable doubt. *Fuentes v. State*, 991 S.W.2d 267, 280 (Tex. Crim. App. 1999).
    6. For capital murder offenses committed after September 1, 2005, Tex. Code of Crim. Proc. Art. 37.071 now requires that the introduction of evidence of extraneous conduct is governed by the notice requirements of Article 37.07 § 3(g).
    7. For capital murder offenses committed before September 1, 2005, the defendant is not entitled to notice. *Guidry v. State*, 9 S.W.3d 133, 153 (Tex. Crim. App. 1999).
- Examples of unadjudicated offenses include:
    1. 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).
    2. "[U]ncharged misconduct, whether actually criminal or not." *Wilkerson v. State*, 881 S.W.2d 321, 326 (Tex. Crim. App. 1994).
    3. Evidence of an extraneous capital offense which had been "retired" without prosecution by the district attorney's office. However, the offense must be shown as relevant and that the accused actually participated in it. *Burks v. State*, 876 S.W.2d 877, 909 (Tex. Crim. App. 1994).
    4. Evidence of an attempted murder charge for which defendant had previously been acquitted. *Powell v. State*, 898 S.W.2d 821, 829-31 (Tex. Crim. App. 1994).
    5. Evidence concerning a homicide, even though defendant had been no-billed by a grand jury for this homicide. *Rachal v. State*, 917 S.W.2d 799, 808 (Tex. Crim. App. 1996).

C. **Examples of Other Admissible Evidence**

- Juvenile offenses
    1. Juvenile records. *East v. State*, 702 S.W.2d 606, 614 (Tex. Crim. App. 1985).
    2. Juvenile misconduct. *Corwin v. State*, 870 S.W.2d 23, 36 (Tex. Crim. App. 1993).
    3. A conviction under the Federal Youth Corrections Act. *Richardson v. State*, 744 S.W.2d 65, 82 (Tex. Crim. App. 1987).
- Evidence of the defendant's conduct
    1. Evidence of conduct after commission of the offense. *Jackson v. State*, 822 S.W.2d 18, 32 (Tex. Crim. App. 1990) (possession of homemade knife).
    2. Post-arrest assaults on prosecutor and journalist. *Herrera v. State*, 682 S.W.2d 313, 321 (Tex. Crim. App. 1984).
    3. Videotape of mid-trial assault on journalist. *Marquez v. State*, 725 S.W.2d 217, 230-31 (Tex. Crim. App. 1987).
    4. Where defendant had been convicted of raping and killing a seven-year-old

girl, evidence that he had once patted a nine year old girl on her "butt" was relevant. *Nenno v. State*, 970 S.W.2d 549, 564 (Tex. Crim. App. 1998), *overruled in part by State v. Terrazas*, 4 S.W.3d 720 (Tex. Crim. App. 1999) (*Nenno* is overruled to the extent it decides Article 38.22 applies only to custodial statements).

5. The court considered several items of evidence which showed the probability that defendant was a continuing threat to society, including:
    a. Defendant once unlawfully shot a cow.
    b. Defendant once wantonly shot and killed a buffalo, and
    c. Defendant attached two young males without justification. *Farris v. State*, 819 S.W.2d 490, 497 (Tex. Crim. App. 1990), *overruled on other grounds by Riley v. State*, 889 S.W.2d 290 (Tex. Crim. App. 1993).

- Evidence of gang membership
    1. "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).
    2. Evidence that defendant 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).
    3. Mere proof of defendant's membership in the Aryan Brotherhood, without more, showed only his "abstract belief," and therefore violated his 1st Amendment right of association. *Dawson v. Delaware, 503 U.S. 159, 166-67 (1992); Fuller v. State, 829 S.W.2d 191, 196, 198-99 (Tex. Crim. App. 1992).*
- Evidence relating to defendant's criminal record
    1. Defendant's jail records, chronicling defendant's violation of rules, cell transfers, and fighting. These records qualify as records made in the regular course of business and were properly admitted. *Jackson v. State*, 822 S.W.2d 18, 30-31 (Tex. Crim. App. 1990).
    2. Escape from city jail many years earlier. *Barnard v. State*, 730 S.W.2d 703, 723 (Tex. Crim. App. 1987).
    3. Revocation of parole. *Brooks v. State*, 599 S.W.2d 312, 322 (Tex. Crim. App. 1979).
    4. 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).
    5. Defendant's extensive criminal record and anti-social tendencies. *Cantu v. State*, 842 S.W.2d 667, 674, 676 (Tex. Crim. App. 1992).
- Defendant's plans of other offenses
    1. Evidence of joking conversations and abortive burglary plans. *Sanne v. State*, 609 S.W.2d 762, 773 (Tex. Crim. App. 1980).
    2. That defendant had planned other offenses. *Draughon v. State*, 831 S.W.2d 331, 335-336 (Tex. Crim. App. 1992).
- Testimony
    1. Uncorroborated accomplice witness testimony about the defendant's extraneous bad acts constitutes "relevant information about a defendant" within the scope of Tex. Code Crim. Proc. art. 37.071. *Bible v. State*, 162 S.W.3d 234, 246 (Tex. Crim. App. 2005).
    2. 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 noncapital case).
    3. However, it is a reversible error for the State to place a defendant's reputation in issue when the defendant has not first raised the issue. *Anderson v. State*, 717 S.W.2d 622, 627 (Tex. Crim. App. 1986).
    4. Upon request, enforcement and application of Tex. Rule Crim. Evid. 613 is mandatory, not discretionary. *Moore v. State,* 882 S.W.2d 844, 847-48 (Tex. Crim. App. 1994). However, a trial court's decision to allow testimony from a witness who has violated the rule is a discretionary matter. *Bell v. State*, 938 S.W.2d 35, 50 (Tex. Crim. App. 1996).

a. Allowing a witness to testify when the witness has been in the courtroom hearing another's testimony is not a ground for reversal unless an abuse of discretion is shown. Unless contrary evidence is shown, it is presumed that discretion was properly exercised. *Valdez v. State*, 776 S.W.2d 162, 170 (Tex. Crim. App. 1989).
b. It is important to look at whether the defendant was harmed or prejudiced by the witness who violated Rule 613. *Bell v. State* 938 S.W.2d 35, 50 (Tex. Crim. App. 1996).
c. It appears that abuse of discretion occurs if the witness's presence in the courtroom during the testimony of other witnesses "colored" his own testimony. If not, then the trial court did not abuse its discretion. *See Bell v. State, 938 S.W.2d 35, 51 (Tex. Crim. App. 1996).*

- Other evidence admissible
  1. Evidence that defendant 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 Conner v. State*, 67 S.W.3d 192, 201 (Tex. Crim. App. 2001) (testimony concerning the meaning behind defendant's tattoos was relevant to defendant's character and hence to punishment).
  2. Possession of sexually explicit magazines found in the same locked drawer as the seven year old victim's clothes, were relevant to defendant's motive to commit the sexual offense.
     a. They were also a sign of defendant's sexual obsession and a jury could have believed that this sexual obsession was likely to lead to further violence.
     b. Even if the viewing of these materials is protected by the First Amendment, this does not necessarily exclude their relevance to future dangerousness. *Nenno v. State*, 970 S.W.2d 549, 564, (Tex. Crim. App. 1998), *overruled in part by State v. Terrazas*, 4 S.W.3d 720 (Tex. Crim. App. 1999).
  3. 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).
  4. Notebook containing racially inflammatory writings. *Gholson v. State*, 542 S.W.2d 395, 398 (Tex. Crim. App. 1976).
  5. A drawing of a large green monster holding a bloody axe in one hand and a woman's scalp in another which the State characterizes as a self-portrait of the defendant without objection is relevant to the question of future dangerousness. *Corwin v. State*, 870 S.W.2d 23, 35 (Tex. Crim. App. 1993).
  6. 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).

D. **Not All Evidence is Admissible**

- Texas, unlike some states, excludes evidence seized in violation of the State and Federal Constitutions. Tex. Code Crim. Proc. 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).
- A capital defendant has no right to testify at punishment for the limited purpose of rebutting evidence of an extraneous offense. If the defendant chooses to testify, the defendant is subject to the same witness rules as any other witness and cannot limit the scope of questioning. *Cantu v. State*, 738 S.W.2d 249, 257 (Tex. Crim. App. 1987); *see also Felder v. State*, 848 S.W.2d 85, 99 (Tex. Crim. App. 1992) (defendant has no right to prevent prosecutor from asking him at punishment whether he committed the capital murder for which he was tried).

E. **Psychiatric Evidence**

- Generally
  1. 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 defendant's expert testimony. If the defendant

refuses to cooperate with the State's psychiatrist the trial court may prevent the defendant's psychiatrist from testifying. *Lagrone v. State,* 942 S.W.2d 602 (Tex. Crim. App. 1997).

2. 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). *See also McBride v. State*, 862 S.W.2d 600, 608 (Tex. Crim. App. 1993).
    a. However, "the law does not permit the State to have a psychiatrist appointed by the court 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).
    b. Psychiatric testimony can be in the form of hypothetical questions. McBride v. State, 862 S.W.2d 600, 610 (Tex. Crim. App. 1993).
    c. Psychiatric testimony is admissible if the responses to hypothetical questions "did not purport to be based upon" the evaluations conducted in violation of *Smith*. *Vanderbilt v. State*, 629 S.W.2d 709, 720 (Tex. Crim. App. 1981).
3. Psychiatric testimony is not essential to support an affirmative finding to the issue of future dangerousness; however, it is also true that most cases have found psychiatric testimony to be sufficient evidence in proving that the defendant would be a continuing danger to society. *Flores v. State*, 871 S.W.2d 714, 717 (Tex. Crim. App. 1993).

- Constitutional Rights
    1. In addition to the standard Miranda-type warning, the psychiatrist must specifically advise the defendant that statements made can be used against him at the punishment phase in a capital trial. *Estelle v. Smith*, 451 U.S. 454, 468 (1981); *Hernandez v. State*, 805 S.W.2d 409, 411 (Tex. Crim. App. 1990).
    2. There was no 5th Amendment violation under *Smith* where the psychiatrist's warnings "substantially complied" with *Miranda v. Arizona* and Tex. Code Crim. Proc. art. 38.22. *Bennett v. State*, 766 S.W.2d 227, 230 (Tex. Crim. App. 1989).
    3. Defendant's 5th 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).
    4. The defendant claimed that the state violated his 5th 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, required a specific objection based on the 5th Amendment. An objection based on hearsay was insufficient. *Pyles v. State*, 755 S.W.2d 98, 122 (Tex. Crim. App. 1988).
    5. When the defendant's right to counsel has attached and counsel is not notified in advance of the psychiatric examination, the defendant's 6th Amendment right is violated. *Estelle v. Smith*, 451 U.S. at 471.

F. **Expert Testimony**

- A state's witness, who had been a special agent with the FBI and a psychologist in several prison units, is permitted to give an opinion on future dangerousness. "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).
- Expert testimony concerning the availability of drugs in prison was relevant where defendant 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).
- Expert testimony of a psychologist and a psychiatrist that capital murder defendant posed a risk of future dangerousness was admissible.
    1. The psychologist's opinion of defendant's future dangerousness was based on offense reports, autopsy report, crime scene photographs, and transcript of defendant's interview with investigators.
    2. The psychologist had given presentations on violence risk assessment to

other mental health professionals and had previously testified as an expert in another capital case.
3. The theory the psychiatrist used was derived from published research studies that had been subjected to peer review and were generally accepted within the relevant scientific community. *Russeau v. State* 171 S.W.3d 871, 883-84 (Tex. Crim. App. 2005).

G. **Victim Impact Evidence**

- Generally
  1. Both victim impact and victim character evidence are admissible, in the context of the mitigation special issue, to show:
     a. The uniqueness of the victim,
     b. The harm caused by the defendant, and
     c. As rebuttal to the defendant's mitigating evidence. *Mosley v. State*, 983 S.W.2d 249, 262 (Tex. Crim. App. 1998).
  2. When the focus of the evidence shifts from humanizing the victim by 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.
     a. 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. *Mosley v. State*, 983 S.W.2d 249, 262 (Tex. Crim. App. 1998).
- Evidence in relation to Rule 403
  1. 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. To determine whether testimony is legitimate depends on:
     a. The closeness of the personal relationship involved,
     b. The nature of the testimony, and
     c. The availability of other witnesses to provide victim-related testimony. *Mosley v. State*, 983 S.W.2d 249, 262 (Tex. Crim. App. 1998).
  2. 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. *Mosley v. State*, 983 S.W.2d 249, 262 (Tex. Crim. App. 1998).
  3. 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. Considerations in determining whether testimony should be excluded under Rule 403 should include:
     a. The nature of the testimony,
     b. The relationship between the witness and the victim,
     c. The amount of testimony to be introduced, and
     d. The availability of other testimony relating to victim impact and character. *Mosley v. State*, 983 S.W.2d 249, 262 (Tex. Crim. App. 1998).
  4. 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. Trial courts should 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).
- Admissible evidence
  1. Mitigating evidence introduced by the defendant may 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).
  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. Victim impact and character evidence is relevant as it relates to mitigation issues. It is "patently irrelevant" as it relates for example, to his future dangerousness. *Mosley v. State*, 983 S.W.2d 249, 263 (Tex. Crim. App. 1998).

4. Photographs of the victim and his family are relevant to humanize victim's family 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).
5. "[V]ictim testimony in which the victims expressed their opinions of defendant and their wish that he receive the death penalty" may be objectionable testimony. *Tong v. State*, 25 S.W.3d 707, 714 (Tex. Crim. App. 2000).

Section 5. Charge Considerations

5. Charge Considerations

A. Law of Parole

* "An inmate under sentence of death [or] serving a sentence of life imprisonment without parole… is not eligible for release on parole." Tex. Gov't Code § 508.145(a).

* "The court shall:

1) Instruct the jury that if the jury answers that a circumstance or circumstances warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed, the court will sentence the defendant to imprisonment in the institutional division of the Texas Department of Criminal Justice for life without parole; and

2) Charge the jury that a defendant sentenced to confinement for life without parole under this article is ineligible for release from the department on parole." Tex. Code Crim. Proc. art. 37.071 § 2(e)(2)

B. Anti-sympathy Charge

* The court rejected defendant's complaint that a jury charge to not consider "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" when considering the evidence violated *Penry*. *Wheatfall v. State*, 882 S.W.2d 829, 841-842 (Tex. Crim. App. 1994).

* 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).

C. Accomplice Witness Rule

* The trial court does not have to give a limiting instruction concerning accomplice testimony because "[t]he 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." *Jones v. State*, 982 S.W.2d 386, 395 (Tex. Crim. App. 1998).

D. Definitions of Terms

* Probability

1) "'Probability' [in Special Issue #1] 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." *Cuevas v. State*, 742 S.W. 2d 331, 346 (Tex. Crim. App. 1987) (citations omitted).

2) It is not 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).

3) The term "probability" is not unconstitutionally vague and indefinite. *Kemp v. State*, 846 S.W.2d 289, 309 (Tex. Crim. App. 1992).

* Society, continuing threat, and criminal acts of violence

1) "Continuing threat," "society," "probability," and "criminal acts of violence" need not be defined, because the jury is presumed to understand them without instruction. *Ladd v. State*, 3 S.W. 3d 547, 572-73 (Tex. Crim. App. 1999).

2) 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 prison "society." *Sterling v. State*, 830 S.W.2d 114, 120 n.5 (Tex. Crim. App. 1992).

3) No definition is required, even if the jury requests it. *McDuff v. State*, 939 S.W.2d 607, 620 (Tex. Crim. App. 1997).

4) 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) 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).

6) If the failure to give a definition 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).

E. Voluntary Intoxication

* An instruction given during the punishment phase on voluntary intoxication pursuant to § 8.04 of the *Texas Penal Code* may impermissibly limit consideration of mitigating circumstances. However, a defendant who requests such instruction is precluded from complaining on appeal if the defendant's request is granted. *Tucker v. State*, 771 S.W.2d 523, 534 (Tex. Crim. App. 1988).

F. The Mitigation Issue

* 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. *Curry v. State*, 910 S.W.2d 490, 497 (Tex. Crim. App. 1995).

* The trial court may present the punishment charge to the jury in the abstract instead of applying the law to the mitigating facts present. *Garcia v. State*, 887 S.W.2d 846, 860-861 (Tex. Crim. App. 1994).

* The defendant is not entitled to jury instructions specifically informing the jury that certain evidence may be considered or how it may be applied. *Chambers v. State*, 903 S.W.2d 21, 34 (Tex. Crim. App. 1995).

* The judge shall deliver to the jury a written charge not expressing any opinion as to the weight of the evidence. Tex. Code Crim. Proc. art. 36.14.

* Evidence can be relevant as both mitigating and aggravating evidence. *Raby v. State*, 970 S.W.2d 1, 7-8 (Tex. Crim. App. 1998).

Section 6. Argument

6. Argument

A. Order of Argument

* The order of argument may be regulated by the presiding judge; but the State's counsel shall have the right to make the concluding address to the jury. Tex. Code Crim. Proc. art. 36.07.

* Texas Code of Criminal Procedure Article 36.07 applies in capital and non-capital cases. *Masterson v. State*, 155 S.W. 3d 167, 175 (Tex. Crim. App. 2005).

* The trial court does not abuse its discretion by denying the defense's motion to close on mitigation. *Threadgill v. State*, 146 S.W.3d 654, 673 (Tex. Crim. App. 2004).

B. Burden of Proof

* Neither party has the burden of proof during mitigation. *Masterson v. State*, 155 S.W. 3d 167, 175 (Tex. Crim. App. 2005).

* "The failure to assign a burden of proof to the mitigation issue does not render the scheme unconstitutional. In instances where mitigating evidence is presented, all that is constitutionally required is a vehicle by which the jury can consider and give effect to the mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime." *Raby v. State*, 970 S.W.2d 1, 9 (Tex. Crim. App. 1998).

C. Addressing the Jury

* The 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. Tex. Code Crim. Proc. art. 37.071 § 2(a)(1).

* The State may tell the jury about its role in the sentencing process, and make a plea to the jury for law enforcement. For example, the State may tell the jury that the "facts and acts as they were committed answered these questions" for the jury. However, these remarks must be based on a reasonable deduction from the evidence. *Modden v. State*, 721 S.W.2d 859, 861-62 (Tex. Crim. App. 1986).

* The State may not tell the jury that any decision it makes will be reviewed by the appellate courts. *Caldwell v. Mississippi, 472 U.S. 320, 328-29 (1985).*

1) "It is constitutionally impermissible to rest a death sentence on a determination made by the sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere. *Caldwell v. Mississippi, 472 U.S. 320, 328-29 (1985).*

2) *A 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) (The trial judge not only sustained the objection, but also admonished the jury to disregard the comment).

Section 7. The Verdict

7. The Verdict

A. Possible Verdicts

* The court shall sentence the defendant to death if:

1) The jury returns an affirmative finding on each anti-party and future dangerousness issue, and returns a negative finding on an issue submitted under mitigation. Tex. Code Crim. Proc. art. 37.071(g).

* The court shall sentence the defendant to confinement in the institutional division of the Texas Department of Criminal Justice for life imprisonment without parole if:

1) The jury returns a negative finding on any anti-party or future dangerousness issue. Tex. Code Crim. Proc. art. 37.071(g).

2) The jury returns an affirmative finding on the mitigation issue. Tex. Code Crim. Proc. art. 37.071(g).

3) The jury is unable to answer any anti-party, future dangerousness, or mitigation issue. Tex. Code Crim. Proc. art. 37.071(g).

B. The 10-2 Verdict

* Future Dangerousness and Anti-Parties Special Issues

1) When answering the future dangerousness and anti-parties special issues, the jury is instructed that it may not answer "yes," unless it agrees unanimously. It may not answer "no" unless 10 or more jurors agree. Tex. Code Crim. Proc. art. 37.071 § 2(d).

2) The jurors do not have to agree on the particular evidence that supports a negative answer to either issue. Tex. Code Crim. Proc. art. 37.071 § 2(d)(3).

* Mitigation Special Issue

1) When answering the mitigation special issue, the jury is instructed 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. art. 37.071 § 2(f)(2).

2) The jurors do not have to agree on the particular evidence that supports an affirmative answer to the issue. Tex. Code Crim. Proc. art. 37.071 § 2(f)(3).

C. Failure to Agree

* The trial court is not required to give the jury a punishment verdict form reflecting an inability to agree. "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).

Section 8. Appellate Review

8. Appellate Review

* The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals. Tex. Code Crim. Proc. art. 37.071 § 2(h).

Section 9. Receipt of the Verdict - Practice Notes

9. Receipt of the Verdict – Practice Notes:

* *Prior to returning the jury to the courtroom when notified that they have a verdict, the trial judge should carefully caution the courtroom observers, media, and interested parties to conduct themselves with decorum. Cautioning against any outbursts is important because this is an emotionally charged situation. The trial judge should consider additional security measures and presence in the courtroom when the verdict is returned.*

* *If the verdict is in order and after the judge has read aloud the answers to the special issues, the judge should inquire as to whether or not a jury poll is requested. Even if a poll is not requested, the judge should ask each juror who agreed to the answers to each special issue and to the entire verdict to raise their hand. The Court should have the record reflect that all jurors raised their hands and that the* verdict is unanimous, if that is the case*.*

* *The judge may discharge the jury and have them go back to the jury room with a bailiff. This will allow the court to complete the formal pronouncement of sentence, notify the defendant of appellate rights and writ rights, make a record of indigent status and any request for appointment of counsel for appeal and writ, and take victim impact statements. The judge might then consider going to the jury room and personally thanking the jury for their difficult work on the capital case.*

* *Alternatively, the judge may sentence the defendant and notify him of his appellate rights in the presence of the jury. The judge may then advise the jury that they may remain in the courtroom for the victim allocution if they desire or return to the jury room with the bailiff. The court can then take the victim allocution off the record and thereafter discharge the jury, thanking them for their service.*

Section 10. Addendum

10. Addendum

- Charge of Court – Sample (Smith County)
- Charge of Court – Sample (Tarrant County)

Section 11. Author Credits

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Chapter 6 - DIRECT APPEAL

Section 1. Introduction

1. INTRODUCTION

- When a defendant has been convicted of capital murder, two possible sentences can result: life without parole (or life with parole for those crimes committed prior to September 1, 2005) or death. *See* Tex. Penal Code § 12.31; Tex. Code Crim. Proc. Art. 37.071, § 2(g). If the defendant is sentenced to life imprisonment, then the judge should follow the procedures set out in the regular bench book. If the defendant is sentenced to death, then two timelines immediately and automatically begin to run.
- In one timeline, the judge must inquire about the defendant's desire to file an application for writ of habeas corpus. The procedures in this timeline are the subject of the next chapter and will not be discussed here.
- The other timeline involves a defendant's direct appeal of his death sentence. This is the timeline discussed in this chapter. As you will see, the trial court has some responsibilities at the beginning of the direct appeal process. However, unlike with the habeas process, these duties are quickly completed. Therefore, much of this brief chapter will simply provide background information on the direct appeal process.

Section 2. Appeal is Automatic

2. APPEAL IS AUTOMATIC

- The judgment of conviction and sentence of death are appealed directly to the Court of Criminal Appeals and are subject to automatic review. *See* Article 37.071, § 2(h). Review of the case will not be waived, despite a defendant's express statement that he wants to waive his appeal and have the trial court immediately set an execution date.
- Because the review is automatic, a party is not required to file a notice of appeal. *See* Tex. R. App. P. 25.2(b). However, pursuant to a change to this rule, effective September 1, 2008, the clerk of the trial court shall, within 30 days after a defendant is sentenced to death, file a notice of the conviction and sentence of death with the Court of Criminal Appeals.

Section 3. The Appointment of Counsel

3. THE APPOINTMENT OF COUNSEL

- After a defendant is convicted and sentenced to death, the trial court should inquire whether he wants counsel to represent him on appeal or whether he wants to proceed *pro se*. *See Lott v. State*, 874 S.W.2d 687 (Tex. Crim. App. 1994). If the defendant chooses to proceed *pro se*, then the court should fully admonish him of the dangers and disadvantages of self-representation. *Id.*
- If an indigent defendant is convicted of a capital felony and sentenced to death, the defendant is entitled to be represented by competent counsel on direct appeal. *See* Tex. Code of Crim. Proc. Art. 26.052(i).
- "As soon as practicable after a death sentence is imposed in a capital felony case, the presiding judge of the convicting court shall appoint counsel to represent an indigent defendant on appeal and to apply for a writ of certiorari, if appropriate." Art. 26.052(j).
- A list of counsel qualified for appointment on the direct appeal of capital cases should be maintained by each judicial region pursuant to the requirements set out in Article 26.052.
- The court may not appoint as counsel on appeal the attorney who represented the defendant at trial, unless (1) the defendant and the attorney request the appointment on the record; and (2) the court finds good cause to make the appointment. Art. 26.052(k). If the trial judge follows this exception, he or she must make sure the information supporting the decision is in the record.
- An attorney appointed under Article 26.052 shall be compensated as provided by Article 26.05 from county funds.

Section 4. Motion for New Trial

4. MOTION FOR NEW TRIAL

- The defendant may file a motion for new trial in the trial court no later than 30 days after the date the trial court imposes sentence in open court. Tex. R. App. P. 21.4(a). The defendant must present the motion to the trial court within 10 days of filing it, unless the trial court permits it to be

presented and heard within 75 days from the date the court imposed sentence in open court. Tex. R. App. P. 21.6.
- The court must rule on the motion for new trial within 75 days after imposing sentence in open court. Tex. R. App. P. 21.8(a). A motion not timely ruled on by written order will be deemed denied when the period prescribed in Rule 21.8(a) expires. Tex. R. App. P. 21.8(c).

Section 5. The Record on Appeal

5. THE RECORD ON APPEAL

- Assuming the trial court overrules any motion for new trial the defendant files (or it is overruled by operation of law), then both the clerk's record (*see* Tex. R. App. P. 34.5) and the reporter's record (*see* Tex. R. App. P. 34.6) will need to be filed in the Court of Criminal Appeals for the automatic direct appeal of the case. *See* Tex. R. App. P. 71.2.
- Texas Rule of Appellate Procedure 35.3(c) provides that the trial and appellate courts are jointly responsible for ensuring that the appellate record is timely filed.
- If a motion for new trial is not filed, then both records are due in the Court of Criminal Appeals within 60 days after the date the sentence is imposed in open court. Tex. R. App. P. 35.2(a).
- If a timely motion for new trial is filed and denied, then both records are due in the Court of Criminal Appeals within 120 days after the date the sentence is imposed in open court. Tex. R. App. P. 35.2(b).
- Both the clerk and the reporter can request from the Court of Criminal Appeals an extension of time to file his or her record. Typically, the Court will allow up to 180 days total time to file each record. In extraordinary circumstances, the Court might allow for a longer period.

Section 6. The Parties' Briefs

6. THE PARTIES' BRIEFS

- Once the clerk's record and the reporter's record have been filed, the appellant's brief will be due in the Court of Criminal Appeals. *See* Tex. R. App. P. 38.1 and 71.3. The appellant's brief is due within 30 days after the later of the date the clerk's record was filed or the date the reporter's record was filed. Tex. R. App. P. 38.6(a). The appellant can request from the Court of Criminal Appeals an extension of time to file his or her brief. *See* Tex. R. App. P. 38.6(d). Typically, the Court will allow up to 180 days total time to file the brief.
- Once the appellant's brief has been filed, the appellee's brief will be due in the Court. *See* Tex. R. App. P. 38.2 and 71.3. The appellee's brief must be filed within 30 days after the date the appellant's brief was filed. Tex. R. App. P. 38.6(b). The appellee can request from the Court of Criminal Appeals an extension of time to file his or her brief. *See* Tex. R. App. P. 38.6(d). Typically, the Court will allow up to 180 days total time to file the brief.
- Any reply brief must be filed within 20 days after the date the appellee's brief was filed. Tex. R. App. P. 38.6(c).

Section 7. Submission to the Court and Opinion

7. SUBMISSION TO THE COURT AND OPINION

- Once the Court has received the record and the parties' briefs, the clerk will set the case for submission. The case will be submitted to the en banc Court either with or without arguments according to the parties' requests. *See* Tex. R. App. P. 75.1.
- After submission, an opinion will be drafted which will be reviewed and discussed by the entire Court. Ultimately, the opinion will be finalized and handed down. There is no set time frame for issuing an opinion. *See, generally,* Tex. R. App. P. 77 and 78.
- If the conviction and death sentence are affirmed, then the defendant can file a motion for rehearing in the Court of Criminal Appeals and/or appeal the case to the United States Supreme Court. If either the conviction or the sentence is reversed, then the case is returned to the trial court to take any action that is consistent with the opinion. *See, generally*, Tex. Code Crim. Proc. Arts. 44.251 and 44.29.

Section 8. Conclusion

8. CONCLUSION

- As this chapter sets out, for purposes of the direct appeal, the trial court must complete only a few preliminary duties immediately after pronouncing judgment in a death penalty case. After that, it generally has no further obligation in the direct appeal process. Nonetheless, a general

understanding of this potentially lengthy process as set out above may still be useful.

Section 9. Author Credits

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Chapter 7 - POST-CONVICTION WRITS

Section 1. Introduction

1. INTRODUCTION

- The writ of habeas corpus is the procedural vehicle used to determine the lawfulness of a person's confinement. *See Ex parte van Truong*, 770 S.W.2d 810, 811 (Tex. Crim. App. 1989). It is available to review jurisdictional defects or denials of fundamental or constitutional rights. *Ex parte Banks*, 769 S.W.2d 539, 540 (Tex. Crim. App. 1989); *Ex parte Adams, 768 S.W.2d 281, 287 (Tex. Crim. App. 1989).*
- Article 11.071 of the Texas Code of Criminal Procedure governs the habeas corpus procedures used in capital cases in which the defendant was sentenced to death.
    A. The statute became effective September 1, 1995.
    B. The statute imposes a deadline for filing an application for a writ of habeas corpus. This deadline often occurs *before* the direct appeal of the case has been decided by the Court of Criminal Appeals.
    C. The statute provides that those convicted of a crime have *only one* opportunity "of right" to file an application seeking habeas corpus relief. Any subsequent application must meet strict conditions before its merits may be considered. Art. 11.071 § 5; *see also* Art. 11.07 § 4. The statute, with the restrictions it places on subsequent habeas corpus applications in death penalty cases, has been upheld as constitutional by the Court of Criminal Appeals. *Ex parte Davis, 947 S.W.2d 216, 219-21 (Tex. Crim. App. 1996).*

Section 2. The Statute: Texas Code of Criminal Procedure Article 11.071

2. THE STATUTE: Texas Code of Criminal Procedure Article 11.071

- Writ law can be somewhat confusing, and utilizing a statute for which very little published authority exists can be perplexing. Following is a breakdown and brief synopsis of the separate sections of the statute, along with comments where appropriate and helpful.

A. **Application of the Statute to a Death Penalty Case**

- Article 11.071 § 1 provides that, notwithstanding any other provisions of Chapter 11, this article establishes the only procedures available by which an applicant may seek relief from a judgment imposing a penalty of death by way of a writ of habeas corpus. In other words, every step in the process is contained within Article 11.071.

B. **Representation by Counsel**

- Article 11.071 § 2 ensures that an applicant choosing to be represented on habeas will receive representation.
    a. "[I]mmediately" after a defendant is sentenced to death in a capital case, the convicting court is required to determine whether the defendant is indigent and whether he desires the appointment of counsel for the purpose of filing a writ of habeas corpus. Art. 11.071 § 2(b). An applicant can elect to proceed *pro se*, but the convicting court must find, after a hearing on the record, that his election to do so is intelligent and voluntary. Art. 11.071 § 2(a).
    b. If the defendant is indigent and wants appointed counsel, then no later than 30 days after the trial judge makes these findings, he shall appoint "competent counsel" to represent the defendant. Art. 11.071 § 2(c).
    - Pursuant to Article 11.071 § 2(d), the Court of Criminal Appeals adopted rules governing the appointments to be made by the convicting court under this section. Under these rules, the Court maintains a list of attorneys eligible for appointment on an initial habeas, and the convicting court should appoint as habeas counsel an attorney who is on that list. The rules and the list of attorneys are posted on the Court of Criminal Appeals website at http://www.cca.courts.state.tx.us in the General Information: Rules & Procedures section.
    c. After appointing counsel, the trial court is required to notify the Court of Criminal Appeals of the appointment, including in its notice a copy of the trial judgment and the name, address, and telephone number of appointed counsel. *Id.*
    - The Court of Criminal Appeals, in turn, will apprise the convicting court whether the

appointment is approved or rejected.

1. The appointment of an attorney who represented the applicant at trial or on direct appeal will be rejected unless both the applicant *and* the attorney requested the appointment on the record *and* the convicting court found good cause to make the appointment. C.C.A. Rule 9. If the trial court follows this exception, then it should send documentation supporting the exception to the Court of Criminal Appeals along with the appointment notification.
2. Article 11.071 § 2(d) provides that a court may not appoint as *lead* counsel an attorney who has been "found by a federal or state court to have rendered ineffective assistance of counsel during the trial or appeal of any capital case."

- The language of this section creates two problems. First, it provides that an attorney who has been held ineffective can never be appointed as lead counsel on habeas. There is no time limit and no provision for reinstatement. Secondly, the provision refers to ineffective assistance that occurred during "any capital case." Potentially, this means that an attorney who has been held to have rendered ineffective assistance on a capital case in which the defendant received a life sentence is also ineligible for appointment as lead counsel. *Cf*. Art. 26.052(d)(2) (the Legislature passed two bills for the same section: one referred to the appointment of counsel "in the direct appeal of a capital case" and the other referred to the appointment of counsel "in the direct appeal of a death penalty case").

d. The requirements listed in a., b., and c., above, apply only to the appointment of counsel on an applicant's initial writ. *See Bridgers v. The Honorable Cynthia Stevens Kent*, No. WR-45,179-03 (Tex. Crim. App. Nov. 13, 2006)(not designated for publication)(holding in mandamus action that there is no ministerial duty to appoint attorney from approved list to represent an applicant in a subsequent habeas). There is no duty under the statute to appoint an applicant counsel on a subsequent writ. *But see* Art. 1.051(d)(3) (providing that an eligible indigent defendant is entitled to an attorney in a habeas corpus proceeding if the court concludes that the interests of justice require representation).

e. The statute does not require the trial court to notify the Court of Criminal Appeals if the defendant has chosen to proceed *pro se* or has hired his own counsel. But it is a good practice, and helpful to the Court of Criminal Appeals, for the trial court to send notice in every case.

C. **Compensating Counsel**

- Article 11.071 § 2(f) provides that the convicting court shall "reasonably compensate" an attorney appointed under this section, whether appointed by the convicting court or by the Court of Criminal Appeals under prior versions of Article 11.071. The county can then apply for reimbursement from State funds that have been set aside for this purpose in an amount not to exceed $25,000 per application. Art. 11.071 § 2A(a). Compensation and expenses in excess of this amount are the obligation of the county. *Id*. To receive reimbursement from State funds, the convicting court must certify the amounts to the comptroller of public accounts. Art. 11.071 § 2A(b). The county might not receive reimbursement funds from the State to compensate an attorney who is not on the approved list.
- Article 11.071 § 2(f) also provides for the reasonable compensation and reimbursement of an attorney representing an applicant in an untimely filed application. *See* discussion, *infra*, at Untimely Filed Application section of chapter.
- Section 2 does not discuss the compensation of an attorney on a subsequent writ that the Court of Criminal Appeals has held meets the dictates of Article 11.071 § 5.

D. **Counsel's Duty to Investigate Grounds for Application and the Court's Payment of Expenses**

- Upon appointment, counsel representing an applicant on habeas corpus:
shall investigate expeditiously, before and after the appellate record is filed in the [C]ourt of [C]riminal [A]ppeals, the factual and legal grounds for the filing of an application for a writ of habeas corpus.

  Art. 11.071 § 3(a). Unlike in a direct appeal, counsel in a habeas application can and should raise matters not included in the trial record. Factual issues that are outside of the trial record can be resolved through a hearing or by other extraneous types of proof. It is therefore necessary for the attorney to investigate the case to uncover

issues that need to be developed and resolved through the habeas process.

a. To aid the investigation, counsel can request the *prepayment* of investigation expenses, including expert fees.
    1. The request must be made no later than the 30th day *before* the date the application is filed with the convicting court.
    2. The request is confidential and should be made *ex parte* and verified. Art. 11.071 § 3(b).
    3. The request for expenses must state the claims to be investigated and the specific facts that suggest the claim is meritorious.
    4. The request must also contain an itemized list of expenses anticipated for each claim. *Id.*
b. The court may grant the request for expenses in part or in whole, and should grant any request that is timely and reasonable. Art. 11.071 § 3(c). If the court denies the request in whole or in part, it shall issue a written order to the applicant briefly stating the reasons for the denial. *Id.*

- Remember that the investigation of claims on habeas will involve matters outside of the trial record. Therefore, before ruling on a request, the court must evaluate the request based upon what counsel reasonably believes he can discover on habeas with the assistance requested, not on what occurred at trial. *See Ex parte Sprouse*, No. WR-66,950-01 (Tex. Crim. App. June 27, 2007)(not designated for publication). In *Ex parte Sprouse*, the trial court denied applicant's motions for various experts stating reasons such as: trial counsel did not request such an expert, applicant was given an expert at trial, court was not advised that the expert was not available at trial, and the information sought was readily available from the experts hired at trial. The Court of Criminal Appeals determined that these reasons were record based and ordered the trial court to re-evaluate the requests based upon the principles of habeas.

c. Investigation expenses may also be incurred without obtaining prior approval from the convicting court or the Court of Criminal Appeals.
    1. When presented with an *ex parte* claim for reimbursement, the court will reimburse those expenses that are "reasonably necessary and reasonably incurred." Art. 11.071 § 3(d).
    2. If the convicting court denies the applicant's reimbursement request in whole or in part, the court shall issue a written order to the applicant briefly stating the reasons for the denial. *Id.* An applicant may request reconsideration of the denial. *Id.* As with the prepayment of expenses, a denial should be based upon the request made on habeas and not solely on what happened at trial. *See Ex parte Sprouse*, No. WR-66,950-01.
d. Any materials submitted to the court under this section become part of the court's record. Art. 11.071 § 3(e).

E. **Filing the Application**

a. An application for a writ of habeas corpus must be filed in the convicting court. Unlike applications filed pursuant to Article 11.07, no set form is required for an application filed pursuant to Article 11.071.
b. The initial application is due in the trial court no later than the 180th day after habeas counsel is appointed under Article 11.071 § 2, or no later than the 45th day after the date the State's brief is filed in the Court of Criminal Appeals in applicant's direct appeal, whichever is later. Art. 11.071 § 4(a); *see also Ex parte Reynoso*, S.W.3d , No. AP-75,963, slip op. p. 8 (Tex. Crim. App. July 2, 2008)(holding that the time "runs from the latest date the court *could have or should have* appointed counsel" (emphasis in original)).
c. An application filed after the due date is considered untimely. Art. 11.071 § 4(c).
    - Practice note: *For the first few years after Article 11.071 became effective in 1995, the deadline for filing applications typically fell within the 180-day time period because many of the direct appeals in the cases at issue were final. Today, because the writ application is generally prepared concurrently with the direct appeal, the process begins before the State has filed a brief, and the 45-day rule usually provides the later due date. The Court of Criminal Appeals notifies the convicting court, the parties, and all of the appropriate attorneys when the State's brief is filed in a death penalty case on direct appeal. Because of the rigid deadlines set throughout Article 11.071, many of which depend upon an action by the trial court rather than an action by a party, it is*

important for the trial court to have a good calendar system in place for these cases.

d. Upon an applicant's request made *before* the applicable filing date, the trial court may (also *before* the applicable filing date), for good cause shown, grant one 90-day extension for filing an application which extension begins on the original due date. Art. 11.071 § 4(b); *see also Ex parte Reynoso*, S.W.3d , No. AP-75,963, slip op. p. 11 (Tex. Crim. App. July 2, 2008)(holding that when an extension is granted it runs from the actual calendar due date without regard to whether that date falls on a Saturday, Sunday, or legal holiday).
    1. Before granting the request for extension, the trial court must give the attorney representing the State notice of the request and an opportunity to be heard. Art. 11.071 § 4(b).
    2. Either party may request that the court hold a hearing on the request. *Id*.
    3. If the court determines that the applicant cannot show good cause to justify the extension, it must make a finding stating that fact and deny the request. *Id*. But, having found good cause for granting the extension, the judge must be mindful when signing the applicable order. When the judge signs an order which simply states that the deadline is extended for "90 days," the applicant is responsible for properly calculating the due date and filing the application by that date. If he miscalculates and files the application even one day late, the court should treat it as untimely and forward it to the Court of Criminal Appeals. *See* discussion, *infra*, at Untimely Filed Application section of chapter; *see also Ex parte Smith*, 977 S.W.2d 610, 611 (Tex. Crim. App. 1998)(illustrating dismissal of application under pre-Sept. 1, 1999 version of Article 11.071). When the court signs an order which extends the deadline to a specific date but, not realized by applicant and not caught by the trial court, the date cited is later than 90 days, then the application is still untimely and should be forwarded to the Court of Criminal Appeals.
    - The Court of Criminal Appeals has held that an application filed on or before a specific date set by a trial court should be considered timely because the applicant relied on an order from the trial court setting a specific date. *See* discussion, *infra*, at Untimely Filed Application section of chapter; *see also Ex parte Brown*, No. WR-68,876-01 (Tex. Crim. App. Jan. 16, 2008)(not designated for publication)(finding good cause for untimely filing because date miscalculation was based on mistaken reading of postal date stamp and was not caught by trial court or either party); *Ex parte Ramos*, 977 S.W.2d 616, 616-17 (Tex. Crim. App. 1998)(raising due process issue under pre-Sept. 1, 1999 version of statute when relying on date set by court). Presumably, in the specific date situation, the miscalculated date cannot be outrageously incorrect. Remember, this is a ruling for the Court of Criminal Appeals to make, not the trial court.
    - What if the cited date is earlier than the full 90 days allowed under the statute? Occasionally, the Court of Criminal Appeals has seen cases in which the trial court has granted two or more extensions. A second extension is not authorized by the statute, and when the second extension extends the filing date past the authorized 90 days, the application will be treated by the Court of Criminal Appeals as untimely. The Court has not addressed a situation where two or more extensions actually result in the filing of an application in less than the authorized 90-day period. Presumably a trial court could "fix" an extension that granted less than the authorized 90 days by issuing a *nunc pro tunc* order citing to the correct due date.

e. Regardless of whether an applicant has requested an extension, four situations can result after the applicable time period has run.
    1. No Application Filed
    - If the convicting court determines that, after the time to file has passed, no application has been filed, then it shall "immediately, but in any event within 10 days," send to the Court of Criminal Appeals and to the attorney representing the State a statement that no application has been filed and any order the judge deems should be attached. Art. 11.071 § 4(d).
    - Practice note: *This is the most violated requirement of Article 11.071, and yet it serves a very important function. With the passage of Article 11.071, the Legislature ensured that every person sentenced to death will have the opportunity to pursue at least one habeas application. When no application is*

filed, and no notice is given to the Court of Criminal Appeals, then the Court does not know whether the system has broken down or whether an applicant has decided that he does not wish to pursue habeas relief. If, on the other hand, the Court has been notified of the omission, then it is in a position to either accept any waiver by the applicant or to fix any breakdown in the system. This is critical because a failure to timely file an application constitutes a waiver of all grounds for relief that were available during the applicable filing period, except as provided by Section 4A. Art. 11.071 § 4(e).

a. If the failure to file is due to applicant's own decision that an application should not be filed, then the trial court should still give the Court of Criminal Appeals notice that no application has been filed. The court should include documentation with that notice that it has taken the appropriate steps to determine that the choice has been made knowingly and voluntarily.
b. If the failure to file an application is due to a breakdown in the system and not by the choice of the defendant, then the Court of Criminal Appeals can get the case back on track by ordering counsel who failed to file the application to show cause for his failure. Art. 11.071 § 4A(a). At the conclusion of counsel's presentation, the Court may (1) permit counsel to continue representing applicant and establish a new filing deadline, which may not be more than 180 days after the date the Court permits the continued representation; or (2) appoint new counsel to represent applicant and establish a new filing deadline, which may not be more than 270 days after the date the Court appoints new counsel. Art. 11.071 § 4A(b). Additionally, the Court may hold in contempt counsel who failed to timely file an application. The Court may punish counsel for each day after the first day on which counsel failed to timely file the application as a separate instance of contempt. Art. 11.071 § 4A(c). In addition to or in lieu of holding counsel in contempt, the Court may enter an order denying counsel compensation. *Id*.
c. If the Court of Criminal Appeals establishes a new filing deadline, it shall notify the convicting court of that fact, and the convicting court shall proceed accordingly. Art. 11.071 § 4A(d). If the Court appoints new counsel, then that counsel shall be paid in the same manner as counsel appointed by the convicting court. Art. 11.071 § 4A(e).
d. Notice that whether counsel is allowed to continue representing an applicant or whether new counsel is appointed, Article 11.071 § 4A does not provide for the granting of any extension past the maximum time allowed in Section 4A(b)(2) or (b)(3). Thus, a trial court has no authority to grant such a request for extension. However, if counsel files a "motion for extension" in the Court of Criminal Appeals with a sufficient showing of good cause for why counsel needs additional time, the Court has considered such motions as new showings under Section 4A. *See Ex parte Ward*, No. WR-64,276-01 (Tex. Crim. App. Mar. 21, 2007)(not designated for publication).

2. **Untimely Filed Application**

- If an application is filed after the time to file has expired, then the trial court shall "immediately, but in any event within 10 days," send to the Court of Criminal Appeals and to the attorney representing the State a copy of the untimely application with a statement that the application was untimely. Art. 11.071 § 4(d). This procedure should be followed despite the reason for the untimely filing, *e.g.*, date miscalculation by applicant, trial court mistake, or some other reason.
- The trial court should not proceed on the application without further instructions from the Court of Criminal Appeals.
    a. When the Court of Criminal Appeals receives an untimely filed application, it can order counsel to show cause for his failure to file the application in a timely manner. Art. 11.071 § 4A(a). At the conclusion of counsel's presentation, the Court may (1) find that good cause has not been shown and dismiss the application; (2) permit counsel to continue representing applicant and establish a new filing

deadline, which may not be more than 180 days after the date the Court permits the continued representation; or (3) appoint new counsel to represent applicant and establish a new filing deadline, which may not be more than 270 days after the date the Court appoints new counsel. Art. 11.071 § 4A(b). Additionally, the Court may hold in contempt counsel who failed to timely file an application. The Court may punish counsel for each day after the first day on which counsel failed to timely file the application as a separate instance of contempt. Art. 11.071 § 4A(c). In addition to or in lieu of holding counsel in contempt, the Court may enter an order denying counsel compensation. *Id*.

b. If the Court of Criminal Appeals establishes a new filing deadline, it shall notify the convicting court of that fact, and the convicting court shall proceed accordingly. Art. 11.071 § 4A(d). If the Court appoints new counsel, then that counsel shall be paid in the same manner as counsel appointed by the convicting court. Art. 11.071 § 4A(e).

- Practice note: *Occasionally, when a trial court sends an untimely application to the Court of Criminal Appeals, it will also send the transcript of a good cause hearing and findings of fact and conclusions of law it made regarding the showing of good cause. While Article 11.071 no longer authorizes the trial court to hold such a hearing, the Court of Criminal Appeals typically does not ignore the trial court's efforts. Cf. 1995 version of Art. 11.071 § 4(c) (1995). This does not mean that the Court will necessarily agree with the trial court's conclusion, but the information may carry some weight.*

3. **Subsequent Application**

- If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of, or grant relief based on, the subsequent application unless the application contains sufficient specific facts establishing that: (1) the claims have not been and could not have been presented previously because the factual or legal bases for the claims were unavailable; (2) no rational juror could have found applicant guilty beyond a reasonable doubt, but for a violation of the United States Constitution; or (3) no rational juror would have answered in the State's favor one or more of the special issues presented to the jury but for a violation of the United States Constitution. Art. 11.071 § 5(a). Although he need not completely prove his claims in a subsequent application, an applicant must make a sufficient threshold showing to meet one of these exceptions. *See Ex parte Campbell*, 226 S.W.3d 418 (Tex. Crim. App.), *cert. denied*, 128 S.Ct. 655 (2007); *Ex parte Blue*, 230 S.W.3d 151 (Tex. Crim. App. 2007); *Ex parte Brooks*, 219 S.W.3d 396 (Tex. Crim. App. 2007).
- If the convicting court receives a subsequent application, the clerk of the court shall attach a notation that the application is a subsequent application, assign the case a file number that is "ancillary to that of the conviction being challenged," and immediately send to the Court of Criminal Appeals the application, the notation, any order scheduling applicant's execution, and any other order the judge directs to be attached. Art. 11.071 § 5(b). On receipt of the documents, the Court of Criminal Appeals shall determine whether applicant has satisfied any of the requirements set out in Article 11.071 § 5(a).
- Practice note: *Follow through on whether the application actually gets sent as instructed. Too frequently a trial court will order the clerk to send a subsequent application record to the Court of Criminal Appeals but for whatever reason, the record will not be sent.*
- The trial court may not take any further action on the application before the Court of Criminal Appeals issues an order finding that the requirements have been satisfied. Art. 11.071 § 5(c). If the Court of Criminal Appeals determines that the requirements have not been satisfied, it shall issue an order dismissing the application and no further action may be taken on it. *Id*. Note that the statute does not prohibit the State from filing a Motion to Dismiss or similar document in which it argues why applicant's allegation or allegations fail to meet any of the Section 5 requirements. *See Ex parte Campbell*, 226 S.W.3d at 422 n.13.

- Be cognizant of what actually constitutes a "subsequent" application that the clerk of the trial court must immediately send to the Court of Criminal Appeals. Under Article 11.071, a "subsequent" application is any application that (1) is filed after an initial application is filed, and (2) is filed outside of the applicable period for filing. An obvious example of a subsequent application is a new application raising entirely new claims that is filed in the trial court after an initial application has been filed and is filed after the statutorily allowed time period.

  But what if an applicant files an initial application within the appropriate filing period, and then, some time after the filing period has expired, he files a document entitled an "amended application" or "supplemental application"? Regardless of the title of the document, if an applicant has expanded upon a claim that he raised in his initial filing, such as adding a due process violation to a cruel and unusual punishment claim, or added a new claim, the document is potentially a subsequent application and should be immediately forwarded to the Court of Criminal Appeals. *See* Art. 11.071 § 5(f). However, if in the document, applicant merely purports to add authorities or evidence to support a claim raised in his initial filing or to waive or withdraw a claim, then the document may not be a subsequent application. *See Ex parte Holberg*, No. WR-68,994-01 (Tex. Crim. App. Jan. 16, 2008)(not designated for publication); *Ex parte Alvarez*, No. WR-62,426-01 (Tex. Crim. App. June 6, 2007)(not designated for publication). In this latter instance, if an applicant labels his document as some sort of "application" but does not intend it to be a subsequent application, then applicant should (or the trial court could require him to) re-name or re-file the document with a name or title more reflective of its intended purpose. When in doubt, the trial court should send it to the Court of Criminal Appeals for a determination.

  Neither of these situations is to be confused with the case in which a trial court or the Court of Criminal Appeals grants the filing of a "skeletal" initial application, and the completed version of the application is filed *on or before the applicable filing deadline*. This type of filing *is not* a subsequent application and should not be treated as such. The filing of a "skeletal" application was frequently used in the early days of Article 11.071 to toll the federal statute of limitations. Now it is not as useful of a tool.

  Another example of a subsequent filing that the Court of Criminal Appeals has held not to be a subsequent application can be found in *Ex parte Kerr*, 64 S.W.3d 414 (Tex. Crim. App. 2002). In this case, the Court of Criminal Appeals held that an application filed after an "initial" application had been filed was not a subsequent application because the first application did not raise any claims attacking applicant's conviction or sentence but, instead, only challenged the constitutionality of Article 11.071.

4. **Timely Filed Application**

- When an application is filed in the convicting court within the applicable time period, a writ of habeas corpus, returnable to the Court of Criminal Appeals, shall issue by operation of law. Art. 11.071 § 6(a). A writ also issues by operation of law if the convicting court receives notice that the requirements of Article 11.071 § 5 have been met. Art. 11.071 § 6(b). After the writ issues, the clerk of the convicting court shall (1) make a notation that the writ issued, (2) assign to the case a file number that is ancillary to that of the conviction being challenged if one has not already been assigned, and (3) send a copy of the application by certified mail, return receipt requested, to the attorney representing the State. Art. 11.071 § 6(c). Throughout the proceeding, the clerk of the convicting court shall promptly deliver copies of any documents submitted in the case to the applicant and to the attorney representing the

State. Art. 11.071 § 6(d). Even when an applicant initially informs the trial court that he does not want to file an Article 11.071 application, he may change his mind and file an application at any point up to the applicable deadline. He might even be allowed to change his mind about not wanting an attorney to represent him in this regard. *See In re Reynoso*, 161 S.W.3d 516 (Tex. Crim. App. 2005). Unlike the situations in which no application is filed, or an untimely or subsequent application is filed, Article 11.071 does not require the convicting court, the clerk, or either party to notify the Court of Criminal Appeals when an application is filed within the applicable time period. However, it is a good practice, and helpful to the Court of Criminal Appeals, for the trial court (or applicant) to send notice in every case. Remember, unlike other types of cases in which trial courts render final decisions, Article 11.071 writs are finally resolved by the Court of Criminal Appeals. Therefore, communicating when applications have been timely filed is important to ensuring that the system is working both properly and efficiently.

F. **The State's Answer to the Application**

a. Under Article 11.071 § 7(a), the State is required to answer the application no later than the 120th day after the date the State receives notice that the writ has issued.

b. The State may request from the convicting court one extension of time in which to file its answer by showing "particularized justifying circumstances" for the extension. *Id*.

c. In no event shall the court permit the State to file an answer later than the 180th day after the date the State receives notice that the writ has issued. *Id*.

- Practice note*: Be aware that the time frame runs from the date the State receives notice that the writ has issued, not necessarily from the date the writ actually issues. So if the State representative's behavior on the day after the writ issues indicates that the State knows a writ has issued, but the file stamp on the notice reveals a date thirty days after that, the applicant might make an argument and the trial court could make a fact finding regarding which date governs.* d. But what if the State files its answer outside of the applicable period? Can the applicant have the answer stricken along with any exhibits that accompany it, thereby arguably rendering applicant's allegations uncontroverted? *See, e.g.,* the motions and responses in the record of *Ex parte Rousseau*, No. WR-43,534-02 (Tex. Crim. App. Oct. 11, 2006)(not designated for publication – dism'd due to death of applicant). The Court of Criminal Appeals has not specifically addressed this issue. However, whether the answer is stricken or not, the plain language of the statute provides that all matters alleged in the application not admitted by the State are deemed denied. Art. 11.071 § 7(b). Therefore, applicant's allegations would not be uncontroverted.

d. The State shall serve a copy of its answer on counsel for applicant, or on applicant if he is proceeding *pro se*. Art. 11.071 § 7(a). This provision is unlike the requirements in the remainder of the statute which place filing and notice requirements on the clerk of the convicting court.

- Notice that the statute provides that an answer should be filed *after* a writ issues. In response to many subsequent applications, especially in the case of eleventh hour applications, the State files an answer in an apparent attempt to convince the Court of Criminal Appeals that applicant's allegations have no merit and a remand of the case is not necessary. Such a document is not permitted by the statute, and any argument addressing the merits of applicant's allegations cannot be considered in an Article 11.071 § 5 analysis. This should not be confused with an "answer" or a motion to dismiss in which the State argues that applicant has not met the requirements of Section 5.

- **Review and Action by the Convicting Court**
  - Not later than the 20th day after the State answers the application, "the convicting court shall determine whether controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist and shall issue a written order of the determination." Art. 11.071 § 8(a). To make this determination, the trial court must look at the nature and

substance of the claims raised and make a preliminary determination on whether applicant has met the pleading requirements. *See* Points to Consider When Reviewing the Habeas Application and Substantive Considerations sections of this chapter, *infra*.

a. **No Unresolved Issues**

- If the convicting court determines that issues do not exist, both parties shall file proposed findings of fact and conclusions of law for the court's consideration on or before a date set by the court that is no later than the 30th day after the court issued its order that no unresolved issues exist. Art. 11.071 § 8(b).
- After consideration of the proposed findings and conclusions made by both parties, and after argument of counsel, if argument is requested by the court, the convicting court shall make appropriate written findings of fact and conclusions of law. These findings and conclusions shall be made no later than the 15th day after the date the parties filed proposed findings or not later than the 45th day after the date the court determined no unresolved issues exist, whichever occurs *first*. Art. 11.071 § 8(c).
- The clerk of the court shall then forward the appropriate papers to the appropriate entities as provided by the statute. Art. 11.071 § 8(d).

b. **Unresolved Issues**

- If the convicting court determines that "controverted, previously unresolved factual issues material to the legality of the applicant's confinement" exist, then the court shall enter an order, not later than the 20th day after the date the State answers the application, designating the issues of fact to be resolved and the manner of resolution. Art. 11.071 § 9(a). The court may order affidavits, depositions, interrogatories, or evidentiary hearings, or may use personal recollection. Art. 11.071 § 9(a).
- The issues to be resolved may bear upon the manner of resolution. For example, when determining whether an applicant is mentally retarded, the Court of Criminal Appeals has stated that a live hearing is usually preferable to a hearing by affidavit and has remanded cases with explicit instructions to hold a live hearing. *See Ex parte Briseno*, 135 S.W.3d 1, 3 (Tex. Crim. App. 2004); *see also Ex parte Lewis*, No. WR-38,355-03 (Tex. Crim. App. Dec. 8, 2004)(not designated for publication).
- If the convicting court decides to hold an evidentiary hearing, it shall hold the hearing no later than the 30th day after the date on which the court entered the order designating the issues to be resolved. Art. 11.071 § 9(b).
- The convicting court may grant one motion to postpone the hearing, but the postponement cannot be for more than 30 days, and the court must state, on the record, good cause for the delay. *Id*.
- The presiding judge of the convicting court shall conduct the evidentiary hearing unless another judge presided over the original capital murder trial, in which event that judge may preside over the hearing if he or she is qualified for assignment under Government Code Section 74.054 (setting out which judges in general are subject to assignment) or 74.055 (setting out the requirements for a retired or former judge to be subject to assignment). Art. 11.071 § 9(c).
- The court reporter has 30 days after the last day of the hearing to prepare a transcript and file it with the clerk of the convicting court. Art. 11.071 § 9(d).
- The Texas Rules of Evidence apply to a hearing held under this article. Art. 11.071 § 10.
- Both parties are then required to file proposed findings of fact and conclusions of law for the court's consideration on or before a date set by the court that is no later than the 30th day after the date the transcript is filed. Art. 11.071 § 9(e).

Section 3. Points to Consider When Reviewing the Habeas Application

3. POINTS TO CONSIDER WHEN REVIEWING THE HABEAS APPLICATION

- When reviewing an application, keep in mind the basic rules of habeas law such as whether applicant has raised cognizable claims and, if so, whether the applicant has met his pleading burden.
- Throughout the process, the burden is on the applicant to state facts which, if true, would entitle him to relief. *Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985); *see also Ex parte Ramirez*, S.W.3d , No. WR-25,057-06 (Tex. Crim. App. Dec. 12, 2007).
- If an applicant merely states legal conclusions or speculates on the result of an alternative approach, the claim is insufficient. The applicant must allege in his application, and at least

attempt to prove (*e.g.* by witness affidavit or other evidence), facts showing that the error complained of actually contributed to either the conviction or punishment. *Ex parte Barber*, 879 S.W.2d 889, 891-92 (Tex. Crim. App. 1994). If an applicant fails to present cognizable claims, or fails to present sufficient facts which amount to more than mere speculation, then a trial judge can easily find that no issues exist which need resolution.

- Note also that the writer must remember to include the "Requisites of Petition" found in Code of Criminal Procedure 11.14, including an oath that the allegations made in the application are true "according to the belief of the petitioner."
- If the trial judge determines after a preliminary review of applicant's claims that unresolved issues exist, then he or she must determine how to resolve those issues. If the trial court determines that it would be helpful, it can hold a "live" hearing and have the parties present evidence and call witnesses who will be subjected to cross-examination, or it can hold a "paper" hearing where all the evidence is presented by affidavit and printed documents. Whether a hearing should be held and, if so, what type of hearing is warranted, often turns on the substance of the allegations raised. For instance, if all of the allegations applicant has raised in his habeas application were raised on direct appeal, then the court can confidently conclude that no hearing is necessary because the claims can be immediately rejected. If, on the other hand, applicant has raised claims like ineffective assistance of counsel or inadequate investigation by trial counsel, then the court is likely to conclude that some sort of hearing would be helpful. Frequently in this latter situation, affidavits from counsel are sufficient. However, the more in-depth or complex a claim is, the more likely it is that a court would benefit from being able to see and hear witnesses. For example, in cases in which an applicant has claimed that he is mentally retarded, this Court has remanded the case for a live hearing. *See Ex parte Briseno*, 135 S.W.3d at 3. Also, in cases in which the habeas judge is not the same judge who tried the case, he or she might want the opportunity to see and hear the witnesses in order to make more accurate credibility determinations. The court must use its judgment.
- Remember that in most circumstances, an applicant must prove his claims by a preponderance of the evidence. *Ex parte Kunkle*, 852 S.W.2d 499, 505 (Tex. Crim. App. 1993); *Ex parte Adams, 768 S.W.2d 281, 287-88 (Tex. Crim. App. 1989). If an applicant fails to attach any supporting exhibits to the application and simply argues that the trial court should give him a hearing, then the applicant will probably not get one. As with the burden to plead and attempt to prove facts which would entitle him to relief, an applicant should state sufficient facts and attach some document or witness affidavit supporting an argument for a live hearing.*
- Practice Note: *When writing findings of fact and conclusions of law, remember that those findings and conclusions come from the court. While it is common practice to adopt the proposed findings of one of the parties, the court must keep in mind that those findings and conclusions have been written by an advocate. Before adopting an advocate's proposed findings and conclusions, the trial court should verify that they are supported by the record. Further, the court should not draft or sign findings and conclusions that are so minutely detailed as to render them difficult to verify.*

Section 4. Substantive Considerations

4. SUBSTANTIVE CONSIDERATIONS

A. **General Habeas Law**

- A good brief review of general habeas law and special substantive issues that have arisen over the years can be found in various papers presented at legal conferences and in books like the Texas Criminal Practice Guide. Although set out in no particular order, a handful of frequently appearing or emerging issues are worthy of note here. Most notably, remember that an applicant must raise claims regarding jurisdictional defects or denials of fundamental or constitutional rights.

B. **Sufficiency Claims**

- Sufficiency of the evidence claims are not cognizable on habeas, although *no evidence* claims are. *Ex parte Brown*, 757 S.W.2d 367, 368-69 (Tex. Crim. App. 1988)(insufficiency claims not cognizable on habeas); *Ex parte Barfield,* 697 S.W.2d 420. 421 (Tex. Crim. App. 1985)(no evidence claims may be raised on habeas); *Ex parte Moffett*, 542 S.W.2d 184 (Tex. Crim. App. 1976)(same).

C. **Other Cognizability Issues**

- Post-conviction habeas corpus is a "collateral attack" on a final conviction. It is not a substitute

for direct appeal, and issues that should have been raised on direct appeal generally will not be considered on habeas. *See Ex parte Drake*, 883 S.W.2d 213, 215 (Tex. Crim. App. 1994); *Ex parte Clore*, 690 S.W.2d 899 (Tex. Crim. App. 1985). An exception to this has been seen in cases where the trial record did not include enough information to resolve the issue, like in the case of an ineffective assistance claim. *See Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997); *see also Jackson v. State, 877 S.W.2d 768, 772 (Tex. Crim. App. 1994)(Baird, J., concurring). The Court of Criminal Appeals reaffirmed the position that habeas is not a substitute for direct appeal in Ex parte Gardner, 959 S.W.2d 189, 191 (Tex. Crim. App. 1998), where the applicant waited several years to raise a Fifth Amendment claim that became available to him during the pendency of his direct appeal. See also Ex parte Ramos, 977 S.W.2d 616, 616-17 (Tex. Crim. App. 1998).*

- An applicant can also procedurally default a claim for the purposes of a habeas review because of his delay in raising it. *See Ex parte Carrio*, 992 S.W.2d 486, 488 (Tex. Crim. App. 1999)(holding that the doctrine of laches may be employed on habeas).
- Claims based on the Texas Constitution which are subject to a harm analysis generally are not cognizable on habeas. *See Ex parte Dutchover*, 779 S.W.2d 76, 77 (Tex. Crim. App. 1989); *see also Ex parte Douthit*, 232 S.W.3d 69 (Tex. Crim. App.), *cert. denied*, 128 S.Ct. 389 (2007)(reiterating that procedural errors or irregularities from "mandatory" statutes are not cognizable on a writ of habeas corpus).
- Finally, preservation of error at trial and on appeal also plays a role in what is available for habeas review. This is especially true now that Texas has the one-writ rule. Even constitutional issues like those raised in *Batson v. Kentucky*, 476 U.S. 79 (1986), might be waived if not properly preserved. *See Mathews v. State*, 768 S.W.2d 731, 733 (Tex. Crim. App. 1989). The most common way to preserve error for complaint is by a contemporaneous objection. Tex. R. App. P. 33.1(a); *see Ex parte Crispen*, 777 S.W.2d 103, 105 (Tex. Crim. App. 1989). There are exceptions to every rule, however, and sometimes an error is so novel that no objection is required to preserve it.

D. **Ineffective Assistance of Counsel**

- Ineffective assistance of counsel claims are a popular topic on habeas. Claims of ineffective assistance of counsel in a death penalty case are governed by *Strickland v. Washington*, 466 U.S. 668 (1984).
- Two of the more frequently seen allegations of ineffective assistance are that trial counsel failed to sufficiently investigate applicant's case or failed to present available mitigating evidence. *See Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003). As the Court of Criminal Appeals stated in *Ex parte Woods*, 176 S.W.3d 224, 226 (Tex. Crim. App. 2005), "*Strickland* does not require defense counsel to investigate each and every potential lead, or present any mitigating evidence at all[.]" However, "it does require attorneys to put forth enough investigative efforts to base their decision not to present a mitigating case on a thorough understanding of the available evidence." *Id.* The attorneys in *Wiggins* did not conduct an adequate investigation; therefore, they could not have made "a fully informed decision with respect to sentencing strategy." *Id.* (*quoting Wiggins*, 539 U.S. at 528). Thus, they failed to provide objectively reasonable assistance of counsel under *Strickland*. *Id.; see also Ex parte Gonzales*, 204 S.W.3d 391, 394-97 (Tex. Crim. App. 2006)(trial counsel held to have performed deficiently during the punishment phase of trial for failing to investigate and present mitigating evidence of abuse applicant suffered at father's hands – relief granted); *Ex parte Martinez*, 195 S.W.3d 713, 721-31 (Tex. Crim. App. June 28, 2006)(Court reviewed what counsel did and held no deficient performance; extensive *Wiggins* analysis).
- A defense lawyer's effectiveness may also be impacted by another party. For example, severe restrictions placed on defense counsel's ability to interview the State's witnesses could result in ineffective assistance. *See generally Stearnes v. Clinton*, 780 S.W.2d 216 (Tex. Crim. App. 1989).
- An applicant who represented himself at trial will not be heard to complain about ineffective assistance. *Martin v. State*, 630 S.W.2d 952, 956-57 (Tex. Crim. App. 1982)(op. on reh'g).
- Finally, the right to counsel on habeas is a statutory creation, not a constitutional one. Therefore, effective assistance of initial habeas counsel is not cognizable in a subsequent application. *See Ex parte Graves*, 70 S.W.3d 103, 105 (Tex. Crim. App. 2002).

E. **Incompetency and Insanity**

- Another frequently raised topic is the allegation that the death penalty cannot be imposed on a person who is presently insane or incompetent to be executed. *See generally Stewart v.*

Martinez-Villareal, 523 U.S. 637 (1998); *Ford v. Wainwright*, 477 U.S. 399 (1986); *Ex parte Jordan , 758 S.W.2d 250 (Tex. Crim. App. 1988).*

- Under Article 46.05(k), if the trial court determines that an applicant is incompetent to be executed, then the clerk of the court shall immediately send the appropriate documents to the Court of Criminal Appeals to determine whether an existing execution date should be withdrawn and stay of execution entered. However, in the vast majority of cases raising this allegation, the applicant does not currently have an execution date. Thus, the claim is not ripe for the Court's review.
- A capital defendant need not be competent to assist his attorney in filing an application for habeas corpus review. *Ex parte Mines*, 26 S.W.3d 910, 912-13 (Tex. Crim. App. 2000).
- The Court of Criminal Appeals cannot review a trial court's finding that the applicant is competent. *Ex parte Caldwell, 58 S.W.3d 127, 130 (Tex. Crim. App. 2000).*

F. **Execution Protocol**

- Allegations are sometimes raised asserting that the chemical protocol used in carrying out a sentence of death by lethal injection amounts to cruel and unusual punishment. In the past, the Court of Criminal Appeals concluded that, if the applicant's execution was imminent, then to meet his burden on habeas, he needed to show that the chemicals to be used on him were likely to cause an unnecessarily painful death. *See Ex parte O'Brien*, 190 S.W.3d 677, 679 (Tex. Crim. App.)(Cochran, J., concurring), *cert. denied*, 127 S.Ct. 9 (2006). In April 2008, the United States Supreme Court handed down the plurality decision of *Baze et al. v. Rees*, U.S. , No. 07-5439 (Apr. 16, 2008), in which it held that Kentucky's three-drug protocol is constitutional. Thus, the claims raised in Texas tried to distinguish Texas' protocol from that utilized in Kentucky. However, on June 9, 2008, the Court of Criminal Appeals decided in *Ex parte Alba*, S.W.3d , No. AP-75,510, that a challenge to the chemical protocol fails to attack the legality of an applicant's conviction or sentence and is, therefore, not a cognizable claim under Article 11.071.

G. **Parole**

- In the late-1990's, whether attorneys could question the venire about parole laws and whether the jury could be given a charge on the topic were frequently raised issues. The Court of Criminal Appeals held in *Smith v. State*, 898 S.W.2d 838, 847 (Tex. Crim. App. 1995), and in a number of cases since, that a defendant has no right to a charge on the effects of the parole laws. The debate largely erupted because of the United States Supreme Court case of *Simmons v. South Carolina*, 512 U.S. 154 (1994), in which the Supreme Court held that a formal instruction concerning a defendant's parole eligibility may be required under the Due Process Clause of the Fourteenth Amendment. However, the Supreme Court's holding was based on the fact that the South Carolina statute at issue provided that a life sentence carried no parole eligibility. Because a life sentence in Texas carried the possibility of parole, the Court of Criminal Appeals consistently held that *Simmons* does not apply to Texas cases. This situation has changed. For capital murders committed after September 1, 2005, the two possible sentences are death or *life without parole*. *See* Tex. Penal Code § 12.31. *Simmons* will apply. The Texas Legislature has also seen fit to statutorily require the court to give the parole instruction. Art. 37.071 § 2(e)(2). Prior caselaw will still apply to trials of crimes committed prior to September 1, 2005.

H. **Mental Retardation**

- On June 20, 2002, the United States Supreme Court held that there is a national consensus to exempt from the death penalty those who suffer from mental retardation. *Atkins v. Virginia, 536 U.S. 304, 307 (2002). But the Court left the implementation of that decision to the states. The Texas Legislature to date has failed to pass any law that would assist the bench and bar in implementing Atkins. Thus, the Court of Criminal Appeals undertook the task and adopted the definition of mental retardation used by the American Association on Mental Retardation (AAMR) and contained in Texas Health and Safety Code Section 591.003(13). Ex parte Briseno, 135 S.W.3d at 7. Under this definition, mental retardation is a disability characterized by: (1) "significantly subaverage" general intellectual functioning (an I.Q. of about 70 or below); (2) accompanied by "related" limitations in adaptive functioning; (3) the onset of which occurs prior to the age of 18. Id.*
- Texas Health and Safety Code Section 591.003(16) indicates that only a physician or psychologist licensed in this state can determine who constitutes a "[p]erson with mental retardation." In *Ex parte Lewis*, 223 S.W.3d 372 (Tex. Crim. App. 2006)(Cochran, J., concurring statement), the trial judge held that one of applicant's expert witnesses (a licensed professional

counselor) was not a physician or psychologist licensed in this state. Therefore, he was not licensed to diagnose mental retardation. The Court of Criminal Appeals rejected these findings. While a particular type of expert might be required to make a diagnosis in order for an individual to qualify for social services, this requirement has not been extended to diagnosing mental retardation in the capital murder defendant context.

- The Court of Criminal Appeals has also determined that, when an applicant raises a claim that he is mentally retarded, either in an initial application or in a subsequent application that meets the dictates of Article 11.071 § 5, the trial court generally should conduct a live hearing instead of a hearing merely by affidavit. The trial court's findings of fact regarding mental retardation are afforded almost total deference when reviewed by the Court of Criminal Appeals, especially when those findings are based upon credibility and demeanor. *Hall v. State*, 160 S.W.3d 24, 36 (Tex. Crim. App. 2004), *cert. denied*, 545 U.S. 1141 (2005). * The lack of legislative guidance on this prevalent issue has prompted the Court of Criminal Appeals to provide some guidance in an attempt to fill this void. *See, e.g., Ex parte van Alstyne*, 239 S.W.3d 815 (Tex. Crim. App. 2007); *Ex parte Chester, No. AP-75,037 (Tex. Crim. App. Feb. 28, 2007)(not designated for publication); Ex parte Rodriquez, 164 S.W.3d 400 (Tex. Crim. App. 2005)(Cochran, J., concurring statement); Ex parte Modden, 147 S.W.3d 293 (Tex. Crim. App. 2004); see also Hunter v. State, 243 S.W.3d 664 (Tex. Crim. App. 2007) and Gallo v. State, 239 S.W.3d 757 (Tex. Crim. App. 2007).** Remember also that the Court of Criminal Appeals is vested with appellate jurisdiction at the time an applicant is convicted of capital murder and sentenced to death. *Ex parte Jackson, 187 S.W.3d 416 (Tex. Crim. App. 2005); see also Art. 37.071 § 2(h); Art. 11.071 § 1. Chapter 48 of the Code of Criminal Procedure does not alter the Court's appellate jurisdiction should the Governor grant a commutation of punishment on the grounds that an applicant is mentally retarded. See id. Although a commutation may render moot any allegations pertaining to applicant's punishment, the Court can still properly review on the merits any allegations pertaining to the guilt stage of applicant's trial.*
- Finally, claims of mental illness do not rise to the level of mental retardation claims with regard to barring execution.

I. Actual Innocence and Newly Discovered Evidence

- Although actual innocence claims have existed for a long time, new and ever-developing science and other investigative techniques have pumped new life into such claims. The arena has become so prevalent that many Texas law schools have joined with the Texas Innocence Network to review such claims in numerous cases. For more comprehensive information on this topic, visit the Texas Innocence Network at http://www.texasinnocencenetwork.com. Papers presented at various conferences may also provide valuable resources. Additionally, review both death penalty and non-death penalty cases such as *Ex parte Chavez*, 213 S.W.3d 320 (Tex. Crim. App. 2006); *Ex parte Brown*, 205 S.W.3d 538 (Tex. Crim. App. 2006); and *Ex parte Thompson*, 153 S.W.3d 416 (Tex. Crim. App. 2005), that discuss the topic. *See also Ex parte Henderson*, S.W.3d , No. WR-49,984-02 (Tex. Crim. App. June 11, 2007)(and accompanying concurring and dissenting statements); *Wilson v. State*, 185 S.W.3d 481 (Tex. Crim. App. 2006); *Thacker v. State*, 177 S.W.3d 926 (Tex. Crim. App. 2005).
- Also, while favorable results from DNA testing conducted pursuant to Code of Criminal Procedure Chapter 64 may be used in actual innocence claims on habeas, complaints that one's attorney was ineffective during Chapter 64 proceedings are not cognizable. *Ex parte Baker*, 185 S.W.3d 894, 898 (Tex. Crim. App. 2006). Likewise, other challenges to Chapter 64 DNA proceedings are not cognizable on habeas. *Ex parte Reyes*, 209 S.W.3d 127 (Tex. Crim. App. 2006).

J. Confrontation Issues

- On March 8, 2004, the United States Supreme Court overruled the *Ohio v. Roberts*, 448 U.S. 56, 63 (1980), "indicia of reliability" reasoning with regard to Confrontation Clause issues and held instead that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Crawford v. Washington, 541 U.S. 36, 68-69 (2004). As a general rule, applicants will not receive relief on habeas regarding Crawford claims because both the United States Supreme Court and the Court of Criminal Appeals have held that Crawford claims will not be applied retroactively. Whorton v. Bockting, 549 U.S. , 127 S.Ct. 1173, 1184 (2007); Ex parte Keith, 202 S.W.3d 767, 771 (Tex. Crim. App. 2006). However, an applicant might raise the issue in another way, such as in an actual innocence or ineffective assistance claim. See Ex parte Byars, 176 S.W.3d 841, 842 (Tex. Crim. App. 2005)(Keller, P.J., concurring).*

Section 5. Conclusion

5 . CONCLUSION

- Although this chapter barely scratches the surface of death penalty habeas, it should provide novice capital jurists with a place to start in the process while offering the more seasoned capital jurists a review of the basics and a look at more complicated and still emerging issues.

Section 6. Author Credits

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Chapter 8 - EXECUTION PROCEDURES

Section 1. Death Penalty

1. Death Penalty

- Capital murder is the only offense for which the death penalty may be imposed. *Ex parte Granviel*, 561 S.W.2d 503, 510 (Tex. Crim. App. 1960).
- In Texas, execution of a prisoner shall be by lethal injection. Tex. Code Crim. Proc. art. 43.14.
- Execution by lethal injection is constitutional, even for those who committed their offense when electrocution was the authorized mode of execution. *Ex parte Granviel*, 561 S.W.2d 503, 510 (Tex. Crim. App. 1960).
- Tex. Penal Code § 12.31 – Capital Felony
- An individual adjudged guilty of a capital felony in a case in which the state seeks the death penalty shall be punished by death or by imprisonment in the institutional division for life without parole.

Section 2. Sentence of Death in Open Court After the Receipt of the Jury's Answer to Special Issues

2. Sentence of Death in Open Court After the Receipt of the Jury's Answer to Special Issues

"__Name of Defendant__, the jury having found you guilty of the capital murder of __Name of Victim__ and having returned a unanimous verdict to Issues Numbers ___, ___, and ____. The Court sentences you to death by lethal injection. It is, therefore the ORDER, JUDGMENT, AND DECREE of this Court that you be remanded to the custody of the Sheriff of this county to be delivered to the institutional division of the Texas Department of Criminal Justice, where you shall be continuously confined until 6 p.m. on a date to be determined when the proper authorities shall administer lethal injections sufficient to cause your death."

Section 3. Setting the Date of Execution

3. Setting the Date of Execution

- The court may contact the Institutional Division Corrections Director in Huntsville at 936-437-2170 to determine a date for a specific execution.
- The current Texas execution schedule can be accessed online at http://www.tdcj.state.tx.us/stat/deathrow.htm (click on "Scheduled Executions"). Multiple executions may be scheduled for the same day, and will take place unless there is a stay given by the Governor.
- Tex. Code Crim. Proc. art. 43.14 – Execution of Convict
    1. The death sentence shall be by lethal injection after 6:00 p.m. on the date set for the execution by the trial court. The procedure for the execution shall be determined by the Director of the institutional division of the Texas Department of Criminal Justice.

- Tex. Code Crim. Proc. art. 43.141 – Scheduling of Execution Date; Withdrawal; Modification
    1. If an initial application is timely filed, the trial court may not set the execution date until the mandate affirming the sentence is returned, and the Court of Criminal Appeals has denied any requested habeas relief.
    2. The first execution date must not be before the 91st day after the date the court enters the order setting the execution date.
    3. Any subsequent execution date must not be before the 31st day after the date the court enters the order setting the execution date.
    4. The convicting court may modify or withdraw the execution date order if the court determines that additional proceedings are necessary on an application for habeas corpus or request for DNA testing.
    5. If the court withdraws or modifies the order the court shall withdraw the warrant and if necessary, the clerk shall issue a new one.

- Influence of federal writ proceedings on setting date of execution.

1. The trial court should not set an execution date while an application for writ of habeas corpus remains pending in the federal courts.
2. The federal courts will always issue a stay of execution to protect the jurisdiction of the trial court and to complete its review of the pending writ.

Section 4. Notice of Date of Execution

4. Notice of Date of Execution

- The Texas Code Criminal Procedure is silent on the question of whether a formal hearing is necessary for setting the date of execution. There is no case law guidance on the question. It is a matter left to the sound discretion of the trial court in which the conviction resulted.
- The trial court should consider the following factors when deciding whether to hold a formal hearing:
    1. The closure that watching a formal pronouncement of the date for execution gives to the relatives and friends of the victim.
    2. The setting of the formal pronouncement hearing provides counsel for the defense due process in raising any further issues at bar to setting the date of execution. This provides further constitutional protection of important 14th Amendment rights.
    3. The security and problems involved in transporting the prisoner, especially for rural counties that may not have adequate manpower.
    4. The date of execution is actually set by informal conferencing with prison authorities to determine available dates and other prison factors.
- If no formal hearing is to be scheduled then the Court shall, after consultation with the appropriate prison officials, enter an execution order. The court clerk shall then issue a warrant of execution under the seal of the Court. The order is then mailed to the defendant. The sheriff of the county serves the warrant.

Section 5. Formal Hearing Procedure to Set Date of Execution

5. Formal Hearing Procedure to Set Date of Execution

- If a formal hearing is to be held then the following procedure is suggested:

1. The trial court shall set the date for the formal pronouncement of date of the execution.
    a. The court might consider setting the hearing mid-morning or early afternoon. This could enable the sheriff to pick the defendant up early the morning of the hearing, bring the defendant to the county for the hearing, and then directly return him to the appropriate death row unit. This procedure will prevent the county from having to keep the death row convict in the county jail for any period of time.
    b. The court should call the penitentiary (inmate records office) or check on-line to coordinate the date chosen for the execution. The court should consider what other executions are set that week or day, and what security or scheduling concerns the penitentiary might have with a particular date the court would like to select.
2. The trial court should send a written notice of the date of the formal pronouncement to all defendant's attorneys (trial, direct appeal and writ counsel) and to the District Attorney.
    a. This notice will allow defendant's counsel to file any stays with the appropriate state or federal courts and prepare any written motions to bar setting date of execution with the trial court.
    b. This notice will allow the State to provide victim notification of the hearing or decision of the trial court to set the date of execution.

- Formal notice of date of execution procedures:

1. Inquire as to whether either party is aware of any stays of the proceeding being ordered and in effect.
2. Inquire of the State whether there is any legal reason barring to the court setting the date of execution.
3. Inquire of the defense if there is any legal reason barring to the court setting the date of execution.
4. Enter trial court's finding that there is no legal reason that the sentence should not be formally pronounced and that the date of execution is set on the final judgment of conviction and sentence of death.
5. Formally pronounce the sentence and set the date of execution.

Section 6. Sample Transcript of Judge's Setting Date of Execution

6. Sample Transcript of Judge's Setting Date of Execution

The Court: Let the record reflect that the defendant is present in open court with (his/her) attorney, the Honorable (_____), and the State is represented by the Honorable (_____).

You, (Defendant), were indicted by the Grand Jury of (_____)County, Texas, charging you with the offense of capital murder, and a jury upon your trial returned a verdict into open court on the (_____) day of (_____), 20(____), with affirmative findings on the issues submitted to the jury regarding the punishment to be assessed, and finding that you are----------COMPETENT TO BE EXECUTED----------, and this court in accordance with said jury's affirmative findings and ---COMPETENCE TO BE EXECUTED----assessed your punishment at death; and the judgment was reviewed on appeal by the Court of Criminal Appeals of the State of Texas, and the Court of Criminal Appeals of Texas in all things affirmed the judgment of this court. (Defendant) is there any legal reason why sentence of the court should not be pronounced against you?

The mandate of the Court of Criminal Appeals of Texas commanding this court to proceed with this judgment was received in this court on the (____) day of (____), 20(____).

As there is no legal reason why sentence should not be pronounced against you, it is the order of this court that you, (Defendant), who has been found guilty by a jury of the offense of capital murder, and whose punishment has been assessed at death in accordance with the affirmative findings of this court, shall, after the hour of 6:00pm on the (____) day of (_____), 20(____), at the Texas Department of Criminal Justice, Institutional Division, at Huntsville, Texas, be put to death by an executioner designated by the Director of the Texas Department of Criminal Justice, Institutional Division, who shall cause a substance or substances in a lethal quantity to be intravenously injected into your body in sufficient amount to cause your death, and until you are dead; such execution procedure to be determined and supervised by the Director of the Texas Department of Criminal Justice, Institutional Division.

The Clerk of this court is ordered to issue a death warrant in accordance with this sentence directed to the director of the Texas Department of Criminal Justice, Institutional Division, and to deliver that warrant to the Sheriff of (_____) County, Texas, to be by him or her delivered to the Director of the Texas Department of Criminal Justice, Institutional Division, at Huntsville, Texas, together with the defendant, (Defendant).

(Defendant) is hereby remanded to the custody of the Sheriff of (_____) County, Texas, to await transfer to Huntsville, Texas, and execution of this sentence.

Section 7. The Death Warrant

7. The Death Warrant

A. **Warrant of Execution -** Tex. Code Crim. Proc. art. 43.15

- The death warrant will be issued by the clerk of the court and delivered to the sheriff within ten days after the court enters the order setting date of execution and delivered to the sheriff.
- The death warrant shall include the following:

    1. The fact of conviction
    2. The offense
    3. The judgment of the court
    4. The date of execution

- The sheriff shall deliver the warrant and the condemned person to the Director of the Texas Department of Corrections.
- The death warrant shall instruct the Director of the Department of Corrections at Huntsville, TX to carry out the execution.

Section 8. Resetting the Date of Execution

8. Resetting the Date of Execution

A. **Scheduling Of Execution Date; Withdrawal; Modification -** Tex. Code Crim. Proc. Art. 43.141

- The convicting court may modify or withdraw the order of the court setting a date for execution in

a death penalty case if the court determines that additional proceedings are necessary because of:

1. A subsequent or untimely application for a writ of habeas corpus filed under Article 11.071;

or

2. A motion for forensic testing of DNA evidence submitted under Chapter 64.

- If the convicting court withdraws the order of the court setting the execution date, the court shall recall the warrant of execution. If the court modifies the order of the court setting the execution date, the court shall recall the warrant of execution and the clerk of the court shall issue a new warrant.
- The Court of Criminal Appeals, the Federal District court, the 5th Circuit Court of Appeals, or the United States Supreme Court can issue a stay of execution but may not modify or withdraw an execution date.
- When it appears inevitable that a stay will be issued by another court, the state should file a motion asking the court to modify or withdraw a set execution date.
    1. “Modifying” the date means that the date is rescheduled; there is still an execution date in effect.
    2. “Withdrawing an” execution date means that there is not longer an execution date in effect, but the trial court still retains authority to set another execution date when desired without being controlled by another court's actions in the case.

Section 9. Suspension or Respite of the Date of Execution

9. Suspension or Respite of the Date of Execution

A. Return of Director - Tex. Code Crim. Proc. art. 43.23

- When the execution of sentence is suspended or respited to another date, this shall be noted on the warrant. On the arrival of the new date, the Director of the Department of Corrections shall proceed with such execution.

Section 10. Competency to be Executed

10. Competency to be Executed

A. **Incompetency to be Executed, Generally**

- A person who is incompetent to be executed may not be executed. Tex. Code Crim. Proc. art. 46.05(a).
- "The Eighth Amendment prohibits a state from carrying out a sentence of death upon a prisoner who is insane." *Ford v. Wainwright*, 477 U.S. 399, 410 (1986).

B. **Incompetent to be Executed, Defined**

- The defendant is incompetent to be executed if the defendant does not understand:
    1. That he or she is to be executed, and
    2. The reason for the execution. Tex. Code Crim. Proc. art. 46.05.

C. **Raising the Issue of Incompetence to be Executed**

- A motion of incompetency to be executed must include the following:
    1. Identify the proceeding in which the defendant was convicted,
    2. Give the date of the final judgment,
    3. Set forth the fact that the date of execution has been set, if the date has been set,
    4. Clearly set forth alleged facts in support of the assertion that the defendant is presently incompetent,
    5. Affidavits, records, or other evidence supporting the defendant’s allegations or the defendant shall state why those items are not attached
    6. The defendant shall identify any previous proceedings in which the defendant challenged the defendant’s competency in relation to the conviction and sentence in question. Tex. Code Crim. Proc. art. 46.05(c).
- The motion must be verified by the oath of some person on the defendant’s behalf. Tex. Code Crim. Proc. art. 46.05(c).

D. **Jurisdiction**

- The trial court which sentenced the defendant to death retains jurisdiction over motions of incompetence to be executed. Tex. Code Crim. Proc. art. 46.05(b).

E. **Basis for Determination of Substantial Doubt of Competency to be Executed**

- Upon receipt of a motion of incompetency to be executed, the court must determine whether the defendant has raised a substantial doubt of the defendant's competency to be executed on the basis of:
    1. The motion, any attached documents, and any responsive pleadings, and
    2. The presumption of competency, if applicable. Tex. Code Crim. Proc. art. 46.05(d).
- Presumption of Competency
    1. If a defendant has previously been determined to be competent to be executed, this previous adjudication creates a presumption of competency to be executed. Tex. Code Crim. Proc. art. 46.05(e).
    2. If there is a presumption of competency the defendant is not entitled to a hearing unless the defendant makes a prima facie showing of substantial change in circumstances sufficient to raise a significant question as to the defendant's competency to be executed as the time of the filing of the subsequent motion. Tex. Code Crim. Proc. art. 46.05(e).

F. **Denial of the Motion**

- If the court determines that the defendant has not made a substantial showing of incompetency the court shall deny the motion and set an execution date. Tex. Code Crim. Proc. art. 46.05(g).

G. **Examination of the Defendant**

- If the court determines that the defendant has made a substantial showing of incompetency the court shall order an examination by at least two mental health experts. Tex. Code Crim. Proc. art. 46.05(f).
- The determination of whether to appoint experts and conduct a hearing is within the discretion of the trial court. *Ex parte Caldwell, 58 S.W.3d 127, 130 (Tex. Crim. App. 2000).*
- By filing a motion of incompetency to be executed the defendant waives any claim of privilege with respect to, and consents to the release of all mental health and medical records relevant to whether the defendant is incompetent to be executed. Tex. Code Crim. Proc. art. 46.05(j).
- The experts shall provide copies of their reports to the attorneys of both parties and to the court within a time ordered by the trial court. Tex. Code Crim. Proc. art. 46.05(i).

H. **Determination of Incompetency to be Executed**

- The trial court shall determine whether the defendant has established by a preponderance of the evidence that the defendant is incompetent to be executed on the basis of the following:
    1. The reports provided by the mental health experts,
    2. The motion and any attached documents,
    3. Responsive pleadings, and
    4. Evidence introduced in the competency hearing. Tex. Crim. Proc. art. 46.05(k).
- If the court makes a finding that the defendant is not incompetent to be executed the court may set an execution date. Tex. Crim. Proc. art. 46.05(k).

I. **Review of the Trial Court's Decision by the Court of Criminal Appeals**

- Following the trial court's determination of the motion of incompetency to be executed and on the motion of either party the clerk shall send immediately to the Court of Criminal Appeals the appropriate documents for review and entry of judgment of whether to adopt the trial court's findings. Tex. Code Crim. Proc. art. 46.05(l).
- The Court of Criminal Appeals shall also determine whether any existing execution date should be withdrawn and a stay of execution issued while that court is conducting its review or after entry of its judgment. Tex. Code Crim. Proc. art. 46.05(l).
- Barriers to Review by the Court of Criminal Appeals:
    1. The Court of Criminal Appeals may not review any finding of the defendant's competency made by the trial court as a result of a motion filed on or after the 20th day before the defendant's scheduled execution date. Tex. Code Crim. Proc. art. 46.05(l-1).
    2. Under Article 46.05, the Court of Criminal Appeals only has authority to review the trial court's finding that a defendant is incompetent, not a finding that the defendant is

competent. *Ex parte Caldwell, 58 S.W.3d 127, 130 (Tex. Crim. App. 2000).*

- If the Court of Criminal Appeals enters a judgment that a defendant is not incompetent to be executed the court may withdraw any stay of execution and the trial court may set an execution date. Tex. Code Crim. Proc. art. 46.05(n).

J. **Re-examination of Incompetent Inmate**

- If a stay of execution is ordered by the Court of Criminal Appeals, the trial court shall periodically order an examination of the defendant to determine if the defendant has regained competency. Tex. Code Crim. Proc. art. 46.05(m).

K. **Compulsory Medication to Restore Competency to be Executed**

- An order compelling an inmate to take medication to regain competency to be executed is not an "appealable order" under Texas Rules of Appellate Procedure, Article 25.2(a)(2). *Staley v. State*, 233 S.W.3d 337, 337 (Tex. Crim. App. 2007) (Defendant's appeal was dismissed because the trial court's order requiring an incompetent-to-be-executed death-row inmate to voluntarily take his psychotropic medications to treat his schizophrenia, and requiring him to be compelled to do so if he refused, was interlocutory in nature and did not constitute an appealable order).
- A state may constitutionally restore a death-row inmate's competency through forced medication and then execute him in part because the best medical interests of the prisoner must be determined without regard to whether there is a pending date of execution. *Singleton v. Norris*, 319 F.3d 1018, 1027 (8th Cir. 2003), *cert. denied*, 540 U.S. 832 (2003).
- A State does not violate the 8th Amendment when it executes a prisoner who became incompetent during his stay on death row but who subsequently regained competency through appropriate compulsory medical care. *Singleton v. Norris*, 319 F.3d 1018, 1026-27 (8th Cir. 2003), *cert. denied*, 540 U.S. 832 (2003).

Section 11. Transfer of Condemned Person to Department of Corrections

11. Transfer of Condemned Person to Department of Corrections

A. **Taken to Department of Corrections -** Tex. Code Crim. Proc. art. 43.16

- The sheriff shall take the condemned person and the death warrant to the Director of the Texas Department of Corrections.
- Upon delivery of the condemned person the sheriff shall receive a receipt from the Director of the Texas Department of Corrections that is to be returned to the clerk of the court which rendered the warrant.
- The sheriff shall be compensated under Article 1029 or 1030 of the Tex. Code Crim. Proc. of 1925.

Section 12. Escape of the Condemned Prisoner

12. Escape of the Condemned Prisoner

A. **Escape After Sentence -** Tex. Code Crim. Proc. art. 43.21

- If the condemned prisoner escapes after sentence but before his delivery to the Director of the Department of Corrections, and is not rearrested until after the date fixed for his execution, the court by whom the condemned was sentenced shall again appoint a time for the execution, not less than thirty days from such appointment. The clerk of such court shall certify such appointment to the Director of the Department of Corrections, who shall proceed at the time so appointed to execute the condemned, as hereinabove provided.

B. **Escape from Department of Corrections -** Tex. Code Crim. Proc. art. 43.22

- If the condemned person escapes after his delivery to the Director of the Department of Corrections, and is not retaken before the time appointed for his execution, the court shall again appoint a time for the execution which shall not be less than thirty days from the date of such appointment. The clerk of such court shall certify such appointment to the Director of the Department of Corrections, who shall proceed at the time so appointed to execute the condemned, as hereinabove provided.
- The sheriff, other officer, or other person performing any service under this and the preceding Article shall receive the same compensation as is provided for similar services under the provisions of Articles 1029 or 1030 of the Code of Criminal Procedure of 1925, as amended.
- If for any reason execution is delayed beyond the date set, the court which originally sentenced

the defendant may set a later date for execution.

Section 13. Treatment of the Condemned Prisoner

13. Treatment of the Condemned Prisoner

A. **Visitors -** Tex. Code Crim. Proc. art. 43.17

- After the receipt of the condemned person by the Director of the Department of Corrections, the condemned person shall be confined therein until the time for his or her execution arrives.
- The condemned person may not have visitors except the condemned person's:
    1. Physician
    2. Lawyer
    3. Clergyperson
    4. Relatives and friends (under the rules of the Board of Directors of the Department of Corrections)

B. **Treatment of the Condemned** - Tex. Code Crim. Proc. art. 43.24

- No torture, ill treatment, or unnecessary pain, shall be inflicted upon a prisoner to be executed under the sentence of the law.
- The possibility that lethal injection might cause additional pain to the condemned prisoner is not cruel and unusual punishment. (*Ex parte Granviel*, 561 S.W.2d 503, 508 (Tex. Crim. App. 1960).

Section 14. Death or Pardon of the Condemned Prior to Execution

14. Death or Pardon of the Condemned Prior to Execution

A. **Return of Director -** Tex. Code Crim. Proc. art. 43.23

- If the condemned person dies before the time for his execution arrives, or if the condemned person is pardoned or his sentence commuted by the Governor, no execution shall be had.
- In such cases, as well as when the sentence is executed, the Director of the Department of Corrections shall return the warrant and certificate with a statement of any such act and his proceedings endorsed thereon, together with a statement showing what disposition was made of the dead body of the convict, to the clerk of the court in which the sentence was passed, who shall record the warrant and return in the minutes of the court.

Section 15. Selection of an Executioner

15. Selection of An Executioner

A. **Executioner -** Tex. Code Crim. Proc. art. 43.18

- The Director of the Texas Department of Corrections shall designate an executioner.
- Director of the Department of Corrections does not have to personally serve as executioner. *Ex parte Granviel*, 561 S.W.2d 503, 507 (Tex. Crim. App 1978).

Section 16. Place of Execution

16. Place of Execution

A. **Place of Execution -** Tex. Code Crim. Proc. art. 43.19

- The execution shall take place in a special room at a location designated by the Texas Department of Corrections.
- Currently, all executions are held at the Walls Unit in Huntsville.

B. **Requirements for the Execution Chamber -** 37 T.A.C. § 152.51(g)

- The room provided for the execution shall be arranged so that:
    1. There is sight and sound separation between any relative or friend of the condemned inmate and any close relative of a deceased victim; and
    2. There is sound separation between the condemned inmate and those in attendance, except that arrangements shall be provided that allow those in attendance to hear the statements of the condemned inmate.

Section 17. Presence at Execution

17. Presence at Execution

A. **Present at Execution -** Tex. Code Crim. Proc. art. 43.20

- The following persons may be present at the execution:
    1. The executioner
    2. Such persons necessary to assist the executioner
    3. The Board of Directors of the Department of Corrections
    4. Two physicians, including the prison physician
    5. Spiritual advisor of the condemned
    6. Chaplains of the Department of Corrections
    7. County judge and sheriff of the county in which the Texas Department of Corrections is situated
    8. Up to five relatives or friends of the condemned person as requested by the condemned person
- No convict may be permitted to witness the execution

B. **Authorized Witnesses to the Execution of an Inmate Sentenced to Death -** 37 T.A.C. § 152.51

- The only persons authorized to witness an execution are as follows:
    1. Departmental staff as deemed necessary by the Director of the TDCJ-ID
    2. Members of the Texas Board of Criminal Justice
    3. Chaplains of the Texas Department of Criminal Justice
    4. Walker County Judge
    5. Walker County Sheriff
    6. Media pool representatives consisting of:
        a. one reporter from the Huntsville Item;
        b. one reporter from the United Press International and the Associated Press;
        c. one additional print media representative and one broadcast representative selected from rotating lists of applicants maintained by the TDCJ-ID Public Information Office
    7. close relatives of the deceased victim not to exceed five in number
        a. if there are fewer than five close relatives of the deceased victim:
            i. additional close relatives of a victim for whose death the inmate has been convicted but for whose death the inmate is not sentenced to death; and
            ii. if there are still fewer than five persons, additional close relatives of a victim for whose death the inmate is unequivocally responsible, upon the recommendation of the Victim Services Division and approval of the Director of TDCJ-ID.
        b. “Close relative” means the spouse of the victim at the time of the victims’ death, the victim’s parent or stepparent, the siblings of the victim, or another individual with a close relationship to the victim who is approved by the Director of the Texas Department of Criminal Justice Institutional Division
    8. Spiritual Advisor and Relatives or friends of the inmate.
        a. the condemned inmate must provide a list of witnesses and the name or type of spiritual advisor he/she wishes to attend the execution to the Bureau of Classification at least 14 days prior to the date of execution
        b. the witnesses and spiritual advisor requested by the inmate must be on the inmate's approved "Visitor's List."
- Any inmate currently confined within the TDCJ is specifically denied authorization to witness the execution of an inmate sentenced to death.

Section 18. Preventing the Rescue of the Condemned

18. Preventing Rescue of the Condemned

A. **Preventing Rescue -** Tex. Code Crim. Proc. art. 43.26

- The sheriff may recruit citizens or call in the military to aid in preventing the rescue of a prisoner prior to the execution.

Section 19. Claiming the Body of the Condemned

19. Claiming the Body of the Condemned

A. **Body of Convict -** Tex. Code Crim. Proc. art. 43.25

- The Director of the Department of Corrections shall order that the body of a convict who has been legally executed to be embalmed immediately after execution.
- If the body is not demanded or requested by a relative or bona fide friend within forty-eight hours after execution, then it shall be delivered to the Anatomical Board of the State of Texas, if the Anatomical Board of the State of Texas so requests.
- If the body is requested by a relative, bona fide friend, or the Anatomical Board of the State of Texas, the recipient shall pay a fee of not to exceed $25 to the mortician for his services in embalming the body. The mortician shall issue the recipient a written receipt. When such receipt is delivered to the Director of the Department of Corrections, the body of the deceased shall be delivered to the party named in the receipt or his authorized agent.
- If the body is not delivered to a relative, bona fide friend, or the Anatomical Board of the State of Texas, the Director of the Department of Corrections shall order the body to be decently buried. The fee for embalming shall be paid by the county in which the indictment which resulted in conviction was found.

Section 20. Addendum

20. Addendum

A. Judgment, Order Setting Execution, Death Warrant

B. Notice to Psychiatrist for Exam for Competency to Waive Appeal

C. Hearing to Set Execution - Reporter's Record

Section 21. Author Credits

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Chapter 9 - MEDIA AND SECURITY

Section 1. Public Access to Trials

1. Public Access to Trials

A. **Generally**

- As a general rule, all court proceedings should be open to the public. The Texas Bill of Rights provides that "all courts shall be open and every person for an injury done him in his land, goods, person or reputation, shall have remedy by due course of law." Tex. Const. art. I § 13.
- Defendants have a right to a speedy public trial. Tex. Const. art. I § 10.
- The proceedings and trials in all courts shall be public. Tex. Code Crim. Proc. art. 1.24.
- In a murder prosecution, the trial judge rising from his bench, to chambers, and conducting the remainder of the hearing in private, to determine whether a confession was voluntary as required by Tex. Code Crim. Proc. art. 38.22, was the functional equivalent of closing the court and denying the public their right to access court proceedings. *Houston Chronicle Pub. Co. v. Shaver, 630 S.W.2d 927, 932 (Tex. Crim. App. 1982).*1) Closing out the media and public was not authorized; therefore, the "availability of a trial transcript is no substitute for public presence at the trial itself." *Houston Chronicle Pub. Co. v. Shaver*, 630 S.W.2d 927, 934, n.16 (1982).
- Intense media coverage of a celebrity defendant is not enough to justify closure from the public and is not narrowly tailored to protect the defendant's fair trial right. *ABC, Inc. V. Stewart*, 360 F.3d 90, 102 (2nd Dist. 2004).
    1. The judge in the Martha Stewart criminal case tried closing the jury voir dire and this decision was vigorously challenged by the media. The appellate court ruled that such closure was improper. *ABC, Inc. V. Stewart*, 360 F.3d 90, 93 (2nd Dist. 2004).
    2. The reversal of the trial judge's decision to close the voir dire of a criminal trial indicates that closing court proceedings is still a difficult and frowned upon procedure. *See ABC, Inc. V. Stewart*, 360 F.3d 90, 102-03 (2nd Cir. 2004).
- A four-part test is utilized for determining whether the right to a public trial has been violated:
    1. The party seeking to close the hearing must advance an overriding interest which is likely to be prejudiced;
    2. The closure must be no broader than necessary to protect that interest;
    3. The court must consider reasonable alternatives; and
    4. The court must make findings adequate to support its action. *Waller v. Georgia*, 467 U.S. 39, 48 (1984); *Johnson v. State*, 137 S.W.3d 777 (Tex. App.—Waco 2004, pet. ref'd).
- Before closing a trial, the judge must state on the record his reasons for doing so to inform the public and enable the appellate court an opportunity to review the adequacy of the reasons. *Rovinsky v. McKaskle*, 722 F.2d 197, 200 (5th Cir. 1984).

B. **Exceptions**

- The circumstances allowing the press and public to be barred from a criminal trial are limited. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982).
    1. If the State attempts to deny the right of access to prevent disclosure of sensitive information, the State must show a compelling government interest exists and that denying access is a narrowly tailored mean to serve that interest. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982).
    2. In a criminal sex-offense trial, protection of minor victims from further embarrassment or trauma is an overriding State interest sufficient to justify partial or complete exclusion of the press or public. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982).
    3. However, a mandatory closure rule in criminal sex-offense trials cannot be justified. A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of the minor victim. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 608 (1982). Factors to be weighed by the trial court include:
        a. Minor victim's age,
        b. Minor victim's psychological maturity & understanding,
        c. Nature of the crime,
        d. Desires of the victim, and
        e. Interests of parents & relatives. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 608 (1982).

- Two examples of proceedings which may be closed to the public include:
    1. Certain juvenile proceedings. Tex. Fam. Code § 54.08.
    2. Mental commitment hearings. Tex. Health & Safety Code § 574.031.

Section 2. Broadcast Media Access to Trials

2. Broadcast Media Access to Trials

A. Broadcast Media

- Federal
    1. While the Supreme Court has concluded that due process does not necessarily prohibit media coverage of judicial proceedings, the 1st Amendment does not mandate the right of access to broadcast court proceedings. *Chandler v. Florida*, 449 U.S. 560, 569-70 (1981) (the Court held that a Florida plan for electronic coverage did not pose a constitutional problem).
        a. "[W]hile the guarantee of a public trial…is a 'safeguard against any attempt to employ the courts as instruments of persecution,' it confers no special benefit on the press." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 610 (1978).
        b. A public trial is satisfied by members of the public and the press having an opportunity to attend the trial and to report what they have observed. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 610 (1978).
    2. To demonstrate prejudice, a defendant must show more than juror awareness that the trial will attract attention of broadcasters. *Chandler v. Florida*, 449 U.S. 560, 581 (1981).
        a. The trial court was found to have the discretion to choose whether to allow in-court broadcast after balancing the procedure for such broadcasting and the fundamental right to a fair trial. *See Chandler v. Florida*, 449 U.S. 560, 582 (1981).
    3. No person shall be permitted to videotape or record jury deliberations, even if it is for educational purposes. *State v. Poe*, 98 S.W.3d 194, 202 (Tex. Crim. App. 2003). Recording jury deliberations violates the secrecy of the deliberations and is forbidden by statute. *See* Tex. Code Crim. Pro. Ann. art. 36.22 (Vernon 2008).
- State
    1. Neither the Texas Legislature nor Texas courts have directly addressed televising courtroom proceedings in criminal cases. *Graham v. State*, 96 S.W.3d, 658, 660 (Tex. App.—Texarkana 2003).
    2. The Texas Court of Criminal Appeals has determined it does not have rule making authority and so has left this decision up to local rules and the sound discretion of the trial judge. *See Graham v. State*, 96 S.W.3d 658, 660 (Tex. App.—Texarkana 2003).
    3. Application of civil cases concerning broadcast media provides guidance for criminal courts. *See Graham v. State*, 96 S.W.3d 658, 660 (Tex. App.—Texarkana 2003).
    4. The civil procedure rules are a useful aid in developing guidelines for a capital case where the trial judge has wide discretion in media management. Texas Rules of Civil Procedure, Rule 18c provides that:

       A trial court may permit broadcasting, televising, recording, or photographing of proceedings in the courtroom only in the following circumstances:

        a. In accordance with guidelines promulgated by the Supreme Court for civil cases, or
        b. When broadcasting, televising, recording, or photographing will not unduly distract participants or impair the dignity of the proceedings and the parties have consented, and consent to being depicted or recorded is obtained from each witness whose testimony will be broadcast, televised, or photographed, or
        c. The broadcasting, televising, recording, or photographing of investiture, or ceremonial proceedings.
- Local Rules
    1. The Texas Supreme Court has approved local rules regarding the broadcast of civil and

criminal trials.

a. These rules leave to the sound discretion of the judge, when the parties and witnesses have consented, the decision to have camera coverage which will not unduly distract the participants or impair the dignity of the proceedings in Texas where there is no local rule approved by the Texas Supreme Court under Texas Rules of Civil Procedure Rule 3a.

2. If a specific county has a local rule approved by the Texas Supreme Court, the trial judge has discretion to allow camera coverage as provided by the local rules.
3. Examples of these rules, which either allow or prohibit cameras in the courtroom, can be found for the following counties in Texas:
    a. Tarrant County Rule 5.12(h): This rule provides for courtroom decorum orders and prohibits cameras or recording equipment in the courtroom without prior permission of the court.
    b. Midland County Rule 1.1(d)(12): This rule prohibits cameras in the courtroom unless required for the court proceedings and previously approved by the bailiff or the court.
    c. El Paso County Local Exhibit A: This rule provides for live media coverage at the discretion of the trial judge.
    d. Harris County Electronic Media Rule 5: This Rule provides for television and camera media coverage under specific equipment provisions.

- Disciplinary Rules of Professional Conduct
    1. Rule 3.07 of the Texas Disciplinary Rules of Professional Conduct discusses trial publicity from an ethical standpoint:
        a. In the course of representing a client, a lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicatory proceeding. A lawyer shall not counsel or assist another person to make such a statement.
        b. A lawyer ordinarily will violate paragraph (a), and the likelihood of a violation increases if the adjudication is ongoing or imminent, by making an extrajudicial statement of the type referred to in that paragraph when the statement refers to:
            1. The character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness; or the expected testimony of a party or witness;
            2. In a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense; the existence or contents of any confession, admission, or statement given by a defendant or suspect; or that person's refusal or failure to make a statement;
            3. The performance, refusal to perform, or results of any examination or test; the refusal or failure of a person to allow or submit to an examination or test; or the identity or nature of physical evidence expected to be presented;
            4. Any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration; or
            5. Information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed creates a substantial risk of prejudicing an impartial trial.

        c. A lawyer ordinarily will not violate paragraph (a) by making an extrajudicial statement of the type referred to in that paragraph when the lawyer merely states:
            1. The general nature of the claim or defense;
            2. The information contained in a public record;
            3. That an investigation of the matter is in progress, including the general scope of the investigation, the offense, claim or defense involved;
            4. Except when prohibited by law, the identity of the persons involved in the matter;

5. The scheduling or result of any step in litigation;
6. A request for assistance in obtaining evidence, and information necessary thereto;
7. A warning of danger concerning the behavior of a person involved, when there is a reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
8. If a criminal case:
    i. The identity, residence, occupation and family status of the accused;
    ii. If the accused has not been apprehended, information necessary to aid in apprehension of that person;
    iii. The fact, time and place of arrest; and
    iv. The identity of investigating and arresting officers or agencies and the length of the investigation.

B. **Disadvantages of Broadcast Media in the Courtroom**

- Allowing cameras into the courtroom has the potential to influence jurors negatively:
    1. Pre-trial announcements of the intention to televise the trial could affect potential jurors.
    2. Awareness of the camera's presence would distract the jury from the evidence and trial in general.
    3. Non-sequestered juries could be affected by the media's interpretation of the trial.
    4. The trial broadcast could jeopardize any retrial due to juror's' exposure to clips from the first trial.
    5. Witnesses' discomfort at testifying, not only before the judge and jury, but also before the entire viewing television audience.
    6. The invocation of the rule of witnesses, individuals with evidence but who choose not to come forward for fear of becoming famous overnight.
    7. 7) Burdening the trial judge with the additional responsibility of supervising the cameras and the conduct of the reporters.
    8. 8) The judge and lawyers "playing" to the camera.
    9. 9) The defendant's mental harassment that could be caused by a televised trial and the possible community bias.
    10. 10) Intrusions upon the confidentiality of the attorney-client relationship. *Estes v. Texas*, 381 U.S. 532, 546-549 (1965).

C. **Objections to Broadcast of Proceedings**

- In order to show that broadcast coverage of a trial denied the defendant due process, the complaining party must meet a high standard by demonstrating either:
    1. That the coverage compromised the ability of the jury to judge fairly, or
    2. The coverage "had an adverse impact on the trial participants sufficient to constitute a denial of due process." *Chandler v. Florida*, 449 U.S. 560, 581 (1981).

D. **Restraining Orders against the Media**

- When considering an order restricting the ability of the news media to publish or broadcast what could possibly be used as evidence in trial, the trial court should consider:
    1. The nature and extent of pre-trial news coverage;
    2. Whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and
    3. How effectively a restraining order would operate to prevent the threatened danger. *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539, 562 (1976).
- The state court's restraining order (GAG Order) prohibiting the media from reporting accounts of the case, was in violation of the 1st Amendment constitutional provisions. *Nebraska Press Assoc. V. Stuart*, 427 U.S. 539, 570 (1976).
    1. A judge seeking to insure the defendant a fair trial should consider other alternatives before giving an order restraining all publication. *Nebraska Press Assoc. V. Stuart*, 427 U.S. 539, 563 (1976). These alternatives include:
        a. Change of trial venue to a place less exposed to intense publicity.
        b. Postponement of the trial to allow public attention to subside.
        c. Questioning potential jurors to find those with fixed opinions as to guilt or innocence.
        d. Give clear instructions on the sworn duty of each juror to decide the issues

only on evidence presented in open court.
e. Sequestration of jurors. *Nebraska Press Assoc. V. Stuart*, 427 U.S. 539, 563-64 (1976).

2. A heavy burden of proof must be met in showing that a restraining order is needed prior to trial; therefore, the probability that a restraining order will be needed is not enough. *Nebraska Press Assoc. V. Stuart*, 427 U.S. 539, 569 (1976).

- The Courts have held that the media has the same right of access to criminal trials as the public, and that absent an overriding interest articulated in a finding, the trial of a criminal case must be open to the public. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580-81 (1980).
- Therefore, any restrictive order must be based on specific findings and articulate the overriding interest made the basis of the restrictions. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580-81 (1980).
- The court granted a writ of mandamus directing the lower court to set aside its closure order and release the full transcript of the hearing on defendant's motion to transfer venue to a newspaper and its reporter, pursuant to Tex. Code Crim. Proc. art. 1.24. *Houston Chronicle Publ'g Co. v. Dean*, 792 S.W.2d 273, 274 (Tex. Crim. App. 1990).

Section 3. Access to Juror Information

3. Access to Juror Information

A. **Generally**

- Information collected by the court or by a prosecuting attorney during the jury selection process about a person who serves as a juror is confidential and may not be disclosed by the court, the prosecuting attorney, the defense counsel, or any court personnel. Tex. Code Crim. Proc. art. 35.29. This information includes the following:
    1. The juror's home address,
    2. The juror's home telephone number,
    3. The juror's social security number,
    4. The juror's driver's license number, and
    5. Any other personal information
- A party in the trial or a bona fide member of the news media who seeks disclosure of sealed juror information must make application to the trial court in which the person is serving or did serve as a juror. Tex. Code Crim. Proc. art. 35.29. On a showing of good cause, the court shall permit disclosure of the information sought. Tex. Code Crim. Proc. art. 35.29; *Falcon v. State*, 879 S.W.2d 249, 250 (Tex. App.—Houston [1st Dist.] 1994).

Section 4. Practice Notes: Media Management

4. Practice Notes: Media Management

A. ***Court Information Officer***

- *A court information officer can assist the media with obtaining accurate information regarding state law and procedural matters in the case. This individual is not allowed to give opinions about the merits or demerits of the case but to assist in making sure that non-lawyer media representatives receive accurate information.*
- *During the pretrial hearings, the information officer can moderate any press briefings and serve as a contact for information regarding case setting and court orders. During the trial, the information officer may hold daily press briefings, obtain public information for the press, and serve as a liaison to the press for public information about the case from the court and clerk's office.*
- *A benefit of appointing a court information officer is that he can become an effective presence in obtaining media compliance with the court's orders in the case.*

B. ***Retained Expert for the Court***

- *The trial court may retain an expert to assist in media management. This expert can assist in pre-filing and post-filing, adverse publicity management, and can assist the trial court in establishing orders and media management rules which will be effective in creating a calm, focused, and judicious atmosphere and approach to case disposition. An expert with a media and legal background will prove most effective in developing a positive media and legal approach to the case.*
- *Working with the media through a skilled professional who is respected by the press can be the*

most valuable tool in management of the case. This will allow the media to express their needs, concerns, recommendations and demands and will allow the court to respond through the media expert, rather than directly, to the development of a media management plan for the case.

C. ***Media Management Order***

- *A Media Management Order is essential to handle the press of the high-profile case. This order should be developed with input from the media expert, attorneys, sheriff, facility plant manager at the courthouse, court clerk, court information officer, and the trial court. The trial judge must be willing to enforce its provisions.*

D. ***Media Room***

- *The court might consider setting up a media room. This room may prove very useful in diverting the media from the courtroom to a place more accessible for them, more convenient to conduct their writing and reporting tasks, and to a location which does not distract the court, counsel, litigants, witnesses, and most importantly, the jury, from the trial focus and work in the courtroom.*
- *If the courthouse does not have adequate space for a proper media room, a media room space might be conveniently located adjacent to the courthouse in a neighboring building.*
- *The media room should contain sufficient space, tables, chairs, telephone lines, cable access (preferably high speed), a copier, and an interview area. The expense may be allocated among the media members requesting media room access passes. It is important to have the cooperation of the facility plant manager at the courthouse, the sheriff's office, the county judge, and the presiding judge to set up the media room arrangements.*
- *If the Court is allowing cameras in the courtroom, the designated pool television camera organization should make arrangements to provide the feed into the media room for the other media outlets. They should also arrange access for the other cameras to pool the audio and video feed.*

E. ***Reserved Seating Plan***

- *There may be a large number of media representatives who want access to the courtroom during the trial, in addition to members of the public, local schools, attorneys, courthouse officials and employees, and court security officers and their families. The court may prepare a seating chart to accommodate all those interested.*
- *Counsel may need extra seating for his staff, co-counsel, parties, and expert witnesses, as well as room to stack the boxes of exhibits, depositions, and other documents needed for the trial. The space needs of counsel, the court, and the media may conflict. This demands early and cooperative planning.*
- *The court should request counsel to notify the court in writing of any specific space and seating needs for the trial of the case.*
- *The court may assign seats for the general public to ensure compliance with the the open courts provisions of the Texas Constitution.*
- *The media will always request courtroom seating, but seldom utilizes all of the seating made available to them. This is especially true if the court has provided a media room.*

F. ***Press Conferences***

- *There may be an interest in daily press conferences or press briefings. If the trial court can limit the attorney's ability to give press conferences, the trial will progress quicker with the attorneys, witnesses, litigants, and jurors focused on their jobs and not publicity. The appointment of a court information officer can help provide the press with accurate information on scheduling, legal terminology interpretation, and logistical information. This may help relieve the media pressure upon the attorneys and allow them greater freedom to focus on their case. Following the trial verdict, the press will be extremely interested in interviewing the attorneys, witnesses, parties, and the jurors. At the conclusion of the trial, counsel should make themselves available to address questions in an ethical and professional manner. This may help foster public confidence in the justice system. Counsel should be careful not to be critical of the jurors so as not to improperly influence future jury pools.*

G. ***Media Truck Parking***

- *Distraction to the jurors, witnesses, attorneys, litigants, and general public is the parking of satellite trucks around the courthouse. The court should consider designated parking areas for*

the satellite trucks at a location which is not noticeable to jurors and others coming to the courthouse.

- *The court's security and media order should address media truck parking. Cooperation by the local police department is often needed to enforce these orders. The media will quickly forget and violate these orders unless promptly enforced by the police.*

H. ***Local v. National Media Interest and Compliance***

- *Generally, the court will have better success in having local media comply with the court's orders. This is because those local media concerns will want access on other, perhaps not as high-profile, cases in the future.*
- *Many times the national media anticipate this is the one and only time they will need access to that court and therefore their vested interest in compliance is directly related to how much access they are deprived of if they violate the court's order. Some organizations, such as Court T.V., have developed an excellent reputation for cooperative and professional work on high-profile cases. The key is to provide information to these media organizations about what the rules of access are and that the rules will be enforced.*

I. ***Courtroom and Courthouse Violations of Orders***

- *The trial judge must be committed to enforcing the courtroom and courthouse orders. If violators go unsanctioned, the violations will grow exponentially. Many judges will not relish the responsibility of enforcing orders against the media, but this is critical to an orderly trial.*
- *The maximum penalty is not needed for all violations; however, quick, decisive and firm direction, correction, and response are needed when a violation occurs.*
- *The media should have a vested interest in working within the court's orders, not around them. If the media wants access to cameras in the courtroom, reserved seating, a media room, and any other arrangements which the court can provide in a carefully structured media order then the media must abide by the rules and restrictions which provide such open access.*

J. ***Trial Management of Jurors***

- *Whether or not the jury is sequestered, the trial court should attempt to protect the jurors from contact with or exposure to the media while traveling to and from the courthouse and while at the courthouse. Special pretrial orders as to secure areas can help protect the jury from press exposure. The trial court should work with the local sheriff to help escort the jurors and keep others away from the jury room, break area, and their arrival and departure from the courthouse.*

K. ***Jury Room and Jury Break Management***

- *In order to protect the jurors from the glaring eye of the press, the court will need to provide the jurors with a safe, convenient, and secure location to assemble in the morning before court, during breaks, and during deliberations. This area should be carefully protected from the inquiring eyes and voices of the media, witnesses, attorneys, and the parties. In extremely high-profile cases the court should consider sequestering the jury or, at the least, protecting their arrival and departure from the courthouse from becoming publicly disseminated news.*
- *The court's bailiff should arrange snacks, drinks, and stretch breaks for the jury. Accommodations for restrooms, smoke breaks, and meals should be planned so that the jury is not paraded in front of the press, witnesses, or litigants.*

L. ***Witness Ready Room and Instructions***

- *Another asset in protecting a case from being adversely affected by the media and public interest is to have a location for the witnesses to assemble when at the courthouse. They should receive careful instructions not to talk about the case. These instructions should also be posted in and around the witness ready room and counsel should be directed to discuss these instructions with their witnesses.*

M. ***Scheduling of Pretrial Matters***

- *A high profile case will attract interest at the time of the alleged incident, the filing of the case, pre-trial hearings and the trial. Every hearing may generate some type of media comment or focus, particularly in smaller counties. Because of the unique attention of the media to capital cases, the trial court should carefully manage and limit the number and timing of pre-trial hearings.*
- *The court may carry rulings until after the jury is selected to limit the effect of the publicity upon*

the jury pool. Once the jury is selected and placed under the Court's instructions or sequestered, the court can then issue a certain ruling which might generate additional publicity or contain prejudicial information. The trial court should utilize its sanction authority if counsel attempt to try their case in the media or unduly prejudice the jury pool by filing pre-trial motions which try the case in the pleadings. The timing of a hearing on a pre-trial matter can be considered so that it does not hit the prime time media market or highest distribution day.

N. ***Scheduling of Trial Day***

- *The trial schedule and media schedule are generally on two different planes of existence. The media's deadlines vary by media outlet and organization. The court's schedule varies depending on what other work the court has that day and the organization of counsel in having witnesses and evidence prepared for presentation. Consider clearing your calendar of other matters and devoting extraordinary time to the trial of the capital case. This will keep the lawyers working on the trial and not playing to the press and keep the courthouse and security personnel focused on their trial duties. This will also keep the jurors in a more controlled environment, focus them on the evidence produced in the courtroom, and have them deliberating quicker, limiting any opportunities for jury misconduct or tampering.*
- *The trial court should schedule the work day, publish that schedule, and keep the attorneys on track. Unscheduled delays are frustrating to the jury, the litigants, and the court's busy work schedule, and they allow the media to show a judicial system that appears both unorganized and unprofessional. Keeping to a trial day schedule is difficult, but it can be accomplished by professional attorneys and a tough judge.*

O. ***Conduct of Court Staff***

- *The court's staff is an important part of the successful trial of a capital case. Before the first media event, whether pretrial or trial, the judge and staff should review and discuss the media and trial management plan. The plan could be a formal document or a plan developed by experience in dealing with capital and high-profile cases and should include procedures, schedules, and conduct. The court staff should consider the following:*
    1. *Limit casual remarks to jurors, other staff, and even friendly attorneys*
    2. *Show no emotion or physical reaction to testimony or to events in the courtroom or to the jury at any time*
    3. *Always be courteous and professional especially in the stress of the capital case*
    4. *Jury panel processing and trial are open to the public even when jury empanelling is in a remote location*
    5. *Always communicate problems and concerns to the judge as they arise*
    6. *Review in detail the plans for jury, media, and witness rooms and restrictive and protective orders*
    7. *Be polite and helpful to the media. The court reporter can make public exhibits available for media viewing.*

P. ***Role of the Judge***

- *A judge's conduct reflects upon not only that judge and his or her court but on the entire judiciary as well as on the public's perception and confidence in the judicial system. Therefore, each judge should restrict his or her personal conduct in an appropriate fashion not to bring discredit or unjust criticism upon the judiciary. The judge should maintain complete control and appropriate decorum and authority in the courtroom and should restrict comments and rulings to those reasonable statements necessary to properly dispose of the case and to preserve the orderly administration of justice.*

Section 5. Security

5. Security

A. **Control by the Court**

- "A court shall require that proceedings be conducted with dignity and in an orderly and expeditious manner and control the proceedings so that justice is done." Tex. Gov't Code § 21.001(b).
- "The judge has general control of the trial and the discretion in this regard is very great, and the exercise of such prerogatives and discretion will be reviewed only upon a showing of abuse." *Clark v. Turner*, 505 S.W.2d 941, 945

- The trial court has "comprehensive inherent and statutory power to discipline errant counsel for improper trial conduct in the exercise of its contempt powers." *Remington Arms Co., Inc. v. Caldwell*, 850 S.W.2d 167, 172 (Tex. 1993).

B. **Control of the Defendant**

- Security personnel in the courtroom
    1. When there is an essential state interest specific to the trial to warrant the deployment of noticeable security personnel in the courtroom during a criminal trial, such deployment is not inherently prejudicial and was proper in that case. *Holbrook v. Flynn*, 475 U.S. 560, 571-72 (1986).
- A “defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.” *Illinois v. Allen*, 397 U.S. 337, 343 (1970).
    1. However, “once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and juridical proceedings.” *Illinois v. Allen*, 397 U.S. 337, 343 (1970).
- To prevent reversal, the trial court must set forth with specificity the reasons supporting his decision to restrain a defendant. *Marquez v. State*, 725 S.W.2d 217, 227 (Tex. Crim. App. 1987).
- When the defendant had assaulted his court-appointed counsel before trial, the mere fact that the defendant demonstrated good conduct during trial did not mean that the decision to restrain him was an abuse of discretion. *Culverhouse v. State*, 755 S.W.2d 856, 860 (Tex. Crim. App. 1988).
- Constitutionally permissible ways to handle a disruptive defendant include:
    1. Binding and gagging the defendant,
    2. Citing the defendant for contempt, and
    3. Removing the defendant from the courtroom until he behaves. *Illinois v. Allen*, 397 U.S. 337, 343-44 (1970).
- A defendant’s presumption of innocence is seriously infringed when he is viewed by the jury in handcuffs or shackles. However, there is no error when the shackles cannot be seen from the jury area. *Cook v. State*, 844 S.W.2d 697, 722 (Tex. Crim. App. 1992).
- The fact that a defendant was in leg chains in the courtroom for part of a trial and that one juror observed the leg chains does not require an automatic reversal. *Gonzalez v. State*, 966 S.W.2d 804, 807-08 (Tex. App.—Amarillo 1998).
- Because the trial court could have permitted the use of visible restraints at defendant's trial, the jury's momentary glimpse of the effects of the stun belt did not deny defendant the presumption of innocence. *Chavez v. Cockrell*, 310 F.3d 805, 808-809 (5th Cir. 2002).
- The fact that the defendant appeared before the jury in shackles when the jury was polled and after the declaration of the unanimous verdict did not prejudice the defendant. *State v. Floyd*, 725 N.W.2d 817, 831 (Neb. 2007), *overruled on other grounds by State v. McCulloch*, 742 N.W.2d 727, 733 (Neb. 2007)(overruled to the extent it limits double jeopardy consideration to only evidence offered by the State).
- When restraints and police escort of the defendant were necessitated by the design of the courthouse, one juror saw defendant in full restraints and all jurors saw defendant six times under police escort. The trial judge examined the jurors to see if they could be fair after the sightings. The defendant was not prejudiced, and there was no harm in seeing the defendant in shackles. *State v. Gray*, 606 N.W.2d 478, 488 (Neb. 2000), *overruled on other grounds by State v. Nelson*, 636 N.W.2d 620, 628 (Neb. 2001) (overruled to the extent it held that double jeopardy principles applied to habitual criminal enhancement proceedings).
- A search of a defendant is permissible under the law, however the time, location of search, and method must be carefully regulated. *See State v. Wood*, 562 S.W.2d 699, 702 (Mo. Ct. App. 1978).

C. **Practice Notes:**

Security Measures Generally

- *Judges have the ultimate responsibility for the type of security utilized and should take reasonable and appropriate measures to assure the safety of the public and the participants in the courtroom. However, to minimize resistance and maximize cooperation, the judge should involve all segments of the courthouse environment in the development of security measures – bailiffs, court clerks, attorneys in a specific case, court reporter, building security personnel, and*

other tenants in the building.

- *Security measures should involve the courtroom, adjoining spaces, and the inside and outside of the court building. They should also address areas where judges conduct trials, sequester juries, witness rooms, media rooms, areas where prisoners are kept or moved, and judge's chambers. The purpose of security is to protect those using the court in a way that maintains access to the court by litigants and the community.*
- *In order to avoid prejudice based on a defendant's wearing jail clothing to trial, the Court should provide express directions for the bailiff, security officer, and transport officers, to provide for the appropriate dress for the defendant and to minimize visible restraints.*

Methods of Providing Court Security

- *Weapons searches*
    1. *Before entering a courtroom or courthouse, individuals should submit to a limited warrantless search of their persons and possessions for weapons.*
    2. *Individuals should walk through metal detectors placed at strategic locations such as the courthouse entrance, courtroom entrance and elevator access areas.*
    3. *It is suggested that notice be provided when there is a need to search those who enter the courthouse or courtroom. This will provide those who do not wish to submit to the search an option not to enter the courthouse or courtroom.*
- *Restricted areas of the court building*
    1. *The entire trial area should be off-limits until the security officers thoroughly search the area each morning and after each lunch break.*
    2. *Certain areas must be designated off limits to the general public. The public should not be able to enter witness rooms, media rooms, attorney preparation rooms, jury deliberation rooms, holding cells and prisoner movement routes.*
    3. *Restricted areas should be searched and continually monitored through the use of physical barriers and additional manpower.*
- *Buffer Zone*
    1. *A buffer zone should be established between the spectators and the attorneys' tables.*
    2. *There should be no verbal or physical contact between any of the spectators and the attorneys or the defendant.*
- *Search of the Defendant*
    1. *The defendant charged with capital murder should be searched every morning and after every lunch break before entering the courtroom.*
    2. *Various courts have held that the search should occur outside the presence of the jury panel or impaneled jurors.*
- *Courtroom security rules*
    1. *During the trial, no standing or movement should be allowed in the spectator area.*
    2. *Security personnel should record the names and dates of birth of all attendees.*
    3. *All doors and windows should be closed at all times. Security personnel should be positioned one at the door to identify all who enter, one unarmed with the defendant and one facing the audience.*
    4. *Alarms and communication devices should be tested each morning, before opening the courtroom to the public.*
    5. *Notice should be posted in the public hallway outside the courtroom advising that spectators and their possessions will be subject to search for weapons.*
- *Catastrophe plan*
    1. *Each court participant should know his own responsibility in the case of a catastrophe such as shots fired or the defendant attempting escape.*
    2. *The judge should leave immediately to the secure area so that the security personnel can concentrate on other problems than the judge's security.*
    3. *The plan should address the removal of jurors, attorneys, and audience.*

Capital Trial Judge Security

- *The trial judge should always be aware of all the security plans and any specific threats that may occur.*
- *Should a security incident occur during court proceedings, the judge must exit the courtroom immediately, thus freeing the security personnel to address the problem without having to be concerned with the judge's safety.*
- *The judge may consider security in his chambers, an escort to court from parking, and varying his travel routes to court when there is a specific threat or security problem.*

Unruly Spectators

- *The trial judge and security bailiffs should have a pre-arranged plan for addressing the unruly or disruptive spectator.*
- *Depending on the level of disruption, that plan could include a bailiff warning to the spectator, a judicial warning to the spectator outside the presence of the jury, or removal from the courtroom.*
- *If necessary, removal should be accomplished quickly and with minimal disruption to the trial.*

Section 6. Addendum

6. Addendum

1. Amended Restrictive and Protective Order
2. Security Area Maps
3. Order on Conduct of Counsel (Sandefer)
4. Decorum Order Highlight Summary (Laney)
5. Amended Decorum Order (Laney)
6. Security Order, Media Relations and Public Access Plan for Special Interest/High Profile Proceedings
7. Addendum and Modification to Security/Media Order (Laney-Nov 2003)
8. Addendum and Modification to Security/Media Order (Laney-Mar 2004)
9. Media Committee Meeting Agenda
10. Organizational Meeting Questionnaire
11. Media Room
    a. Sign for Media Room
    b. Media Room Rules
    c. Media Room Log
    d. Credentialed Media Courtroom Pass Log
12. Seating Chart for Courtroom: High Profile Case
13. Courtroom Passes: Public, State, Witness, Staff
14. Notice to Witnesses: High Profile Case
15. Sign for Witness Ready Room
16. Sign for Witnesses
17. Sign to Contact Bailiff Desk Before Entering Courtroom
18. Sign for Juror Security Area
19. Sign for Restricted Area
20. Sign for Public Pass Distribution
21. Student Letter and Seating Request Form
22. Order and Guidelines for Photographing, Recording & Broadcasting in the Courtroom
    Including Consent of Party, Attorney, Witness and Receipt and Acknowledgement of Terms
23. Sample Discharge Instructions to Jury in High Profile Case
24. Webmaster Page — Laney Trial

Chapter 10 - CURRENT AND PAST COMMITTEE MEMBERS

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